

IN THE SUPREME COURT OF OHIO

RICHARD HOUCK, et al.,

Plaintiffs-Appellants,

vs.

**BOARD OF PARK
COMMISSIONERS HURON
COUNTY PARK DISTRICT, et
al.,**

Defendants-Appellees

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Ohio Supreme Court
Case No. 06-1262

On Appeal from the Huron County
Court of Appeals, Sixth Appellate
District

Court of Appeals
Case No. H-05-018

Trial Court
Case No. CVH-2003-0946

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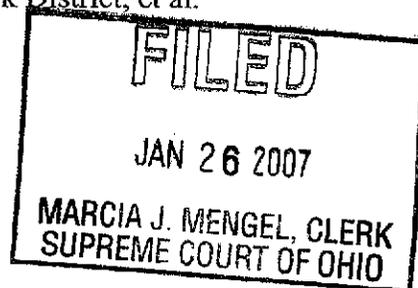


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OVERVIEW OF THE CASE

This appeal is about an attempt to take land owned by park districts for the public good and intended to be used for the expansion of a recreational trail.

In 1998, the six public park districts who are the Defendants obtained title to a stretch of former railroad property from the Northwest Ohio Rails-to-Trails Association. Other portions of the railroad corridor have already been developed into a recreational trail in northern Ohio, and this stretch will add another section to the trail. The park districts plan to eventually develop the entire railroad corridor as a recreational trail.

Plaintiffs Richard Houck and his farming corporation, Greenacres Enterprises, Ltd., own adjacent property and claim ownership rights in the railroad property by adverse possession. Mr. Houck and his corporation acquired their property in 1998 – the same year Defendants took title – when they purchased their farmland from the Henry family. The other Defendants claim drainage and easement rights to the property.¹

The evidence produced below did not create a strong legal or equitable case for Plaintiffs. To the contrary, in sworn interrogatory answers Plaintiffs admitted that their predecessors in title first took possession of the land in 1979. Even tacking the predecessors' period of possession to their own produced a period of possession that was just 19 years in duration. That period is too short to acquire title by adverse possession, if it is assumed – as Ohio law and all leading commentary declare – that time cannot be deemed to run after political subdivisions of the state such as park districts take ownership.

To increase their period of possession, Plaintiffs resorted to two arguments. First, they abandoned 1979 as the commencement date of possession for the northern portion of the land in question, and “clarified” that the period of possession had actually begun much earlier, in 1949.

¹ Complaint, Record Doc. 1 at Prayer for Relief.

But this required them to back away from their previous sworn testimony and the statements in their Complaint about when the possession period began. And, it required them to rely upon certain activities of Defendant Eldon Smith,² a former employee and tenant farmer of the Henry family, to claim possession. Smith's activities did not rise to the level sufficient to constitute an adverse use in the first place. Even so, those activities pertained just to the north section of the land, not to the ditch and the track area. If Smith's activities could amount to adverse possession at all – and there is ample legal and factual reason to conclude they did not – they would still be insufficient to enable Plaintiffs to gain title to all of the land in question.

So, Plaintiffs also have sought to fundamentally change Ohio law by seeking to establish that the statutory period of adverse possession can run against park districts. That is the crux of this appeal. Yet the result Plaintiffs propose runs counter to nearly all relevant Ohio law. The basic rule in Ohio is that the public – the beneficial owners of land titled to political subdivisions – generally cannot lose that land to private citizens via claims of adverse possession. Exceptions to that rule have always been few, limited and narrow. Plaintiffs' proposed rule goes further than mere recognition of another exception. Instead it changes a basic principle of hornbook law entirely. And, that change would come at a time when the doctrine of adverse possession is retreating rather than advancing in judicial favor. *E.g. Grace v. Koch (1998), 81 Ohio St. 3d 577,580* (“[a] successful adverse possession action results in a legal titleholder forfeiting ownership to an adverse holder without compensation. Such a doctrine should be disfavored, and that is why the elements of adverse possession are stringent.”)

Moreover, Plaintiffs' proposed rule is inconsistent with a number of fundamental public policies of this state. Those policies include a strong preference for establishing title by recorded

² Eldon Smith was a Plaintiff when the Complaint was filed, but he died December 28, 2004. *See* Record Doc. 65 (Suggestion of Death).

deed, and strong support for the establishment of public park lands in general, and recreational trails in particular. These policies have been expressed both judicially and legislatively for years. It is striking that Plaintiffs have offered not one societal principle, legal justification, or public benefit that would be promoted by the ruling they seek.

The park districts ask this Court to assert as law a simple and straightforward principle:

Land owned by park districts established under Ohio R.C. Chapter 1545 cannot be taken by adverse possession.

This rule breaks no new ground, because none needs to be broken. It does confirm what has long been understood and accepted: the rights of the public in land held by political subdivisions, particularly park districts, cannot be lost by the artifice of adverse possession.

Adverse possession is a doctrine that is disfavored even among private parties because its application in favor of an occupier requires a court to ignore a recorded title. But when the party sought to be divested of title is the public itself, that disfavor is even more pronounced. In that setting, application of the doctrine means that public plans funded with public dollars and cast for the public good are thwarted in favor of a narrow private interest. When, as in this case, the only adjoining landowner personally took ownership at approximately the same time that the public gained title, the absence of a superior equitable interest is highlighted still more. Whatever interests the Plaintiffs may have by virtue of tacking their short period of ownership with others in a chain of title, they do not warrant divesting the public of land intended to promote the collective community good.

In search of a theory that would invest their case with some degree of legal support, Plaintiffs suggest that the issues at stake center around tort immunity and its exceptions. The reasons are obvious: the only modern authority from this Court suggesting that the doctrine of adverse possession can be applied against a political subdivision involved a case brought against

a school board. The Court resolved the issue by examining conflicting decisions concerning whether a school board could share in the state's sovereign immunity. *Brown v. Board of Education* (1969), 20 Ohio St.2d 68.

Brown has been criticized and questioned³, because a claim for adverse possession does not involve tort principles, and because the legal rules which disallow adverse possession claims against political subdivisions generally do not find their source in the concept of tort immunity in the first place. Exceptions to immunity exist to protect the public from injury caused by a political subdivision, but generally only when it is not acting in a governmental or discretionary fashion. By contrast, application of adverse possession to land owned by park districts would disserve the public, by divesting it of rights in property acquired with public money.

For that reason, issues of exceptions to immunity from tort suit on the one hand, and the issue of political subdivision exemption from adverse possession on the other, are not analogous. Whatever policy considerations may support the former are not transferable and applicable to the latter. This case is simply not about tort immunity, no matter how hard Plaintiffs try to steer the Court in that direction and away from those considerations that pertain to the rights of the public in ownership of public property.

FACTUAL BACKGROUND

A. The Nature of the Property and its Ownership History

The property in question is a strip of land 64 feet wide and slightly less than $\frac{3}{4}$ mile in length. Although Plaintiffs have fabricated a description of the land that segments it into three areas, that description was devised only after Plaintiffs altered their theory of the case to meet

³ *Law v. Lake Metroparks*, 2006-Ohio-7010 (Lake Co. App. Dec. 20, 2006); *Nusekabel v. Cincinnati Public School Employees Credit Union, Inc.* (Hamilton Co. App. 1997), 125 Ohio App. 3d 427, 435; *Wyatt v. Ohio Department of Transportation* (Lake Co. App. 1993), 87 Ohio App. 3d 1, 5; *1540 Columbus Corp. v. Cuyahoga County* (Cuyahoga Co. App. 1990), 68 Ohio App. 3d 713, 718.

Defendants' defenses. In fact, the legal descriptions of the property in the various deeds produced in discovery do not apportion the land into track, ditch and north sections.⁴

The early title history is straightforward. In 1852, Orrin Head conveyed the land to the Toledo, Norwalk and Cleveland R.R. Company. Various railroads operated trains across the property for more than a hundred years until operations ceased in the late 20th century.⁵ In 1979, according to the Complaint, the railroad then in ownership of the property removed the rail tracks, ties, ballast and other fixtures.⁶ That action, according to the Plaintiffs, freed the property for brush-clearing and use of the former railway as a roadbed for farming operations.

In 1997, the entire railway corridor across Huron and neighboring counties was conveyed by the railroad to the Northwestern Ohio Rails-to-Trials Association, Inc. ("NORTA"). In 1998, NORTA conveyed the property to the park districts for eventual development of the recreational trail.⁷

The Complaint in this case was filed October 16, 2003. The only Plaintiffs to claim they owned land contiguous to the subject property were Richard Houck and his farming corporation, Greenacres Enterprises, Ltd.⁸ Mr. Houck obtained his land from the Henry family in September 1998.⁹ One of the other Plaintiffs, Eldon Smith, was an employee and later a tenant farmer for the Henry family.¹⁰ The Complaint asserted a quiet title claim premised on adverse possession and a number of other theories of recovery which were considered and dismissed by the trial

⁴ See Richmond Affidavit, Exhibit G in Defendants' Appendix of Exhibits in Support of Summary Judgment, Volume 1, for a description of the title history and copies of the historical deeds, Rec. Doc. 69.

⁵ *Id.*

⁶ Complaint Par. 5, Record Doc. 1.

⁷ See deeds attached to the Richmond Affidavit, Exhibit G to Volume I of Appendix of Exhibits in Support of Defendants' Motion for Summary Judgment, Record Doc. 69.

⁸ Record Doc. 70, Exhibits H1-H11.

