

STATE OF OHIO            )  
                                  )ss:  
COUNTY OF SUMMIT    )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

MERRILL LYNCH MORTGAGE  
LENDING, INC., et al.

C.A. No.       24943

Appellees

v.

WHEELING & LAKE ERIE RAILWAY  
CO., et al.

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF SUMMIT, OHIO  
CASE No.    CV 2007-10-7535

Appellants

DECISION AND JOURNAL ENTRY

Dated: April 28, 2010

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MOORE, Judge.

{¶1} Appellant, Wheeling and Lake Erie Railway Company (“the Railroad”), appeals from a judgment of the Summit County Court of Common Pleas that granted summary judgment to Bardin Road Ventures, Inc. (“Bardin”) and declared that Bardin holds an express easement appurtenant to use a railroad crossing over the Railroad’s tracks. This Court affirms.

I.

{¶2} Bardin is the current owner of a parcel of property that it purchased from the original plaintiff in this case, Merrill Lynch Mortgage Lending, Inc. The property is located at 1867 and 1883-1889 West Market Street in Akron. Other than a thin strip of land leading out to Market Street, most of the property sits back from the street, to the north of an existing railroad line, and has access to West Market Street only by means of a crossing over the Railroad’s tracks. For more than 100 years, the various owners of this parcel have gained ingress to it and

egress to the street by using the same railroad crossing. Because the Railroad gave notice that it intended to close the crossing, this dispute arose as to whether the owner of the landlocked property had the legal right to continue using the crossing over the Railroad's tracks.

{¶3} The property at issue in this case was originally part of a 45-acre parcel of property owned by David and Lydia Long. At that time, the area was in rural Portage Township, which had not yet been incorporated into the city of Akron. On October 2, 1890, through a deed that was later recorded on October 28, 1893, the Longs conveyed an 80-foot-wide strip of land to the Railroad's predecessor, Pittsburgh, Akron & Western Railroad Company.<sup>1</sup> The strip of land, which was to be used as a railroad, ran across the Longs' property, dissecting the northern corner of their property (the "Northern Parcel"). Because the Northern Parcel would lack access to the road and to the remainder of the Longs' property after the railroad was built, the deed conveying the property to the Railroad provided that the railroad would furnish and maintain a crossing over the railroad tracks for the benefit of the Longs. In addition to the Longs' conveyance of the 80-foot strip of property to the Railroad, the deed included the following clauses:

"Said Railroad Co. agree[s] to furnish and maintain one good grade crossing, properly planked. Said crossing to be located where grantor may designate.

"Said Railroad Co. agree[s] to fence said strip of land and without using barbed wire."

{¶4} In 1910, the Longs sold the Northern Parcel, as well as a strip of the lower portion allowing access to the street, to Jay Hawkins. The 1910 deed made no reference to the railroad crossing. During the next century, the population of the surrounding area grew significantly and the property that had been the Longs' farm eventually developed into a commercial part of the city of Akron. The Northern Parcel was transferred between several owners, but it is not

disputed that all subsequent owners of the Northern Parcel continued using the railroad crossing and the attached lower strip of land as a means of ingress and egress to the street. In 1930, the then-owner of the Northern Parcel, apparently unaware that it might already have an easement to do so, entered into a license agreement with the Railroad to use the railroad crossing. The Railroad entered into similar license agreements with some of the subsequent owners of the Northern Parcel. In 2006, the Railroad gave notice to Bardin's predecessor, Merrill Lynch, that it was terminating the license.

{¶5} Consequently, during October 2007, Merrill Lynch filed a complaint seeking a declaration that it held an easement that allowed it to continue using the railroad crossing. It further sought injunctive relief to prevent the Railroad from closing the crossing. The Railroad counterclaimed for a declaration that its ownership of the Railroad property was not subject to any easement over the railroad tracks. Bardin was later substituted as the party plaintiff in this case and as the party defendant to the Railroad's counterclaim.

