

CBA Real Property Committee
CASE UPDATE
As of 05-05-08

**RECENT CASES OF INTEREST TO
REAL PROPERTY LAWYERS**

Esteph v. Grumm, 2008-Ohio-1121

- Easements, reciprocal, terms of deed, summary judgment, fact issues, pipeline
 - Grumm owns a piece of land that is adjacent to Esteph's land. A business is operated upon Esteph's land and there are two easements which are a burden upon Grumm's land. One of the easements is for a gas pipeline to be maintained over the property. The second is a mutual easement that was negotiated by Grumm's predecessor in interest for the mutual use of driveways, however, the location, length, and width of the driveway were not provided. Grumm determined that Esteph's use of the driveway exceeded the "scope" of the mutual easement. Grumm took steps to prevent Esteph from trespassing on his property by placing obstacles on areas that he believed were outside of the easement. However, these obstacles caused a problem for the easement for the gas pipeline company. An action was brought against Grumm for interfering with the Easements. The trial court found that the easement covered the entire driveway. However, on appeal, the Court found that the deed actually limited the Easement to the areas described in the exhibits. Therefore, the trial court's decision was improper. With regard to the pipeline easement, the appellate court found that the trial court properly granted summary judgment to the gas pipeline company.

DLJ Mtge. Capital, Inc. v. Parsons, 2008-Ohio-1177

- Foreclosure, real property in interest, record assignment, timeliness
 - On April 18, 2006, Appellee filed a foreclosure complaint against the appellants alleging that they were in default. On August 22, 2006, Appellee moved for summary judgment. Appellants claimed that appellee was not the real party in interest, that payments made by the parties were not reflected and that the monthly mortgage payments exceed the amount in the note and mortgage. The Court granted summary judgment in favor of appellees, however the judgment was not sent to the parties. On November 24, appellee filed a motion for extension of time to file a response to appellants response and the Court granted this extension. The appellate Court found that the Trial Court should have denied summary judgment as it was not clear whether the mortgage had been assigned.

Semirale v. Jamieson, 2008-Ohio-1093

- Fraudulent concealment, misrepresentation, sink overflow, significance, correction, contract, home inspection, arbitration, limitation of damages, Consumer Sales Practices Act

- The plaintiff hired an inspection company to inspect a property that he was planning on purchasing. The plaintiff sought a declaration showing that the contract was unconscionable and unenforceable as it limited the amount that of the fee paid for the inspection. The plaintiff also claimed the inspection was negligent and as a result he incurred property damage and repair costs. The plaintiff also complained the inspection company violated the Consumer Sales Practices Act. He then claimed that the former owner of the home failed to disclose defects and concealed material defects. The inspection company stated that they were not given notice of the defects to repair the defects before the Plaintiff incurred the costs to do so himself. They also claimed that the plaintiff destroyed evidence. The Court granted the defendants summary judgment finding that he purchased the property as is and that all defects were open and obvious.

Farrell v. Deuble, 2008-Ohio-1124

- Restrictive Covenants, manufactured home, interpretation, free use of land
 - The trustees of a trust caused four tracts of the property owned by the Trust to be subject to certain restrictive covenants. The Deubles purchased one of the lots with the intent to operate a bed and breakfast, however, there was a restrictive covenant stating that the property could only be used for single-family residential purposes. An amendment was made to the deed restrictions allowing the Deubles to operate a bed and breakfast. The Deubles then arranged for an industrialized unit to be delivered to the property. The trustees sent the Deubles a cease and desist letter stating that this was in violation of the restrictive covenants. The Farrells were granted a permanent injunction which prevented the Deubles from putting a manufactured home on the premises. The Court found that since the term manufactured home can be susceptible to different meanings, the trial court should have allowed the free use of the land.

Machnics v. Sloe, 2008-Ohio-1133

- Zoning, injunction, contempt, civil, jail sentence
 - The appellant owns property in Geauga County, which was previously owned by Raymond Arnold. When Arnold owned the property, he applied for a conditional variance to operate the property as a service garage. His application was granted subject to conditions that no vehicles would be sold, there would be no outside display of merchandise, no body work would be performed on the premises, and there would be no outside storage of the vehicles. Appellant then purchased the property subject to the conditional variance. Appellant applied to have some of the conditions removed. He was granted a variance allowing the sale of tires, however, he was denied the variance for allowing body work to be performed on the premises. During Appellants testimony, he admitted to doing all of the things that on the property that are specifically not allowed under the conditional variance. The Zoning Inspector then filed a Complaint for an

injunction against Appellant. The court then granted appellee's motion for summary judgment and a permanent injunction was ordered. Appellant failed to follow the purge orders and was sentenced to thirty days in jail. The Appellate Court affirmed the judgment.

Weber v. Troy Twp. Bd. Of Zoning Appeals, 2008-Ohio-1163

- Zoning, nonconforming use, business continuation, business expansion
 - The Schuettes own and live on 24 acres of property of which they also operate a trucking and excavation business. This business has been conducted since the property was purchased without interruption. The Webers purchased a neighboring property in 2000 and stated they did not realize a business was operated on the property next door. Appellants then filed a complaint with the Township Board of Zoning. The investigator found that the Schuettes operation of their business was a lawful, prior non-conforming use under the current zoning code. Appellants appealed this decision which was affirmed by the Trial Court. The appellants further appealed. The appellate Court affirmed the decision of the Trial Court as it relates to the designation of the prior non-conforming use. However, the appellate Court because the area of the nonconforming use was extended beyond the original property as it existed before the resolution, this portion is remanded to the Board of Zoning to see if there was compliance.