⁹ Record Doc. 70, Exhibits H-1 and H-2

¹⁰ Record Doc. 79, Plaintiffs' Brief in Opposition to Defendants' Joint Motion for Summary Judgment, Mary Margaret Smith Affidavit attached thereto.

court. Only the adverse possession claim was litigated at the appellate court level. Thus this appeal concerns only the claim for adverse possession.

Plaintiffs' Complaint states that their predecessors-in-interest "took actual possession and control of the property" in 1979. It was then, according to the Complaint, that the Plaintiffs' predecessors began planting crops, maintaining and using a road, and utilizing the property for ditch and drainage purposes.¹¹

B. The Record Evidence Concerning Possession and Use of the Land

In addition to the statements in their Complaint concerning timing of possession and use of the land, Plaintiffs produced discovery responses reiterating and attesting to the position that their predecessors took possession of the entirety of the property in 1979.¹² These interrogatories were posed to Plaintiffs:

Interrogatory No. 12: Did any of your predecessors in title use or occupy any portion of the Railroad Corridor?

Interrogatory No. 13: If your answer to Interrogatory No. 12 is yes, set forth the date(s) when any such use or occupation began, when it ended, and a description of the use or occupation.

Each of the Plaintiffs, including Eldon Smith before he died, responded "yes" to Interrogatory 12 and each provided the following sworn response to Interrogatory No. 13:

Predecessors took possession on or about June 19, 1979 and used the property from that time until the time that plaintiff leased the property for farming, ingress, and egress to the farmland and maintenance of the waterway.¹³

The Park Districts filed a Motion for Summary Judgment. There, the Park Districts argued that Plaintiffs' claimed period of adverse possession that began in 1979 ended in 1998,

¹¹ Id. at Par. 13.

¹² All of the documents comprising and produced in response to the Park Districts' discovery requests are found at Record Doc. 70, Volume II of Defendants' Appendix of Exhibits in Support of their Motion for Summary Judgment, at Exhibits H-1 through H-11.

¹³ Record Doc. 70 at Exhibits H-6 to H-10; see also Certificate of Service, Record Doc. 49.

when the Park Districts took title, because the possession period cannot run against political subdivisions.¹⁴

Plaintiffs reacted to the Motion by attempting to modify the evidence concerning the period of possession. Plaintiffs' counsel sent a letter to the Park Districts' attorney claiming that "adverse cultivation" of a section of the land now defined as the "north portion" began in 1949.¹⁵ When they filed opposition papers to the Defendants' Summary Judgment motion, Plaintiffs included an affidavit from Mary Margaret Smith, the widow of Eldon Smith. Recall that the late Mr. Smith swore to a possession date of 1979 in his discovery responses. Mrs. Smith's affidavit stated that her husband farmed and cultivated property owned by the Henry family as an employee and tenant farmer beginning in 1949, and that the property included the disputed property up to the railroad ties.¹⁶

Even though intended to create a longer period of possession, Mrs. Smith's belated affidavit actually was significantly limited in scope. It was confined to statements made concerning farming and cultivating the land by her husband. She did not testify that he sought to take possession of the so-called north portion for himself or for the Henry family. Nor is there testimony that Eldon Smith or any of the Henry family sought to dispossess the railroad from that portion during the 1949-1979 timeframe.¹⁷

C. Disposition in the Lower Courts

Judge McGimpsey of the Huron County Common Pleas Court granted the Defendants summary judgment in a thorough Decision and Judgment Entry. On the issue of adverse

¹⁴ Record Doc. 68, Defendants' Joint Motion for Summary Judgment and Supporting Memorandum.

¹⁵ Record Doc. 82, Exhibit L to Defendants' Reply Memorandum in Support of their Motion for Summary Judgment.

¹⁶ Record Doc. 79, Plaintiffs' Brief in Opposition to Defendants' Joint Motion for Summary Judgment, Smith Affidavit attached thereto at paragraphs 4-7. Plaintiffs also submitted the affidavit of Mr. Stieber who verified that Eldon Smith farmed the property up to the railroad ties. It is attached as well to Plaintiffs' Brief in Opposition to the Motion for Summary Judgment.

¹⁷ Id.

possession, the trial judge found that Plaintiffs' claim of adverse possession failed because the period of possession was less than 21 years. The period of possession ended in 1998 when the Park Districts took title, because the period of adverse possession cannot run against political subdivisions. Judge McGimpsey found this Court's decision in *Brown v. Board of Education (1969)*, 20 Ohio St. 68 was limited to its unique facts.

The trial court also found that the belated affidavit testimony and the "clarification" offered by counsel indicating that Eldon Smith had farmed the north portion of the property since 1949 did not change the result. Relying upon *Barnhart v. Detroit, Toledo and Ironton Rd. Co. (Lawrence Co. App. 1929)*, 8 Ohio Law Abs. 22, the Court found that cultivation of land near a railroad is not adverse the railroad's interests, and indeed is often beneficial to it. Judge McGimpsey concluded that the record evidence was insufficient to establish adverse possession for the requisite period of time:

The affidavits establish only that Eldon Smith cultivated portions of the northern side of the right of way in a manner that apparently did not conflict with the continuous use of the right of way by what Mrs. Smith describes as "the, then active, railroad." It is obvious from Eldon Smith's answers to interrogatories that he first thought of his use as being adverse to the railroad when he on behalf of the Henrys took "possession" of the right of way in June 1979 and at that time began to clear brush in the former track area and the ditches and to use the right of way for purposes of ingress and egress to and from the farm fields. Thus, the Court concludes that any use adverse to the railroad first occurred in 1979 when Eldon Smith averred and the other Plaintiffs aver that their predecessors in title first "possessed" the railroad right of way in question.¹⁸

The Court of Appeals affirmed for much the same reasons. It first addressed the two portions of the property (that is, the ditch and the track area) which even Plaintiffs did not claim to have possessed until 1979. As to this area, the Court of Appeals said that the authority allowing adverse possession to be applied to political subdivisions was narrow and ought not be

¹⁸ Trial Court's Decision and Judgment Entry at p. 4, copy included in the Appendix to this Brief.

extended to park districts. The Court was “hesitant to enlarge this device beyond the scope of application it already occupies.”¹⁹ Plaintiffs’ brief wrongly states that the Sixth District’s decision was grounded on sovereign immunity, apparently in order to set the stage for their immunity argument to come.²⁰ In fact, nowhere in the opinion is the concept of tort immunity discussed.

Next, the Court of Appeals addressed the north portion of the property as to which the later-filed affidavits said farming activities had begun in 1949. It echoed the trial court’s conclusion that cultivation or farming activities along unused right-of-way land owned by a railroad was not a hostile or adverse use. And, the appellate Court noted that Mrs. Smith’s affidavit contained no evidence showing an intent by her late husband or his employers to assert ownership of the land to the exclusion of the railroad.²¹

This Court granted jurisdiction to resolve the question of whether park districts can be divested of real property through application of the doctrine of adverse possession.

ARGUMENT

Proposition of Law: Land owned by park districts established under Ohio R.C. Chapter 1545 cannot be taken by adverse possession.

This appeal causes the Court to come to grips with an indisputable truth: publicly-owned land is a valuable public asset that should be insulated from loss, not exposed to it. As Judge Painter observed: “Undeveloped land is a precious commodity in today’s crowded world, and a municipality [or park district] should not lose its rights in a property, or the property itself. . . .”

Nusekabel v. Cincinnati Public School Employees’ Credit Union (Hamilton Co. App. 1997), 125 Ohio App. 3d 427, 436.

¹⁹ Court of Appeals Decision and Judgment Entry at p. 5, copy attached to this Brief.

²⁰ Plaintiffs’ Merit Brief at p. 6.

²¹ Court of Appeals Decision and Judgment Entry at p. 9, copy attached to this Brief.

Fortunately, it is unnecessary to reformulate Ohio law to protect the public's land in this case. Rather, the Park Districts' proposed rule of law is consistent with the vast majority of Ohio precedent, as described below

A. Ohio's General Rule: Land Owned by the Public is Exempt from Adverse Possession.

1. Decisions of this Court Support the Park Districts' Proposed Rule.

This Court's historic case law on the issue of application of adverse possession to property owned by the state and its political subdivisions was reviewed and summed up by the Cuyahoga County Court of Appeals this way: "Generally, it has been held that adverse possession cannot be applied against the state and its political subdivisions." *1540 Columbus Corp. v. Cuyahoga County (Cuyahoga Co. App. 1990)*, 68 Ohio App.3d 713, 718.

Among the decisions of this Court which generated that conclusion are *Haynes v. Jones (1915)*, 91 Ohio St. 197, *syllabus* where the Court held: "No adverse occupation and use of land belonging to the State of Ohio, however long continued, can divest the title of the State in and to such lands."

That principle was applied by the Court in earlier cases involving political subdivisions, such as *Lake Shore & Michigan S. Ry. Co. v. Elyria (1904)*, 69 Ohio St. 414, 435 ("it is the well settled law of this State that encroachments upon a public highway never ripen into a title by adverse possession. . ."), and *Heddleston v. Hendricks (1895)*, 52 Ohio St. 460. *Heddleston* was a suit against a county supervisor to restrain him from removing hedges and destroying a store wall of the plaintiff along a highway. In *Heddleston*, this Court held: "The right of an adjacent landowner to enclose [sic] by a fence, however constructed, a portion of a public highway, cannot be acquired by adverse possession, however long continued." *Id. at syllabus*.