{¶6} The sole issue in this case was whether Bardin, as the owner of the Northern Parcel, had a legal right to continued use of the railroad crossing. Bardin and the Railroad each eventually moved for summary judgment. Bardin raised several arguments to support its claim that it held an easement, including that an express easement appurtenant had been created by the Longs in the 1890 deed when they transferred the property to the Railroad, that the easement attached to subsequent conveyances of the Northern Parcel, and that, as owner of the Northern Parcel, Bardin had the legal right to continue using the crossing over the Railroad's property. The Railroad raised numerous arguments in opposition to Bardin's summary judgment motion, including that any easement created by the deed was personal to the Longs and did not run with

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<sup>1</sup> For ease of discussion, the original owner of the railroad property will also be referred

conveyances of the land and that the easement had been extinguished over the years due to the increased burden on the crossing, the licensing agreements between the Railroad and previous owners of the Northern Parcel, and laches.

{¶7} The trial court granted summary judgment to Bardin, concluding that it held an easement appurtenant to use the railroad crossing and enjoined the Railroad from closing the crossing or otherwise interfering with Bardin’s right to use the crossing. The Railroad appeals and raises two assignments of error. Bardin raises one cross-assignment of error, defending the trial court’s judgment on its alternate summary judgment grounds, in the event this Court determines that there is merit in the Railroad’s assignments of error.

## II.

### **ASSIGNMENT OF ERROR I**

“THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF [BARDIN], AND DENYING SUMMARY JUDGMENT IN FAVOR OF THE [RAILROAD], BECAUSE THE 1890 DEED DID NOT CREATE AN EASEMENT APPURTENANT.”

{¶8} The Railroad maintains that the trial court erred in granting summary judgment to Bardin. This Court reviews summary judgment under the same standard as the trial court. *Perkins v. Lavin* (1994), 98 Ohio App.3d 378, 381. Pursuant to Civ.R. 56(C), summary judgment is proper if:

“(1) [N]o genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the nonmoving party.” *State ex. rel. Howard v. Ferreri* (1994), 70 Ohio St.3d 587, 589.

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to as “the Railroad.”

{¶9} The trial court granted summary judgment to Bardin, concluding that the undisputed facts established that, as owner of the Northern Parcel, Bardin held an easement appurtenant to use the railroad crossing. The Railroad maintains that the trial court erred in concluding that the easement over the railroad crossing was an easement appurtenant rather than an easement in gross.

{¶10} An easement is a property interest in the land of another that allows the owner of the easement “a limited use of the land in which the interest exists.” *Colburn v. Maynard* (1996), 111 Ohio App.3d 246, 253. The creation of an easement may be express, implied, or by prescription. *Trattar v. Rausch* (1950), 154 Ohio St. 286, paragraph two of the syllabus. An express easement may be created by grant, or by reservation or exception in a deed. *Gateway Park, LLC v. Ferrous Realty Ltd.*, 8th Dist. No. 91082, 2008-Ohio-6161, at ¶29.

{¶11} Easements are either appurtenant or in gross. *Id.* at ¶28. “An easement appurtenant requires a dominant tenement to which the benefit of the easement attaches and a servient tenement upon which the obligation or burden rests.” *Id.*, citing *Warren v. Brenner* (1950), 89 Ohio App. 188, 192. The easement essentially attaches to the dominant estate, runs with all transfers of it, and cannot be transferred independently of it. *State ex rel. Lindemann v. Preston* (1960), 171 Ohio St. 303, 305-306. An easement in gross, on the other hand, is a right held by an individual, exists independent of any ownership of land, and is not transferrable to subsequent owners. *DeShon v. Parker* (1974), 49 Ohio App.2d 366, 367.

{¶12} Although Bardin also raised alternative arguments in its motion for summary judgment, the trial court found that it held an express easement appurtenant that was created in the 1890 deed when the Longs conveyed the strip of property to the Railroad. Although the Railroad initially denied that any type of easement had been created by the 1890 deed, it later

conceded that the deed had created an easement for the Longs to use a crossing over the Railroad property. The Railroad maintains, however, that the easement created in the 1890 deed was an easement in gross that was personal to the Longs and could not be transferred to future owners of the Northern Parcel.