Estate of Westover v. Emmanuel Homes, LLC, 2008-Ohio-1248

- Arbitration, real estate listing, stay
 - The Estate entered into a listing contract for the auctioning off two real property parcels for the deceased property. There was an arbitration clause in the listing contract. A contract was entered into for the sale of both properties. The Estate then filed suit for breach of contract and the defendants asked for a stay in order to arbitrate pursuant to the clause that was put in both sale contracts. The Court denied the request for stay and set the case for trial. This Court reversed finding the trial court erred by not allowing the stay.

Gall v. Mariemont Windsor Square Condominium Assn., 2008-Ohio-1276

- Condominiums, amendment of declaration, required vote
 - Appellant brought a suit against the condominium association claiming that some owners were not paying their full assessment, the association planned to amend the declaration in violation of the law, an individual who did not own a unit was on the board in violation of the bylaws, and he would have been elected to the board if the non-owner were not on the board. The association filed a motion for summary judgment. The Court determined that some of the issues were moot and that the Court did not have authority to appoint Appellant to the Board. Therefore, the only issue was whether the amendment to the declaration was in accordance with the Ohio Revised Code. The Court found that Appellant did not have

standing because his par value on his unit did not change and granted summary judgment for the Association. The Appellant argued that as a unit owner, he was affected by the Association's failure to collect the proper assessment and by the amendment in the par values. The Court found that this argument had merit.

Anderson Twp. Historical Soc. v. Rhodes, 2008-Ohio-1436

- Appeal by Hamilton County Auditor from the judgment of common pleas establishing value of property at \$177,000. The board of revision had previously determined the value of the property was \$316,000 the price the plaintiff purchased it for in 2005. Owner filed a complaint with the board of revision contesting the valuation and the board held the value of the purchase price. Trial court was in error for refusing to accept arms length sale valuation based on it being a substantial increase from prior values. Without evidence that it was not an arms length transaction the valuation should be upheld.

Sexton v. Mason, 2007-Ohio-38

- Appeal from granting of summary judgment in favor of City of Mason. Development of Sextons neighbors' property caused flooding on the Sextons property. Sextons argue that flooding on the property was a continuing trespass and the trial court thus erred in using a 4 year statute of limitations. Under RC 2305.09(A) there is a 4 year statute of limitations for all trespass actions on real property. A continuing trespass results when the tortious activity is ongoing and perpetually creates fresh violations of the property rights. A permanent trespass occurs when the tortious act has been fully accomplished but injury persists. As a permanent trespass the poorly engineered subdivision water system was a cause of action subject to the four year statute of limitations.

State ex rel. Cleveland Cold Storage v. Beasley, 2008-Ohio-1516

- ODOT proposed development of Cleveland Innerbelt project which identified certain properties as potentially impacted by the development. CCS property owners property was not included. CCS invested substantial amounts to renovate its property and after inquiry received a letter from the mayor that the city would not require acquisition of the CCS property by eminent domain. One year later, CCS received notice that the Innerbelt Project would need to acquire the property. After bankruptcy by CCS, CCS filed a writ of mandamus seeking immediate proceeding on the eminent domain. Dismissal of the petition and complaint was warranted because the representations made by ODOT constituted only a statement of intention to acquire the CCS property in the future and did not constitute a taking requiring ODOT to institute appropriation proceedings.

Key-Ads, Inc. v. Warren Cty. Bd. of Commrs., 2008-Ohio-1474

- Defendant appellee the Warren County Board of Commissioners promulgated a resolution denying an application to erect a billboard. Appellant was lessee of tract of land zoned for general business use. To install a double sided illuminated advertising billboard at the intersection, the lessee filed an application and after a hearing the zoning board held that the sign would detrimentally impact the public and nearby property owners. Appellant alleged that no provision in the zoning code permitted outright rejection of the application, rather it required the board to make modifications. Board decision was upheld as the code provided the application was “subject to” an impact determination.

Berry v. Mullins, 2008-Ohio-1475

- Butler County quiet title action of strip of land between two property owners. One property owner had a survey conducted and stakes placed to rebuild a fence, the other destroyed those stakes and a complaint for trespass ensued. Quiet title counterclaim granted and court ordered the parties deeds to be reformed to reflect the decision. The location of a boundary is a question of fact to be determined by the trier of fact. Trial court found one survey more reliable than the other and that decision was upheld on appeal.

Sun Life Assur. Co. of Canada v. Schrock Rd. Markets, Inc. , 2008-Ohio-7

- Commercial Lease in which the tenant removed certain rooftop unit and opener/sensors after lease negotiations broke down. Those items were fixtures and remained with the owner of the property. The bankruptcy of the prior tenant and rejection of the Lease by the trustee did not cause that ownership to change.

State ex rel. Overholser Builders, L.L.C. v. Clark Cty. Bd. of Commrs., 2007-Ohio-7230

- Overholser Builders filed a petition with Clark County Commissioners for the annexation of certain land from Springfield Township to the city of Springfield. By filing a cooperative economic development agreement sought expedited annexation which was signed by the Board of Commissioners and provided that the noncontiguous nature of the property would not prevent annexation. Later the board denied the petition for that reason. Held that RC 709.022 annexation statute implicitly includes a right to seek relief through a writ of mandamus.