Earlier, in *Little Miami RR. Co. v. Greene Cty. Commrs. (1877)*, 31 Ohio St. 338, a railroad company had constructed a road across a public county road, laid heavy sills from one abutment to the other and carried its road across on them. This Court found in favor of the county because the railroad company's claim of adverse possession could not defeat the county's title in the public highway. The Court stated: “[I]n all cases where an effort has been made to acquire title to a portion of a public highway by adverse possession and enjoyment outside of a municipal corporation, such effort has failed.” *Id.* at p. 349. The Court cited its earlier decisions from this Court in support of that principle. *E.g. Lane v. Kennedy (1861)*, 13 Ohio St. 42, and *McClelland v. Miller (1876)*, 28 Ohio St. 488.

In short, a long line of cases from this Court is consistent with the view that a claim of adverse possession is not properly asserted against the state and its subdivisions, which by definition include park districts.

2. Other Ohio Case and the Recent Law Decision

The decisions of the appellate courts relying on these Supreme Court cases and other authorities are nearly unanimous in agreeing that adverse possession cannot be applied against political subdivisions of the state. Some of the more recent of these are *Law v. Lake Metroparks 2006-Ohio-7010 (Lake Co. App. Dec. 20, 2006)*; *Nusekabel v. Cincinnati Public School Employees Credit Union, Inc. (Hamilton Co. App. 1997)*, 125 Ohio App. 3d 427, 435; *Wyatt v. Ohio Department of Transportation (Lake Co. App. 1993)*, 87 Ohio App. 3d 1, 5; and *Bryan v. Killgallon, Case No. WMS-81-6 (Williams Co. App. Sept. 25, 1981)*, unreported.

Bryan is of interest because then Judge, later Justice, Douglas reviewed historical Ohio authority and public policy considerations bearing on the issue and came to the conclusion that “title by adverse possession cannot be acquired against a municipal corporation just as it cannot

be so acquired against the state. . . .[citations omitted.]” Two public policy considerations made this the better rule, he said. One is the fact that setting land aside for future public use in order to provide orderly development, in and of itself is a valuable use of land resources. In other words, non-use by a political subdivision should not be equated with non-use by a private party because non-use by a public entity may be purposeful. A second consideration is the fact that it is unreasonable and contrary to the public interest to impose upon political subdivisions the burden of continual inspection of all public lands. *Id.* at *2. Both of those points apply with particular force when park land is concerned.

Nusekabel is noteworthy because there Judge Painter advocated a bright line rule establishing a total prohibition of adverse possession claims against political subdivisions. That is also the position of a leading commentator on the subject. Professor Latovic of the University of Michigan has argued that land owned by municipalities and other political subdivisions ought to be made specifically exempt from adverse possession claims, even to the point of proposing legislative action to adopt such a rule, if necessary. *Latovic, Adverse Possession and Municipal Land: It's Time to Protect This Valuable Asset*, 31 U. Mich. J.L. Reform 475 (1998).

All of these appellate decisions are based on sound reasoning, and they all properly apply precedent. A particularly good illustration is *Law v. Lake Metroparks 2006-Ohio-7010*, decided just weeks ago. It is the most recent of the appellate decisions holding that adverse possession cannot be applied against political subdivisions, and the only other case in Ohio specifically addressing whether the doctrine of adverse possession can be used to dispossess Ohio park districts of land.

In that case, the property behind the claimants' residence had been owned by a railroad but, over a 35-year period of ownership, the claimants had used it install landscaping, a tool

shed, a garden and playhouse. In 1990 the local Metropark system purchased the land formerly owned by the railroad for use as a recreational trail. A survey done in 2003 showed that the Metroparks was entitled to the area that had been occupied by the claimants. The claimants sued to quiet title claiming ownership by adverse possession. The Court of Appeals held that park districts were exempt from claims of adverse possession.

To reach that conclusion, the Court first reviewed the older Ohio cases holding that political subdivisions may not be divested of property by adverse possession, and their rationale. Some are founded on the principle that encroachments on land used for highways are not necessarily adverse to the public, and therefore the use is permissive so as to not bar reclamation of the lands for the public. *Law supra* at ¶12. Others are premised on the notion that encroachments on public property are in the nature of a nuisance, and no length of time can legalize a nuisance. *Law supra* at ¶13.

That second rationale was dispositive in *Law*. The *Law* Court ultimately found that private encroachment on public parkland intended to be used as a recreational trail was similar in character to encroachment upon land intended to be used for public roads, and thus was a public nuisance which can never ripen into a valid claim of ownership. The Court also found the decision to be compelled by public policy because “the same active vigilance cannot be expected of [political subdivisions], as is known to characterize that of a private person.” *Law supra* at ¶23, citing *Heddleston v. Hendricks* at p. 465. *Law* echoes, then, some of the same public policy justifications that were expressed by Justice Douglas in *Bryan*.

In sum, judicial thought on this subject is not limited to old decisions from the nineteenth and early twentieth century. Nearly all modern Ohio cases – and the only other specific case

addressing park districts – also conclude that adverse possession does not apply against political subdivisions of the state.

B. Neither the *Brown* Decision Nor its Rationale Compel a New Rule that Allows Park Districts to Be Divested of Land by Adverse Possession.

Plaintiffs rest their case nearly entirely upon *Brown v. Board of Education* (1969), 20 Ohio St.2d 68. In fact, the legal theory upon which their argument is founded derives explicitly from some of the language and reasoning found in that decision.

Whatever may have prompted that decision nearly four decades ago, *Brown* should not sway the Court today into adopting a rule of law that would permit the public to lose land by adverse possession that is intended to be used for public park and recreational purposes. Even apart from its factual distinctions, *Brown's* reasoning – and, likewise, the entire theory lying behind Plaintiffs' appeal – is deficient on multiple levels.

1. *Brown* is Factually Limited. Its Logic is Questionable. Therefore, All Ohio Appellate Courts Reject *Brown* in Adverse Possession Cases.

First, note the unusual posture of *Brown* when it came to this Court. Possession and other elements of adverse possession were not contested. In fact, the School District defendant had agreed by stipulation that the claimants' use of the property was open, notorious, continuous, uninterrupted, exclusive, hostile and adverse. In that sense, the School District had essentially conceded it had no need for the land and had never actively asserted it did. This Court was asked to resolve a title issue in circumstances in which the record owner appeared unconcerned about the adverse use.

Legally, this Court was asked to reconcile two of its prior decisions²² in order to resolve whether a private litigant can obtain title to land held for school purposes from a board of

²² The two cases were *Board of Education of Cincinnati v. Volk* (1905), 7 Ohio St. 469 and *State ex rel. Board of Education of Springfield City School District v. Gibson* (1935), 130 Ohio St. 318.

education. One case held that boards of education were immune from tort claims; the other held that boards of education are amenable to contract suits and are subject to the operable statutes of limitation. This Court resolved the issue by looking at the enabling legislation that creates boards of education. That legislation was construed as broad enough to constitute consent to suits involving real property. Given that, the Court concluded that a statute of limitations could apply against a board of education, and hence, an adverse possession claim could proceed. The broader policy considerations involved in permitting application of the doctrine of adverse possession against political subdivisions in general, or even school boards in particular, were not discussed.

In the thirty-seven years that have followed, no Ohio appellate court has applied *Brown* in order to authorize a claim of adverse possession against another board of education or any other political subdivision. To the contrary, every appellate court to consider the decision in the context of adverse possession, including the Sixth District in this case, has found a way to distinguish it.²³

The Eighth District Court of Appeals was the first to do so. It found *Brown* different because it involved property held by boards of education that was not a legal highway or street. *1540 Columbus Corp. supra at p. 718*. Next the Eleventh District found the decision was “limited to its facts.” *Wyatt, supra at p. 5*. Then, the First District refused to apply the case to municipally-owned property. It said that municipalities should not be equated with local school boards, and observed that, “[t]he modern trend in Ohio has been to shield municipalities from adverse possession. . . .” *Nusekabel, supra at p. 435*. The Sixth District came next, holding in

²³ See *Law v. Lake Metroparks, 2006-Ohio-7010 (11th Dist. App. Dec. 20, 2006)*; *Nusekabel v. Cincinnati Public School Employees Credit Union, Inc. (Hamilton Co. App. 1997), 125 Ohio App. 3d 427, 435*; *Wyatt v. Ohio Department of Transportation (1993), 87 Ohio App. 3d 1, 5*; and *1540 Columbus Corp. v. Cuyahoga County (Cuyahoga Co. App. 1990), 68 Ohio App. 3d 713, 718*.

this case that it would not expand the doctrine of adverse possession and would view *Brown* as limited to school property.

Finally the Eleventh District reviewed *Brown* for the second time, and gave it its most expansive analysis yet. *Law, supra* at ¶¶15-24. It found additional reasons to reject *Brown's* application in the context of park districts. Among other things, the *Law* Court noted that, despite their amenability to suit, park districts remain invested with the right to assert the defense of immunity in tort cases. Immunity remains the general rule, unless the park districts' actions involve a proprietary function. *Id.* at ¶20, citing *Schenkolewski v. Cleveland Metroparks System (1981), 67 Ohio St. 2d 31. See also Ohio R.C. §2744.02.* Even then, immunity can be reinstated if the activity of the park district involves various discretionary decisions. *See Ohio R.C. §2744.03.* Moreover, the statutes creating park districts and giving them the right to sue do not include language suggesting there has been a waiver by the park districts of the historic exemption of political subdivisions from adverse possession claims. *Law supra* at ¶20-22. So, even utilizing the basis of this Court's ruling in *Brown*, the *Law* Court had no trouble finding that an adverse possession claim against a park district was invalid.