{¶13} The Railroad’s primary argument is that the easement created by the 1890 deed was an easement in gross because the deed clauses that created it failed to use words of inheritance. In other words, the deed did not explicitly indicate that the right to use the crossing would be for the benefit of the Longs, their heirs, and assigns. Although Ohio law no longer requires the use of words of inheritance to create or convey interests in land, the parties do not dispute that this Court must apply Ohio law as it existed in 1890, the time the deed was created. At that time, Ohio law required the use of words of inheritance to convey a fee simple estate in land and the omission of such language in the deed would prevent a subsequent transfer of the property. See *Ford v. Johnson* (1884), 41 Ohio St. 366, 367. In *Ford*, the Ohio Supreme Court recognized that the language requirement was “technical” but emphasized that it had “always been a rule of property in this state and must, for manifest reasons, be upheld.” *Id.*

{¶14} It is less clear, however, whether 1890 Ohio law also required the use of words of inheritance to create a perpetual easement over the railroad crossing in the Longs’ 1890 deed. The Railroad maintains that words of inheritance were required to create a perpetual easement, that they were absent from the 1890 deed, and that the railroad crossing easement consequently expired when the Longs conveyed the Northern Parcel to another owner.<sup>2</sup>

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<sup>2</sup> Although the trial court found that words of inheritance in other parts of the deed extended to the clauses that created the easement, this Court will presume for purposes of this discussion that the language creating the easement lacked words of inheritance.

{¶15} Although the Railroad and Bardin each cite legal authority, attempting to support their respective positions on the necessity of words of inheritance to create a perpetual easement,

this Court found little guidance in these cases because they did not address the specific issue before us. Specifically, the issue before us is distinguishable from the facts of the cited cases for a variety of reasons, including the manner in which the 1890 deed created this easement and the specific nature of the easement that was created.

{¶16} The parties do not dispute that the easement at issue was created by the 1890 deed. The deed did not *convey* an easement to the Longs, however. Instead, the Longs *retained* an interest in the land that they conveyed to the railroad. Prior to the execution of the deed, the Longs owned the entire tract of land and all the rights that ran with it. Through the deed, the Longs conveyed the 80-foot parcel to the Railroad, but at the same time retained a right to use a crossing over the railroad at a location that they would designate. Whether words of inheritance were required to preserve the right to use the railroad crossing for future owners of the Northern Parcel was dependent upon the technical classification of nature of the right retained by the Longs.

{¶17} In 1890, property law made a technical distinction between the two types of property interests that grantors could retain in their property when they conveyed it to another: a reservation and an exception. A “reservation” created a new right that did not exist at the time the grantor owned the property, while an “exception” involved the grantor merely retaining part of what he already owned. See *Gill v. Fletcher* (1906), 74 Ohio St. 295, 303-304. If the language of the deed was deemed to constitute an “exception,” words of inheritance were not necessary for the grantor to retain a property right that he could convey to future owners, for the grantor merely retained a portion of his former estate. *Id.*; *Hall v. Hall* (1910), 106 Me. 389, 76 A. 705, 706. On the other hand, because a “reservation” was considered to create a new property interest, which was essentially transferred back to the grantor from the property he conveyed, a

reservation required words of inheritance to create an interest that would be alienable by the grantor. *Id.*; *Embleton v. McMechen* (1924), 110 Ohio St. 18, 25.

{¶18} A grantor could retain an easement either by reserving it or by excepting it from the grant of land. Determining whether the grantor had excepted the easement or reserved it, however, was not necessarily resolved by resorting to the language of the deed or dictionary definitions of the terms “reservation” or “exception.” As one court observed, “the distinction between an ‘exception’ and a ‘reservation’ is frequently quite obscure and uncertain, and has not always been observed.” *Chappell v. New York, N.H. & H.R. Co.* (1892), 62 Conn. 195, 24 A. 997, 999. “Whether a given clause creates a reservation or an exception is not so much a question of words as of intention to be gathered from all the circumstances of the case[.]” *Hall v. Hall*, *supra*.

{¶19} In *Gill v. Fletcher*, 74 Ohio St. 295, at syllabus, the Ohio Supreme Court similarly emphasized that there is no magic deed language that will determine whether the interest retained by the grantor is an exception or a reservation. Instead, it is the intent of the parties that is dispositive. “Whether the language used in a deed creates a reservation or exception from the grant depends upon the intention of the parties as evinced by a construction of the whole instrument in the light of the circumstances of each case.” *Id.* If the language and surrounding circumstances demonstrate that the grantor intended to retain more than “an immediate privilege which should expire with his own life” but instead intended to except “an absolute and inheritable” right, then the clause will be deemed to be an exception, which required no words of inheritance to preserve a perpetual interest. See *id.* at 304.