In sum, while *stare decisis* prevents the lower appellate courts from overruling *Brown*, they have found ways to avoid its application in every adverse possession case in which it has been raised. It remains only for this Court to acknowledge that *Brown* is flawed and to formally abandon it. Now is the time to establish a uniform rule that prevents application of adverse possession as a means to take away public [park] land.

2. **The Rationale Underlying *Brown* and Plaintiffs' Theory of the Case Actually Support the Park Districts. They Are Consistent with a Rule that Prevents Adverse Possession Against Public Owners.**

In fact, good legal reasons exist to reject the logic of the *Brown* decision, and its derivative legal theory that Plaintiffs offer here.

In a nutshell, Plaintiffs' argument is this: Park districts are not entitled to absolute tort immunity, by virtue of decisions like *Schenkolweski v. Metroparks System (1981)*, 31 Ohio St.2d 132 and *Marrek v. Cleveland Metroparks Board of Commissioners (1984)*, 9 Ohio St. 3d 194. Park districts may sue and be sued, and are themselves entitled to assert the doctrine of adverse possession to gain title to land. Therefore, park districts ought not be exempt from adverse possession claims.

But, an overriding false premise taints that argument. While park districts are not absolutely immune from suit, they remain subject to very broad immunity protections. Even this Court's abrogation of park district immunity in the early 1980s was by no means complete. Immunity still applied when the park district acted in ways that were legislative, judicial, or involved the exercise of an executive or planning function or the making of a basic policy decision requiring official judgment or discretion. *Marrak, supra at p. 196*.

Later, the General Assembly adopted a comprehensive political subdivision tort immunity act that applies to park districts. *See Ohio R. C. Chapter 2744*. It operates by conferring immunity for all suits upon political subdivisions. That immunity can be overcome only if certain statutory exceptions are established. Even then, immunity can be reinstated if the political subdivision can avail itself of affirmative defenses related to discretionary and planning activities. *See Cater v. Cleveland (1998)*, 83 Ohio St.3d 24, 28 (explaining operation of the Act). Finally, park districts can also be the beneficiaries of a separate statutory immunity (that is, *Ohio*

R.C. § 1533.181) that applies to recreational land. *Johnson v. New London* (1988), 36 Ohio St.3d 60.

It is fair to say, then, that a park district is entitled by its status as a political subdivision to a presumption of immunity that is overcome only in rare and limited circumstances. That reality guts Plaintiffs' argument. The fact that immunity remains the general rule does not negate an exemption from application of adverse possession claims to political subdivisions including park districts. In fact, immunity supports that exemption. It demonstrates that public bodies indeed are not governed by the same rules that apply to private individuals, and this is so for sound policy reasons. Those reasons include assuring that limited public resources be jealously guarded and rigorously protected. See *Menifee v. Queen City Metro* (1990), 49 Ohio St. 3d 27, 29. A rule of law that would allow public land to be taken without payment is actually contrary to the foundational policy consideration underlying the current state of political subdivision immunity – the policy of protecting the public's assets.

The statutory immunity that now governs tort actions also retains a feature of common law immunity that has never been questioned: the state and its political subdivisions are insulated from claims that attack their policy-making and discretionary functions, or their decisions concerning use of public resources. Compare Ohio R.C. §2744.03 and *Schenkolweski v. Metroparks System*, supra. But that fact, too, undermines the proposition that park districts ought to be subject to claims for adverse possession. Decisions by park boards about development (or lack of it) of public lands, and the timetable on which that may be accomplished are matters which simply cannot be second-guessed by the courts. The public should not be subject to loss of land merely because the park district may have decided to allow land to lie

fallow, or because the park district lacks additional financial resources that would allow an eventual development plan to be immediately implemented.

Even more basic, there is no real analogy between tort immunity (including its exceptions) and property claims involving adverse possession in the first place. One commentator has observed that the equities are entirely different when an adverse possession claim, as opposed to a tort claim, is at issue:

The considerations involved in protecting municipal land ownership are vastly different than those related to the compensation of persons injured by municipal agents. In the adverse possession context, the claimant is seeking title to government-owned land merely based on his use and occupancy of that land for a period of time. There is no suggestion that the government has somehow caused the claimant harm. Instead, the claimant actually seeks to harm the public (or at least his fellow municipal residents) by taking a public resource – land owned by the municipality – for himself without compensation.

Latovic, Adverse Possession and Municipal Land: It's Time to Protect This Valuable Asset, 31 U. Mich. J.L. Reform 475, 503 (1998). Plaintiffs' theory of this case would have the result of allowing a trespasser upon public land to be rewarded for the encroachment, not at the expense of an owner that slept on its rights, but at the expense of the public that cannot possibly afford to pay for constant patrols of every acre of Ohio park land.

3. **It is Not Contradictory or Unjust to Allow Political Subdivisions to Obtain Land by Adverse Possession and Still Be Protected from Loss of Land by its Operation**

Plaintiffs also claim it is inherently inequitable to allow political subdivisions, including park districts, to acquire property by adverse possession while simultaneously protecting them from loss of land through application of the doctrine. But, as noted, private landowners and public bodies that own property are not comparably situated. Private parties rightly can be presumed to have the ability and resources to monitor and protect their property interests. This

Court has recognized that the same vigilance cannot be expected of political subdivisions. *Heddleston, supra 53 Ohio St. at p. 465.*

It is also not unjust to allow political subdivisions to acquire land by adverse possession but not lose it in the same way, because the rationale of the doctrine is concerned with the use of the land, not the identity of the owner. Adverse possession is ultimately grounded on the principle that property should be put to its highest and best use. *Nusekabel, supra at p. 434.* It is utilized only when the occupation by the claimant is ultimately deemed more beneficial than the inattention of its owners.

But, when the public is the beneficial owner of property acquired for the lawful purposes of a park district, it can never be fairly said that the trespasser's use is higher and better than that of the owner. Park districts are only entitled to acquire property to further their statutory purposes of conservation of natural resource and the development of parkways conducive to the general welfare. *See Ohio R.C. §1545.11.* Whether the park district intends to preserve the land in an undeveloped state or ultimately develop it for public recreational use, the highest and best use of land will always remain its dedication to the public at large.

Finally, it is not unfair to exempt political subdivisions from claims of adverse possession because, as a matter of law, the requisite proof elements necessary for the claim can never be established against the public. Adverse possession requires proof that the possession of the land is hostile and adverse. *Grace v. Koch, supra at p. 579.* But, land owned by the public benefits the community no matter how it may presently be used or who may be using it. That is because public land may always be sold and the proceeds applied to meet other public needs. “[T]he current use of the land is irrelevant to its importance as a municipal asset capable of being converted to funds for important. . .[public] projects in relatively short order.” *Latovic, Adverse*

Possession and Municipal Land: It's Time to Protect This Valuable Asset, 31 U. Mich. J.L. Reform 475, 486 (1998).

So, even if a trespasser has been using property owned by a political subdivision for the required statutory period, the claimant can never prove his use to be hostile, since use by a trespasser is never inconsistent with the political subdivision's right to simply allow the asset to appreciate in value in an undeveloped state until sold.

C. Other Policy Considerations Support the Park Districts' Proposed Rule of Law

The foregoing provides sufficient legal bases to reject a rule of law that allows adverse possession to be applied against Ohio Park Districts. But additional policy considerations are also at work and deserve brief mention.

First, "society generally prefers that traditional recordable conveyances control the status of titles for real property interests." *J.F. Gioia, Inc. v. Cardinal Am. Corp. (Cuyahoga Co. App. 1985)*, 23 Ohio App. 3d 33, 37. For that reason, adverse possession is generally disfavored and the elements of proof are stringent. A clear and convincing burden of proof is imposed upon the one asserting the claim. *Grace v. Koch, supra at p. 580*. Plaintiffs' proposed rule of law would allow record titles to public land – land that is acquired and managed by frequently-changing political administrations or groups of public servants – to be rendered subservient to unrecorded private trespasses. When public property is concerned, recorded titles alone should be the means by which transfer of interests occur. That is the only way that public officials can undertake the task of managing public property – and make sensible decisions about those assets – with confidence and certainty of their knowledge of the universe of property under their care.

Second, Ohio resolves conflicting public interests in a way that promotes the greater public benefit. For instance, when governmental powers are in conflict (such as a conflict

between exercise of the power of eminent domain and regulation of property use by zoning), this Court has said the correct approach is to weigh the general public purposes to be served by the exercise of each power, and to resolve the impasse in favor of that power which will serve the needs of the greater number of citizens. *E.g. Brownfield v. State (1980), 63 Ohio St. 2d 282.* Application of adverse possession conflicts with the preference for establishing ownership of land by recorded titles. Whatever public interest there is in quieting title to public property used by trespassers, ultimately doing so by adverse possession directly benefits only the claimants. By contrast, quieting title to public land strictly by application of title ownership serves all of society at large. The greater benefit rule, then, runs in favor of the Park Districts and against the Plaintiffs.