{¶20} Moreover, years before *Fletcher v. Gill*, in cases that involved easements created by express conveyances, the Ohio Supreme Court had recognized that the language used in the

conveyance was not necessarily dispositive of the transferability of the easement. The court had already begun shifting its emphasis away from the technical language used in the instrument of conveyance and had focused instead on the parties' intentions and surrounding circumstances to determine whether the easement conveyed was perpetual in nature. In *Boatman v. Lasley* (1873), 23 Ohio St. 614, 618, the court emphasized that where a right of way is in gross and not attached to an interest in land, it cannot be converted into an appurtenant easement by using words of inheritance in the deed creating it. The court emphasized that a "mere naked right to pass and repass over the land of another" is of a personal nature and dies with the person. *Id.*

{¶21} The *Boatman* court was careful to distinguish, however, a right-of-way easement that was not merely a right to pass over land but was attached to ownership of adjacent land:

"Where the way is appendant or appurtenant to other lands, very different considerations arise. There the right attaches to the lands to which the way is appurtenant, because it is granted for the convenience of their occupation without respect to the ownership or number of occupants. In such case the right of way passes with the dominant estate as an incident thereto. A right of way appendant can not be converted into a way in gross, nor can a way in gross be turned into a way appendant." *Id.*

{¶22} In addition to recognizing that technical deed language was not dispositive of the nature of an easement, the Ohio Supreme Court had explicitly recognized the perpetual nature of the attachment of railroad tracks to property. In *Junction RR. Co. v. Ruggles* (1857), 7 Ohio St. 1, a case that involved whether the railroad's easement to operate its railroad could be transferred to another entity, the court recognized that the construction of railroads across the state presented a unique use of land that then-existing property law was not designed to address. The court emphasized that principles of property law, which had been established long before the railroads came into existence, did not address the practical reality of railroad lines being affixed to land. The *Ruggles* Court noted that the construction of railroad lines across the state had been a huge

undertaking that took years to complete and, after the tracks were affixed to the land and the railroad line was in operation, the railroad was there to stay. *Id.* at 7-8. “Like real estate, a railroad is - or at least the Ohio Railroad was - expected to be of perpetual duration.” *Id.* at 8. Despite the lack of any words of inheritance in the language creating the railroad’s easement, the court made a presumption, absent any language to the contrary, that the parties creating the easement for the railroad to run its tracks across the landowner’s property must have intended that the easement would be of a perpetual nature. *Id.*

{¶23} We have also found guidance from two 1892 decisions from other jurisdictions that addressed the same issue before us: whether the retention of a right to cross a railroad in the deed that conveyed property to the railroad constituted a reservation or an exception and, consequently, whether the lack of words of inheritance in the deed clause prevented the creation of a transferrable interest. Both courts focused on the intentions of the parties and the surrounding circumstances, as the Ohio Supreme Court would have done, to conclude that the lack of words of inheritance did not defeat the obvious intentions of the parties that the easement would be of a perpetual nature.

{¶24} In *White v. New York & N.E.R. Co.* (1892), 156 Mass. 181, 185, the court recognized that the right to cross a railroad retained by the grantor constituted an exception even though the deed had incorrectly used the word “reserving” instead of “excepting.” Like the situation between the Longs and the Railroad here, the grantor had sold a strip of land for the construction of a railroad that dissected his property and, without a continued right to cross the railroad, a portion of the grantor’s property would be completely inaccessible. “[T]he only reasonable construction in the present case would seem to be that it was the intention of the parties to annex the right of passing to the larger tract as a perpetual easement[.]” *Id.* Therefore,

the omission of words of inheritance was not fatal to the creation of an alienable easement appurtenant. *Id.* at 184.