Third, the General Assembly of this state, representing the legislative will of the people, strongly favors the development of parks and park districts. The statutory purposes to which land acquired by park districts may be put include conservation and preservation. *Ohio R.C. §1545.11.* That implies allowing land to remain undeveloped, which in turn, creates a much greater potential for trespass and encroachment. Land intended to lie fallow may appear to trespassers to simply be unused. Permitting adverse possession because a park district has not actively used property for a period of 21 years runs counter to a legislative intent that encourages park districts, in some cases, to do nothing to develop public property.

Finally, the public policy of this state strongly supports the development of recreational trails. The Director of Natural Resources has a statutory duty to plan and administer a state system of recreational trails for hiking, bicycling, horseback riding, skiing, canoeing and other forms of non-motorized travel. *Ohio R.C. §1519.01.* With some limitations, property including that along abandoned roadways and railroads may be appropriated for that purpose. *Ohio R.C.*

§1519.02. Allowing land held by park districts for trail development to be obtained by adverse possession is not merely inconsistent with the state policy encouraging creation of recreational trails. It also creates the incongruous possibility that, once a trespasser obtains title by adverse possession, he may immediately lose it again when the property is reacquired by the park district, the state, or any other political subdivision by appropriation. And, the public would then be forced to pay compensation to the trespasser simply to reacquire property taken from it without payment.

In light of all this, the Park Districts' proposed rule of law is the only outcome that makes sense. The public, which stands as the beneficial holder of land titled to Ohio park districts, should not be divested of that valuable asset through the doctrine of adverse possession.

D. Application of the Rules of Law to the *Houck* case

The lower courts resolved this case by first holding that Plaintiffs' statutory period of possession was too short to vest them with title to the track and ditch, which Plaintiffs conceded they had not possessed until 1979. The period of possession terminated when the Park Districts took title in 1998, the lower courts said, because the period of possession could not be deemed to run against them.

As to the north area, which was the subject of Mrs. Smith's belatedly filed affidavit, the lower courts found there to be no claim because farming and cultivation of the right-of-way, even if it happened, were not adverse to the predecessor owner's – the railroad's – interests. *Barnhart v. Detroit, Toledo & Ironton Rd. Co.*, *supra*. Farming land in railroad rights-of-way was an historic practice that the railroads welcomed as a way to control weeds and limit the potential of fire. It did not interfere with, it actually assisted in, the operation of a railroad. This

Court can affirm on that basis, for it remains a valid way to dispose of the claim for adverse possession as it pertains to the remaining segment of the property.

But there is a more direct way to reach this same result and also establish the legal landscape for future cases with even more precision. It is found in the bright-line rule stated in the Park Districts' Proposition of Law. If this Court adopts it as law, then it will not matter how long Plaintiffs or their predecessors may have used some or all of the land in question. Once a Park District obtains title, its status as an Ohio park district organized under R.C. Chapter 1545 insulates that property from any claims of adverse possession.

Applying the law in this fashion is simply another way of saying that acquisition of property by Park Districts for uses authorized by statute terminates any claim that a trespasser might otherwise have had to title by adverse possession. Trespassers must take steps to quiet title before the public obtains title, for thereafter, public ownership of the property nullifies the possibility of divestiture by adverse possession, for all the policy reasons discussed above.

This rule of law is straightforward. It does not force the Courts to characterize a trespasser's use as a nuisance which cannot be legalized (since, after all, the encroachment may have been harmless), or require resort to other strained legal theories to protect the property. Rather, the rule simply establishes that a particular category of land – publicly-owned park land – is exempt from any claim of adverse possession upon its acquisition by a park district.

To the extent this rule may be claimed to modify prior law on the subject of adverse possession, the Court need not be concerned. Adverse possession is a judicially-created common law doctrine. Judicially-created doctrines may be modified, particularly when they conflict with current societal needs. *E.g. Enghauser Manufacturing Company v. Eriksson Engineering Ltd. (1983), 6 Ohio St. 3d 31, 35.* The Park Districts' Proposition of Law at most merely clarifies

existing law. By insulating a specific category of public land from any claim of adverse possession, the common law will simply reflect a rule that best serves the various public interests at stake.

That holding would also bring this Court full circle with its historic decision in *McClelland v. Miller* (1876), 28 Ohio St. 488, 502. There the Court recognized that once property is obtained for a particular public purpose it can never be lost to the public merely because adjoining owners may have been in possession of it:

[T]he mere inclosing of a part of a highway by a fence does not necessarily constitute such adverse possession, as against the public, as will confer title by mere lapse of time. When roads are laid out and travel is limited, necessity may not require that the whole width should be opened when a less quantity answers every purpose. But the fact that a portion of the highway remains in the possession of adjoining owners, is merely matter of sufferance, from which rights cannot accrue.²⁴

In this case, whatever farming, cultivation or transportation activities Plaintiffs may have continued to engage in after the Park Districts obtained title but before the Park Districts had need or opportunity to complete development of the recreational trail, those activities should never be deemed to be “adverse” possession. They were simply matters of sufferance. Until the land was needed by the Park Districts to finalize the trail development, the public’s rights in the land were not compromised by those activities, and it was unnecessary for the Park Districts to take affirmative action to stop them. Doing so would have produced only a needless expenditure of taxpayer money and a needless termination of harmless activity.

Inaction by the Park Districts for these reasons also cannot ripen into ownership by the Plaintiffs. Rights cannot and should not flow from activities engaged in at the public sufferance.

²⁴ The General Assembly modified this rule in the context of streets in Ohio R.C. §2305.05. Cases like *1540 Columbus Corp. v. Cuyahoga County* (Cuyahoga Co. App. 1990), 68 Ohio App. 3d 713 merely enforce the statute that applies only to municipal corporations.

When public resources of time and money have been devoted to acquisition of property and the preparation of plans for its preservation or its development, those resources will be lost if a trespasser is able to assert title by adverse possession.

That was the implicit concern of this Court in *McClelland v. Miller*, and it remains a valid one today. Taxpayer money, resources and time are too precious for that. That concern can be met by a ruling that makes acquisition of title by a park district the distinct event that, by operation of law, terminates any claim to title by adverse possession.

Simply put, once land is acquired for public purposes, it cannot be lost by adverse possession, no matter how long a trespasser may have encroached on the land when held by others. Application of that rule to this case requires the decisions below to be affirmed as to all of the property involved.

CONCLUSION

The Park Districts respectfully ask that the decision of the Sixth District Court of Appeals be affirmed and that this Court establish as law the principle that title to land held by Ohio park districts for the benefit of the public cannot be taken by a third party through application of adverse possession. Acquisition of title to land by a park district should insulate the land from the possibility that it can ever be lost by the public without compensation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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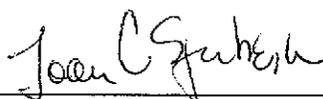
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APPENDIX OF EXHIBITS

COPY

IN THE COURT OF COMMON PLEAS OF HURON COUNTY, OHIO

FILED
HURON COUNTY
COMMON PLEAS COURT
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SUSAN S. HAZEL
CLERK OF COURTS

Richard Houck, et al., : Case No. CVH 2003 0946
Plaintiff(s), : Judge Earl R. McGimpsey
vs. : Decision & Judgment Entry
Board of Park Commissioners, :
Huron County Park District, et al. :
Defendant(s). :

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DECISION

This matter is before the Court on the Defendants' Joint Motion for Summary Judgment and Plaintiffs' Motion for Summary Judgment.

This is an action to quiet title in the Plaintiffs to what is described as a corridor of land consisting of a former railroad right of way, approximately 64 feet wide and 3,884 feet long, running generally in an east-west direction and located in Huron County, Ohio. The Plaintiffs are residents who live in the vicinity of the corridor and two of whom own properties bordering the corridor. The Defendants are county park districts who are the title holders of record of the former right of way, having acquired their title in 1998 from the Northwestern Ohio Rails to Trails Association, Inc. (NORTA), which had obtained title to the property from the railroad the year before. It is the Defendants intention to develop the corridor into a recreational trail as part of a multi-county bike and recreational walking path and in furtherance of that goal they have spent monies to purchase the right of way and to improve it in some areas.

Plaintiffs claim that title to the corridor should be quieted in them because they and their predecessors in title continuously used the railroad right of way adversely to the railroad for more than 21 years. They also claim that the railroad abandoned the right of way and assert various legal theories as to why the right of way reverted to them.

Defendants claim that title by adverse possession cannot be obtained against them because they are political subdivisions of the state and are immune to adverse possession claims. They also claim that the railroad did not abandon its right of way, that a recreational trail program is a railroad use, precluding any reversion to the heirs of the original grantor, and that even if there were a reversion, these Plaintiffs have no standing to assert the reversionary rights.



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Summary judgment is a procedural vehicle used to terminate legal claims without factual foundation. Summary judgment shall be granted if: "(1) No genuine issue of material fact remains to be litigated; (2) The moving party is entitled to the judgment as a matter of law; and (3) The evidence demonstrates that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party opposing the motion." Civ. R. 56; *Temple v. Wean United, Inc.* (1977), 50 Ohio St. 2d 317, 327; *Davis v. Loopco Industries, Inc.* (1993), 66 Ohio St. 3d 64. In determining a motion for summary judgment the court is to resolve all doubts and construe the evidence in favor of the non-moving party. *Welco Industries, Inc., v. Applied Cas.* (1993), 67 Ohio St. 3d 344; *Murphy v. Reynoldsburg* (1992), 65 Ohio St. 3d 356, 359. Inferences to be drawn from the evidence submitted by the parties must be viewed by the court in a light most favorable to the non-moving party. *Hounshell v. American States Inc. Co.* (1981), 67 Ohio St. 2d 427,433; *Wills v. Frank Hoover Supply* (1986), 26 Ohio St. 3d 186, 188.