{¶25} In *Chappell v. New York, N.H., & H.R. Co.*, 24 A. at 999, the court likewise held that, despite the use of the words of reservation, the right to cross a railroad retained by an owner of adjacent property constituted an exception from the grant of the land to the railroad. Words of inheritance were not required to preserve the perpetual nature of that interest. The *Chappell* court reasoned that the right to cross the railroad was an “exception” because it was a right that had been held by the grantors prior to conveying their land to the railroad:

“It was a part of their full dominion over the strip about to be conveyed by the deed, and not a right to be, in effect, conferred upon them by the grantees. It was something which the ‘reservation’ in effect ‘excepted’ from the operation of the grant. Hence it is quite reasonable to conclude that the stipulation as to the right of way was intended by both parties to give a right, not temporary and personal, but permanent, and for the benefit, not so much of the [grantors], as for the premises they continued to hold. In such cases we think the rule is well settled that a permanent easement in favor of the retained land may be made without words of limitation.” *Id.*

{¶26} The *Chappell* court also focused on the surrounding circumstances and the clear intention of the parties that the right to cross the railroad would attach to the land and not a specific person:

“[I]t is difficult to believe that the parties to the deed intended that the right to cross was only to exist during the lives of the grantors. The situation and needs of the grantors’ premises seem to forbid such a belief. The way at the date of the deed was an existing one, plainly visible and necessary, and in almost constant use. The right to continue to use it was an almost absolute necessity, not only to the grantors, but to all subsequent owners of the premises.” *Id.*

{¶27} Therefore, with all of these legal principals in mind, this Court must look to the 1890 deed in light of the surrounding circumstances to determine whether the Longs’ retention of a right to cross the Railroad property was intended as a perpetual “exception” or as a “reservation” that was personal to the Longs. As quoted above, the deed provided as follows:

“Said Railroad Co. agrees to furnish and maintain one good grade crossing, properly planked. Said crossing to be located where the grantor may designate.

“Said Railroad Co. agrees to fence strip of land and without using barbed wire.”

{¶28} The language of the deed reveals that the Longs and the Railroad intended that the Railroad would provide the Longs with access to their entire remaining property and that it would build the crossing where the Longs designated, plank it, maintain it, and fence the remainder of the tracks with something other than barbed wire. Whether the parties intended this right to be personal to the Longs or to be a perpetual right that attached to the property is not necessarily clear from the language of the deed, but can be gleaned from the surrounding circumstances.

{¶29} The circumstances surrounding the creation of this easement were similar to those in *White and Chappell*. Without a crossing, the northern portion of the Longs’ property would be inaccessible and would be rendered useless. Moreover, as observed by the Supreme Court in *Ruggles*, once the tracks were affixed to the property and the railroad line was in operation, it was essentially part of the real estate and the intention was that it would continue to operate indefinitely. The parties certainly intended that the Railroad would continue to exist, as would a need to cross it, beyond the lifetime of the Longs. It must have been the intention of the parties to the 1890 deed that the Railroad would build and maintain a crossing to allow the existing owner of the property to have continued access to the northern portion of the property and to give the northern portion access to and from the remainder of the property and the street. As was emphasized in *Chappell*, it was clear at that time that the need to cross the railroad tracks would be ongoing and would be essential for the northern portion of the property to have any use or value. It is only reasonable to conclude that the parties intended that the railroad crossing would benefit all subsequent owners of the Northern Parcel, not the Longs personally, as its ongoing

use was necessary to gain access to or from the street to the Northern Parcel. As it was clearly the intention of the parties that the easement created in the 1890 deed would be perpetual in nature, it was unnecessary that its exception from the Longs' conveyance to the Railroad be supported by any words of inheritance.

{¶30} Although the Railroad further points to the fact that reference to the crossing easement was omitted from subsequent deeds that transferred the Northern Parcel, it was not necessary for those deeds to refer to the easement in order to preserve it. Once an easement appurtenant was established, it attached to the dominant estate and passed with every conveyance of that estate. “[I]t is the established rule in this state that the appurtenances to property pass with it, upon its alienation, without the use of the term ‘privilege or appurtenance’ in the conveyance.” *Shields v. Titus* (1889), 46 Ohio St. 528, 540, citing *Morgan v. Mason* (1851), 20 Ohio 401. “[A] right of way or other easement appurtenant to the land[] passe[s] by a grant of the land without any mention being made of the easement, and though neither the term ‘appurtenance,’ nor its equivalent, be employed.” *Id.*

{¶31} The undisputed facts established that the 1890 deed created an express easement appurtenant that ran with subsequent transfers of the land. As the easement was essential to the use of the isolated, northern portion of their land, when the Longs sold the Northern Parcel, the easement appurtenant necessarily ran with it and all subsequent transfers. Because the trial court properly concluded on summary judgment that the 1890 deed created an express easement appurtenant over the railroad crossing for the benefit of the owner of the Northern Parcel, the Railroad's first assignment of error is overruled.