On the other hand, the non-moving party is not without some burden. A motion for summary judgment forces the non-moving party to produce evidence on any issue for which that party bears the burden of production at trial. *Celotex Corp. v. Catrett* (1986), 477 U.S. 317; *Wing v. Anchor Media Ltd. Of Texas* (1991), 59 Ohio St. 3d 108.

In interrogatory answers Plaintiffs stated that their possession of the railroad right of way commenced on June 19, 1979, through the use by them and their predecessors in title. Plaintiffs have also submitted affidavits of Mrs. Smith and Mr. Stieber stating that Mrs. Smith's late husband, Eldon, one of the original Plaintiffs in this action, farmed property owned by Arthur Henry between 1949 and 1966 and that he continued as a tenant farmer on that same property between 1966, when Frederick Henry became its owner, until Plaintiff Richard Houck purchased it in the 1990s. She states that her husband's farming of the Henry property included the "disputed railroad property up to the railroad ties of the, then active, railroad." Mr. Stieber's affidavit verifies that "since at least 1965, Eldon Smith farmed and cultivated property up to the railroad ties * * * " The Henry-Houck property is on the north side of the corridor. Both affidavits also state that beginning in 1979 the Smiths and the Stiebers cleared brush on the railroad right of way where the train tracks used to run and in a drainage ditch adjacent thereto.

The original interrogatory answers were signed by Eldon Smith before his death. They specifically state that the predecessor to Plaintiffs' interest took possession of the property for farming on June 19, 1979.¹ The affidavit of Mrs. Smith states that her late husband farmed the property up to the railroad ties from 1949 on until the 1990s. Mr. Stieber's affidavit states that Eldon Smith "farmed and cultivated property up to the railroad ties" since at least 1965. Neither affidavit states that Eldon Smith took possession of the property on behalf of the Henrys in 1949 or at any time prior to 1979, only that he "farmed," i.e., cultivated, a portion of the north side of

¹ The predecessor he would have been referring to was Frederick Henry, his landlord for whom he tenant farmed in 1979. Frederick Henry and his father, Arthur Henry, before him were the predecessors in title to Plaintiff Houck and Greenacres Enterprises, Ltd. who now hold title to the property adjoining the corridor.

the corridor prior to 1979. The affidavits do not contradict Eldon Smith's verified answers to the interrogatories that the predecessors to Plaintiffs' title, i.e., his landlord, Frederick Henry, "took possession on or about June 19, 1979." Both affidavits describe activities that could be consistent with possessing the old railroad right of way beginning in 1979.

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The distinction drawn between Eldon Smith cultivating a portion of the north side of the railroad right of way, when he was working for Arthur Henry and tenant farming for Frederick Henry while it was still an active right of way used by the railroad for trains, and Frederick Henry taking "possession" of the railroad right of way, which Eldon Smith and the other plaintiffs averred in their interrogatory answers began on or about June 19, 1979, is a subtle but significant distinction. While Ohio law does not require that a person claiming adverse possession do so under a claim of right, the nature of the possession and the manner in which it is done is highly relevant to a determination as to whether the possession is adverse.² Cultivating or farming a portion of the railroad's right of way is not necessarily possessing the railroad's right of way in a manner that is adverse or hostile to the railroad. *Barnhart v. Detroit, Toledo & Ironton Rd. Co.* (4th Dist. Ct. App. 1929), 8 Ohio L. Abs. 22.

In *Barnhart* the court held that a plaintiff could not obtain adverse possession against a railroad where she and her predecessor in title had fenced and cultivated a strip of the railroad's right of way. The court observed:

* * * The claim of the plaintiff is that from a point near the upper end of the stone wall she and her predecessor have acquired title to a small parcel of land by reason of a fence erected by plaintiff's predecessor which took from the defendant a strip of something like twenty feet and which strip was cultivated by both plaintiff and her predecessor. The concrete question then is as to whether or not the plaintiff and her predecessor in title made such use of this strip as would amount to a disseisin of the defendant. * * *

* * * She must avail herself of the adverse occupancy by her predecessor in order to make good her claim. In this behalf she relies upon the conduct of her uncle, James Sisler, who was her predecessor in title and who built the fence in question. Mr. Sisler says that he built the fence along about 1888 and that he cultivated the land in question. During part of that time he was a section hand of the owner of the railroad. He does not testify that he put up the fence under any claim of ownership but "because there was some stock running out." During all this time the railroad had no need to occupy the property for any purpose and was only interested in keeping down vegetation that would increase the fire hazard. It is to be borne in mind that when one who has no claim to another's property, except that he has adversely occupied it for the prescribed period, such person

² 2 Ohio Jur. 3d, *Adverse Possession*, Section 28, pp. 456-457.

must make it manifest that he is asserting a purpose to dispossess that other in order that the real owner may be aware of the danger that he is encountering. The possession, therefore, to be adverse must be in some way hostile to the interests of the person about to be disseised.

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* * *

The possession of the plaintiff and her predecessors was not so adverse to the defendant's interests as to require the defendant to make any move in the premises until it had occasion to use its land. There is nothing to indicate that Sisler put up or kept up the fence because he claimed the property that clearly did not belong to him, but only because he did not want stock to wander onto the railroad track. Plaintiff has consequently not made a case.

8 Ohio L. Abs. at 22-23.

The holding in *Barnhart* is salutary. Railroads own hundreds, in some cases thousands of miles of right of way, much of which is adjacent to farm land. If railroads had to be vigilant to every incursion on their right of way by an adjoining farmer, the burden of policing and enforcing their rights of way would be extremely expensive, burdening not only the railroads but the courts. Casual cultivation by farmers of parts of railroad rights of way is common in farming areas. Unless it interferes with the railroad's use of its right of way, such cultivation, as the *Barnhart* court observed, is not adverse to the railroad and may often be beneficial in that it keeps the weeds under control.

The affidavits in this case do not state that in cultivating a portion of the railroad's right of way, Eldon Smith, the farm hand and later tenant farmer, was in any way attempting to "possess" the railroad's right of way on behalf of his employer or landlord adversely to the railroad's interest. Neither Mrs. Smith nor Mr. Stieber would be competent to aver what Mr. Smith's intention was on behalf of the Henrys, much less what the Henrys' intention was. The affidavits establish only that Eldon Smith cultivated portions of the northern side of the right of way in a manner that apparently did not conflict with the continuous use of the right of way by what Mrs. Smith describes as "the, then active, railroad." It is obvious from Eldon Smith's answers to the interrogatories that he first thought of his use as being adverse to the railroad when he on behalf of the Henrys took "possession" of the right of way in June 1979 and at that time began to clear brush in the former track area and the ditches and to use the right of way for purposes of ingress and egress to and from the farm fields. Thus, the Court concludes that any use adverse to the railroad first occurred in 1979 when Eldon Smith averred and the other Plaintiffs aver that they or their predecessors in title first "possessed" the railroad right of way in question.

The Defendant park districts hold record title to the so-called "corridor" consisting of the old railroad right of way. A park district is a political subdivision of the state. *Village of*

Willoughby Hills v. Board of Park Commissioners (1965), 3 Ohio St. 2d 49, 51. Adverse possession cannot be applied against the state or its political subdivisions. *1540 Columbus Corp. v. Cuyahoga County*. (1990), 68 Ohio App.3d 713, 718. The exception to this general rule for school districts, noted in *Brown v. Monroeville Local School Dist. Bd. of Edn.* (1969), 20 Ohio St.2d 68, which Plaintiffs advocate should be extended to park districts, has been limited to its facts. *Id.* at 719. Any claim of Plaintiffs for title by adverse possession was, therefore, cut off in 1998, when the park district Defendants took title to the land in question. Plaintiffs are not able to establish an adverse possessory interest in the land for 21 years or more. Their claim for title by adverse possession fails as a matter of law.

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There is nothing in the Plaintiffs chain of title that reserves to the Plaintiffs any interest in the railroad right of way. There is no reference to a reversionary interest. The only mention of the railroad right of way is for the purpose of excluding it from the property being conveyed to the Plaintiffs or to mark a boundary of a Plaintiff's property. Nevertheless, Plaintiffs seek to have title quieted in them on the theory that they hold a reversionary interest.

Plaintiffs' claim that the original deed from Orrin W. And Julia Head to the Toledo, Norwalk & Cleveland R.R. Co. gave the railroad only a "bare right-of-license with reversionary interest to grantor" does not square with the deed. There is in the deed no mention of a reversionary interest. The granting clause of the deed provides that the Heads "* * * do hereby grant, release, and convey to the said Toledo, Norwalk and Cleveland Rail Road Company, for the purpose of constructing their said Rail Road * * * " the property at issue. The habendum clause of the deed provides that the grantors conveyed the land to the railroad "[t]o have and to hold the above granted premises, rights and privileges, for the uses and purposes above mentioned to the said [railroad], their successors and assigns forever * * * " While these clauses do contain words of limitation ("for the purpose of constructing their said Rail Road" and "for the uses and purposes above mentioned"), they do not contain words of reversion or words of limitation that are conditional, e.g., "as long as," "so long as," "until," "during the time that," "but if," "in the event that," "provided that" or "on condition."

Plaintiffs reliance on *Walker v. Lucas County Bd. Of Comm'rs* (1991), 73 Ohio App. 3d 617, and *Waldock v. Unknown Heirs* (June 7, 1991), Erie App. No. E-89-53, unreported, 1991 Ohio App. LEXIS 2599, is misplaced. In *Walker*, which cited the court's prior holding in *Waldock*, the court held that "where the language 'upon the express condition' is used in a deed, a clause of re-entry or forfeiture is not necessary to create a qualified fee so long as such language appears in the granting clause, since such language declares a condition and imports a forfeiture." Here the language in the granting clause provides only that the property was being granted to the railroad "for the purpose of constructing their said Rail Road." Unlike the deed to the railroad in *Walker*, the grant was not made 'upon the express condition' that the land be used for that purpose. As the *Walker* court pointed out:

In Ohio, bare words of limitation or qualification or mere statements of purpose, though they appear in the granting clause of a deed, do not create a

qualified fee without other language in the deed indicating avoidance, forfeiture, reversion or re-entry. *Miller v. Brookville* (1949), 152 Ohio St. 217, 219-222, 40 O.O. 277, 278-280, 89 N.E.2d 85, 86-87.

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Hence a condition will not be raised by implication from a mere declaration in the deed that the grant is made for a special and particular purpose, without being coupled with words appropriate to make such condition.

Copps Chapel, supra, 120 Ohio St. at 314, 166 N.E. at 220.

73 Ohio App. 3d at 623. In this case the words of limitation are not coupled with language indicating avoidance, forfeiture, reversion or re-entry or with any words appropriate to make the stated purpose of the grant a condition of the grant importing a forfeiture if the land is used for other purposes.

Walker also points out that when words of limitation are used in the habendum clause "without any provision for forfeiture or reversion, such statement is not a condition or limitation of the grant." *Id.* at 622. Thus, the phrase "for the uses and purposes above mentioned" in the habendum clause of the Heads' deed to the railroad did not create a reversionary interest in the Heads or their heirs or assigns if the property was later used for another purpose.

Even were the Court to find that a reversionary interest was reserved by the original grantors, *Walker* holds that where words of forfeiture or reversion are used or can be implied from appropriate limiting language, adjoining property owners do not succeed to the reversionary interest in the railroad right of way unless they can prove "that the reversionary interests in the railway property were conveyed to them or their predecessors in title by the original grantors or their heirs." *Id.* at 625. Here Plaintiffs have offered no evidence that any reversionary interest in the railroad right of way was conveyed to them or their predecessors in title.³

³ The Plaintiffs' assert the railroad's alleged abandonment of the right of way as an independent ground upon which title should be quieted in them. In reality, the abandonment argument is not a separate ground upon which their claim of title rests, but rather their claim that the railroad abandoned the right of way when it removed the tracks in the 1970s underpins their claim that they hold a reversionary interest. Without abandonment of the right of way for railroad purposes there could be no forfeiture under their reversionary interest theory.

In order to prove an "abandonment" the Plaintiffs must establish: (1) nonuse of the right of way, and (2) an intention to abandon it. *Schenck v. The Cleveland, Cincinnati Chicago & St. Louis Railway Co.*, (1919), 11 Ohio App. 164, 167. The latter must be established in unequivocal and decisive terms. *Id.* The fact that the right of way is no longer used for railway operations does not establish abandonment absent independent evidence of the railroad's intent to abandon the right of way. *Erie Metroparks Bd. of Commrs. v. Key Trust Co. of Ohio, N.A., et al.* (2001),

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Plaintiffs claims for quieting title in them to the former railroad right of way boil down to title by adverse possession or, alternatively, by a reversionary interest. Plaintiffs have failed to establish their rights as a matter of law and have failed to even created a genuine issue of material fact to draw into question the title acquired by the Defendants. Defendants are entitled to judgment as a matter of law. Their joint motion for summary judgment is granted and Plaintiffs' motion for summary judgment is denied.

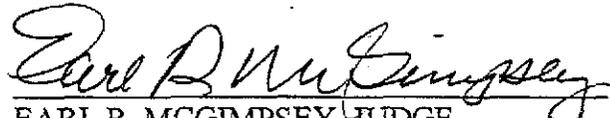
JUDGMENT ENTRY

145 Ohio App.3d 782, 790; *Rieger v. Penn Central Corp.*(May 21, 1985), Greene App. No. 85-CA-11, unreported, 1985 Ohio App. LEXIS 7876. . Since Plaintiffs bear the burden of proof at trial on that issue and Defendants have shown that they hold title through the railroad, Plaintiffs are obligated to put forward evidence in resisting the Defendants' motion for summary judgment and in supporting their own motion for summary judgment on the issue of the railroad's intent to abandon the right of way. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 296. Other than showing nonuse and failure to maintain the right of way for a period of about 20 years, Plaintiffs have offered no evidence from which the Court can conclude that the railroad intended to abandon the right of way before it was transferred to NORTA and ultimately to the Defendants or even evidence from which the Court can conclude that there is a genuine issue of material fact as to whether the railroad intended to abandon its right of way before it transferred title to NORTA..

Plaintiffs reliance on *McCarley v. O. O. McIntyre Park District* (February 11, 2000), Gallia App. No. 99 CA 07, unreported, 2000 Ohio App. LEXIS 603, to support their abandonment argument is misplaced. While the Court there found an abandonment, where the railroad before transferring the property to the park district had filed a petition for abandonment, the railroad's interest was only an easement for "the right to locate, construct and forever maintain, use and operate said road, on such line as it or them may seem best through our lands." The railroad held no fee interest in any specific property. The issue of abandonment was germane because without a fee interest the railroad had no right to use the property for other than railroad purposes. Here the railroad held and conveyed to the Defendants a fee interest for which there was no reversionary interest reserved. The issue of abandonment is not relevant under the circumstances in this case because the railroad was not restricted in its right to use its right of way. Furthermore, even were the Court to find that the limitation of use language in the deed implied a reversion, Plaintiffs have not created a genuine issue of material fact as to their right to the reverted interest. They have none.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendants' Joint Motion for Summary Judgment is granted and Plaintiffs' Motion for Summary Judgment is denied. Costs taxed to Plaintiffs.

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EARL R. MCGIMPSEY, JUDGE

Copies to:

D. Jeffrey Rengle, Esq. and Thomas R. Lucas, Esq.
Joan C. Szuberla, Esq. and Gary D. Sikkema, Esq.
Ladd Beck, Esq.
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HURON COUNTY
COURT OF APPEALS
FILED
MAY 19 2006

SUSAN S. MAJEL
CLERK

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
HURON COUNTY

JOURNALIZED 5-19-06
VOL. 14 PG 9-13

Richard Houck, et al.

Court of Appeals No. H-05-018

Appellants

Trial Court No. CVH-2003-0946

v.

Board of Park Commissioners,
Huron County Park District, et al.

DECISION AND JUDGMENT ENTRY

Appellees

Decided: **MAY 19 2006**

D. Jeffery Rengel and Thomas R. Lucas, for appellants.

Joan C. Szuberla, Gary D. Sikkema, John D. Latchney, Abraham Lieberman, Dennis M. O'Toole, and Ladd W. Beck, for appellees.

EXHIBIT
tabbles
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SINGER, P.J.

{¶ 1} This is an appeal from a summary judgment issued by the Huron County Court of Common Pleas in a property dispute. Because we conclude that appellants failed to provide evidence sufficient to create a question of fact with respect to their adverse possession of part of a railroad property, we affirm.

copies: D Jeffery Rengel / Davia Kasper /
1. Abraham Lieberman / Dennis O'Toole / John Latchney /
Joan Szuberla / Teresa Grigsby / Ladd Beck / AA
Thomas Lucas / Common Pleas Court

{¶ 2} In 1852, Orrin W. Head deeded a strip of land across Huron County to the Toledo, Norfolk & Cleveland Railroad Company ("Toledo, Norfolk") for a railroad right-of-way. Toledo, Norfolk built tracks on the land and, through multiple successors, maintained an operating rail line across the site until 1979, when operations ceased. In 1997, Toledo, Norfolk's successor in interest, American Premier Underwriting, Inc., f/k/a The Penn Central Corp., sold this 64 foot wide, 3,884 feet long rail corridor to the Northwest Ohio Rails to Trails Association, Inc. for the creation of a recreational trail. A year later, the association conveyed the property to appellees, six park districts which span north central Ohio.¹

{¶ 3} In 2003, appellants, Richard Houck, Green Acres Enterprises, Inc., Ronald Sparks, Eldon Smith,² and Stieber Bros., Inc., filed a complaint to quiet title to the corridor of property at issue in their favor. Appellants claimed a right to the property by adverse possession, commencing in 1979.

{¶ 4} Following discovery, appellees moved for summary judgment, arguing that, even had appellees satisfied all of the other elements for adverse possession of the railway corridor, they had not possessed the land for 21 years. This was because a political subdivision of a state acquired the land in 1998, only 19 years after appellants claimed possession. Since time does not run against the state, adverse possession does

¹Appellees are the Lorain County Metro Park District; The Metro Park District of the Toledo Area; Erie Metroparks; The Wood County Park District; The Sandusky County Park District; and the Huron County Park District.

²On January 5, 2005, counsel for plaintiff filed a suggestion of death with respect to Eldon Smith. It does not appear that a motion for substitution pursuant to Civ.R. 25(A) was made.

not apply once a subdivision of the state owns the property, appellees asserted. Thus, the statutory period for adverse possession was never achieved.