### **ASSIGNMENT OF ERROR II**

“THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF [BARDIN], AND DENYING SUMMARY JUDGMENT IN

FAVOR OF THE [RAILROAD], BECAUSE ANY EASEMENT HAS BEEN EXTINGUISHED DUE TO MODIFICATION IN USE, THE SUBSEQUENT LICENSING AGREEMENTS AND LACHES.”

{¶32} Through its second assignment of error, the Railroad argues that the trial court erred in granting summary judgment to Bardin because any easement over the railroad crossing had been extinguished over time due to the increased burden on the railroad crossing, by subsequent licensing agreements, and by laches.

#### Increased Burden

{¶33} First, the Railroad maintains that the easement over the railroad crossing had been extinguished because the burden on the easement had significantly increased over the years. Specifically, it pointed to the fact that the original easement provided for a crossing to facilitate operation of the Longs’ private farm, but the burden on the crossing had increased over the years to numerous automobiles traveling over it daily to and from commercial office buildings. The Railroad further maintained that a portion of Bardin’s property that claimed a right to use the crossing was not actually part of the original Northern Parcel that was owned by the Longs and that, therefore, the size of the dominant tenement had nearly doubled.

{¶34} Although Ohio Courts have recognized that an easement may be terminated due to misuse by the owner of the dominant tenement, proof of misuse requires proof that the easement has been used beyond its stated purpose, which has caused an interference with the property rights of the owner of the servient tenement, such as where the property has been damaged or obstructed. See, generally, *Walbridge v. Carroll*, 184 Ohio App.3d 355, 2009-Ohio-5183; *Cleveland v. Clifford*, 9th Dist. No. 02CA008071, 2003-Ohio-1290; Annotation, What Constitutes, and Remedies for, Misuse of an Easement (2003), 111 ALR 5th 313.

{¶35} When an easement is created expressly, the extent and limitations of the easement depend upon the language of the creating instrument. *Columbia Gas Transm. Corp. v. Bennett* (1990), 71 Ohio App.3d 307, 318. The easement created by the 1890 deed was the use of a railroad crossing to cross the Railroad's tracks. It was a general exception from the grant of land to the Railroad and was not limited in time or scope, nor was it limited to use by farm vehicles or for farming purposes. The Railroad did not present evidence to suggest that any owner of the Northern Parcel had used the crossing for anything other than a way to cross over the tracks, nor did it suggest that the use of the crossing had caused any damage to its tracks or obstructed its operation of its railroad in any way.

{¶36} The Railroad's primary argument was that the burden on the crossing had increased due to development over the years as this neighborhood changed from a rural area to a commercial part of the city. However, changes in the use of an easement are permitted to the extent that they result from the normal growth and development of the dominant land, and are, therefore, a proper and reasonable use of the easement. *Erie RR. Co. v. S.H. Kleinman Realty Co.* (1915), 92 Ohio St. 96; *Mark Ten Mining & Consulting, Inc. v. Rawson* (Nov. 25, 1992), 7th Dist. No. 91-C-77, at \*2. The Railroad presented no evidence to demonstrate that the development of the Northern Parcel was any different from that of this entire region, as it evolved over the next century from a rural farming community to a commercial part of the city.

{¶37} The Railroad also maintained that the easement had been expanded beyond its intended use because approximately half of Bardin's existing property was not part of the original Northern Parcel that had been owned by the Longs when the easement was created. In addition to asserting that the Railroad failed to support this argument with proper Civ.R. 56 evidence, Bardin correctly argues that, at the time the easement was created, the dominant

tenement owned by the Longs was comprised of their entire remaining property, both to the north and south of the railroad tracks. Even if the Railroad could demonstrate that the Northern Parcel had doubled in size to over seven acres, the original dominant tenement owned by the Longs was over 45 acres. Thus, the size of the dominant tenement claiming a right to use the railroad crossing has actually decreased in size by over 80 percent since the easement was created.

{¶38} Moreover, as the trial court noted, even if the Railroad had demonstrated an increased burden on the crossing, the remedy would not be to terminate the easement. As demonstrated by case law cited by the Railroad, even if the trial court found that the use of the easement had impermissibly expanded to areas beyond the original dominant tenement, the appropriate remedy would be an injunction to restrict the use of the easement to the original dominant tenement, relief which was not sought by the Railroad in this action. See *State Ex Rel. Fisher v. McNutt* (1992), 73 Ohio App.3d 403, 408.

#### License Agreements

{¶39} Next, the Railroad maintains that, because several owners of the Northern Parcel entered into license agreements to use the railroad crossing, the express easement was extinguished due to equitable principles of estoppel. Although the Railroad suggests that the easement was extinguished simply because some of the prior owners entered into unnecessary license agreements to use the crossing, it cites no legal authority to support that argument. The only authority that the Railroad cites for this argument is *Lake Front-East 55th St. Corp. v. Cleveland* (1939), 21 O.O. 1, a case in which the holder of an easement appurtenant entered into a license agreement that granted the owner of the servient tenement the right to obstruct the easement. Because the holder of the easement had expressly authorized the obstruction of the

easement, and the owner of the servient tenement spent time and money building improvements that obstructed the easement, the court held that the easement was extinguished under the doctrine of equitable estoppel.

{¶40} The reasoning of *Lake Front* is inapplicable to the facts of this case, as the Railroad failed to point to any facts to support an equitable reason to extinguish this easement. The Railroad simply presented evidence that some of the prior owners of the Northern Parcel, apparently unaware that they already held an easement to use the railroad crossing, entered into license agreements with the Railroad to use the crossing. None of the prior owners had ever authorized the Railroad to obstruct the crossing, nor had the Railroad acted in detrimental reliance on any authorization to obstruct the crossing.

#### Laches

{¶41} Finally, the Railroad argues that the easement had been extinguished by laches because Bardin and the prior owners of the Northern Parcel sat on their rights by failing to bring an action to quiet title until 2007. Bardin maintains that the Railroad did not properly raise this argument before the trial court and that, even if the issue was properly raised, it lacks merit.

{¶42} The Railroad cites *Lone Star Steakhouse & Saloon of Ohio, Inc. v. Ryska*, 11th Dist. No. 2003-L-192, 2005-Ohio-3398, as support for its position that an easement can be extinguished by the doctrine of laches. *Lone Star* did recognize that a prescriptive easement can be extinguished by the doctrine of laches, but held that the owner of the servient tenement in that case could not resort to the doctrine of laches to extinguish an express easement appurtenant:

“Express easements appurtenant appear in the chain of title to property and therefore place a servient tenant on notice, at the point of obtaining an interest in the property, of the interest appertaining to the dominant estate. Evidently, the express presence of the easement in the chain of title suffices to place a servient tenant on notice of the existing interest and, consequently, equity does not

acknowledge the extinguishment of such an easement by recourse to estoppel and laches.” Id. at ¶50.

{¶43} Because the owners of the Northern Parcel held an express easement appurtenant, the Railroad failed to demonstrate that the doctrine of laches could apply. Consequently, the Railroad failed to raise a material issue of fact that the express easement appurtenant over the railroad crossing had been be extinguished on any of the above grounds. Because the trial court did not err in rejecting these arguments in opposition to Bardin’s motion for summary judgment, the Railroad’s second assignment of error is overruled.

### III.

{¶44} The Railroad’s assignments of error are overruled. Because this Court found no merit in the Railroad’s challenges to the trial court declaring that Bardin holds an express easement appurtenant to continued use of the railroad crossing, it is unnecessary for us to address Bardin’s cross-assignment of error. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

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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 Summit, 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 Appellant.

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CARLA MOORE  
FOR THE COURT

WHITMORE, J.  
BELFANCE, P. J.  
CONCUR

APPEARANCES:

GEORGE CARR, COLLEEN A. MOUNTCASTLE, and THOMAS E. DOVER, Attorneys at Law, for Appellant.

CHRISTOPHER F. SWING, Attorney at Law, for Appellee.

CAROLINE L. MARKS, Attorney at Law, for Appellee.