{¶ 5} Appellants responded with their own motion for summary judgment and a memorandum in opposition to appellees' motion. Appellants argued that park districts should be treated the same as the school districts or municipal corporations which, appellants argue, are excepted from the general rule that adverse possession cannot be applied against subdivisions of the state.

{¶ 6} Moreover, appellants asserted, even if the park districts were exempt from adverse possession, at least one-third of the property was still theirs, because crops had been planted on railroad land since 1949. With this last assertion, appellants amended their prior response to an interrogatory in which they claimed possession of the land only since 1979. This amendment was supported by the affidavit of the widow of the late Eldon Smith, who averred that her husband farmed the land at the behest of a former adjacent property owner from 1949 forward.

{¶ 7} The trial court denied appellants' motion for summary judgment and granted appellees'. From this judgment, appellants now bring this appeal. They set forth the following two assignments of error:

{¶ 8} "I. The trial court erred in its ruling that appellee park districts cannot be divested of real property through the doctrine of adverse possession.

{¶ 9} "II. The trial court erred in granting summary judgment in favor of appellees and against appellants where genuine questions of fact existed relating to

appellants' use of property adjacent to railroad tracks and ties for more than twenty-one years."

{¶ 10} On review, appellate courts employ the same standard for summary judgment as trial courts. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129. The motion may be granted only when it is demonstrated:

{¶ 11} "* * * (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor." *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 67, Civ.R. 56(C).

I. Time Does Not Run Against The State

{¶ 12} Adverse possession is a common law device by which one in unauthorized possession of real property acquires legal title to that property from the titled owner. 1 Curry and Durham, *Ohio Real Property and Practice* (5th Ed.1996) 276. "To acquire by adverse possession, a party must prove, by clear and convincing evidence, exclusive possession and open, notorious, continuous, and adverse use for a period of twenty-one years." *Grace v. Koch* (1998), 81 Ohio St.3d 577, syllabus. A party who fails to prove any of the elements fails to acquire title through adverse possession. *Id.* at 579; *Pennsylvania Rd. Co. v. Donovan* (1924), 111 Ohio St. 341, 349-350.

{¶ 13} In this matter, the trial court focused on the element of time of possession. Applying the general rule that adverse possession cannot be applied against the state or

its subdivisions, see *1540 Columbus Corp. v. Cuyahoga Cty.* (1990), 68 Ohio App.3d 713, 717; *Haynes v. Jones* (1915), 91 Ohio St. 197, at paragraph three of the syllabus, the court concluded that, even if appellants established all of the other elements of adverse possession, it could not obtain title because their time of possession was cut off in 1998, when the land was transferred to a political subdivision of the state. On the face of things, then, title to the property at issue failed to vest in appellants because they only adversely possessed the land for 19 years when it was transferred to appellee park districts.

{¶ 14} Appellants observe here, as they did in the trial court, that unlike the state exemption from adverse possession, which is absolute, the political subdivision exception is not. In Ohio, adverse possession has been applied to municipal corporations, see *LTV Steel Co. v. Cleveland* (Oct. 15, 1987), 8th Dist. No. 53827, and school boards. *Brown v. Bd. of Edn., Monroeville* (1969), 20 Ohio St.2d 68. Appellants argue that since school districts are much like park districts, the exception should be extended to park districts.

{¶ 15} Adverse possession is a recognized, but not favored, manner for gaining title to land. *Montieth v. Twin Falls United Methodist Church* (1980), 68 Ohio App.2d 219, 224. Indeed recent commentators have characterized the concept as an artifact that, " * * * has now outlasted its utility." *Grace v. Koch* (Oct. 9, 1996), 1st Dist. No. C-950802, see, also, (1998), 81 Ohio St.3d 577, 580. We are, therefore, hesitant to enlarge this device beyond the scope of application it already occupies. This is patently what appellants seek.

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{¶ 15} The abrogation of the rule that time does not run against the state is statutory with respect to municipalities. R.C. 2305.05 expressly permits, in certain very specific circumstances, for platted, but unopened streets or alleys in a municipality, to be acquired by adverse possession. *Rocco v. Fairview Park* (Feb. 12, 1998), 8th Dist. No. 72263. There is no statute excepting park districts.

{¶ 16} With respect to school districts, the sole authority for allowing adverse possession comes from *Brown*, supra, which has been widely criticized and held to be limited to its facts. *Wyatt v. Ohio Dept. of Transp.* (1993), 87 Ohio App.3d 1, 5; *1540 Columbus Corp.*, supra, at 719.

{¶ 17} In view of the narrowness of the authority for permitting adverse possession to any political subdivision, we decline appellants' invitation to extend this application to park districts. Consequently, for two-thirds of the land at issue, adverse possession clearly was cut off by appellees' acquisition of the land prior to the 21 years. Accordingly, appellants' first assignment of error is not well-taken.

II. 1949 Use

{¶ 17} Appellants' original complaint claimed use of the disputed property no earlier than 1979. Appellants' initial discovery responses were in conformity with this assertion. After appellees moved for summary judgment premised on state ownership, appellants responded in opposition with an affidavit from Mary Margaret Smith, widow of plaintiff Eldon Smith, who, in material part, averred that:

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{¶ 18} "4. [I]n 1949 my husband, Eldon Smith, continuously began farming and cultivating property owned by Arthur F. Henry, who owned the property prior to his son, Frederic C. Henry.

{¶ 19} "5. That this property included the disputed railroad property up to the railroad ties of the, then active, railroad.

{¶ 20} "6. My husband farmed the property, described in the previous paragraph, up to the railroad ties on behalf of Arthur F. Henry from 1949 through 1966.

{¶ 21} "7. That my husband became a tenant farmer and farmed this same property, in his own right and for his own benefit, from 1966 until the property was sold to plaintiff Richard Houck in the 1990's.

{¶ 22} "8. That in 1979, I assisted my husband and others in clearing away underbrush and overgrowth on the railroad right-of-way and that in 1979 my husband began to farm the land where the railroad tracks had previously been located."

{¶ 23} According to appellants, widow Smith's affidavit establishes her husband's use of at least a portion of the railway corridor since 1949. Consequently, appellants argue, the 21 year period necessary for adverse possession had long since expired before the land was transferred to appellee park districts.

{¶ 24} Although appellees characterize Mrs. Smith's affidavit as suspect, the trial court accepted it at face value. Nevertheless, the trial court concluded, Smith's averment failed to establish adverse possession for any part of the disputed land. While the 1949 beginning date might establish activity on the property in the requisite 21 years, appellants have the burden of showing all of the other elements of adverse possession.

The trial court concluded that appellants had failed to show that appellants' predecessor's 1949 possession was adverse.

{¶ 25} As stated above, for title to vest via adverse possession, the possession must be both exclusive and adverse. "Exclusive" means "sole physical occupancy." Boyer, *Survey of the Law of Property* (1981), 236: "* * * an assertion of ownership of the premises to the exclusion of the rights of the real owner." *Gill v. Fletcher* (1906), 74 Ohio St. 295, at paragraph three of the syllabus. For conduct to be considered adverse, it must be inconsistent with the owner's rights, "* * * it must deny the owner enjoyment of his property rights." *Anspach v. Madden* (Nov. 1, 1985), 6th Dist. No. S-84-40.

{¶ 26} As the trial court noted, in *Barnhart v. Detroit, Toledo & Ironton Rd. Co.* (1929), 8 Ohio Law Abs. 22, Barnhart claimed title by adverse possession to a 20 foot strip of land along a railroad right-of-way. Barnhart presented evidence that her predecessor in interest had begun cultivating and growing crops on the land, a practice which Barnhart had continued for a period in excess of 21 years. Indeed, her predecessor at one point had fenced the land to prevent his livestock from straying onto the track.

{¶ 27} The court granted quiet title to the land on the railroad's cross-motion and was affirmed. The appellate court stated that Barnhart's predecessor had not made manifest a claim of an intent to own the property. Neither, the court explained, was the culture of crops adverse to the railroad's interest, because during this time the railroad had no need to occupy the land, "* * * and was only interested in keeping down vegetation that would increase the fire hazard." *Id.* at 23.

{¶ 28} The facts in *Barnhart* are indistinguishable from those presented here.

Even though railroads were no longer as prone to set fires on the right-of-way in 1949, cultivation or farming along unused land on the right-of-way remained not hostile to the railroad. Moreover, as the trial court noted, nothing in widow Smith's affidavit indicates any intent by her late husband or his employers to disseise the railroad from its land. Absent evidence that appellants' predecessor asserted ownership over the land to the exclusion of the real owner and acted to deny the owner its enjoyment of property rights, appellants' claim for adverse possession fails. Accordingly, appellants' second assignment of error is not well-taken.

{¶ 29} On consideration whereof, the judgment of the Huron County Court of Common Pleas is affirmed. Appellants are ordered to pay the costs of this appeal pursuant to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Huron County.

JUDGMENT AFFIRMED.

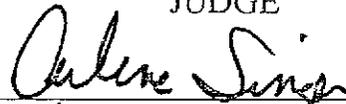
A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 1/1/98.

Peter M. Handwork, J.



JUDGE

Arlene Singer, P.J.



JUDGE

William J. Skow, J.



JUDGE

CONCUR.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/rod/newpdf/?source=6>.

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IN THE COURT OF COMMON PLEAS OF HURON COUNTY, OHIO

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SUSAN S. HAZEL
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Richard Houck, et al.,

Case No. CVH 2003 0946

Plaintiff(s),

Judge Earl R. McGimpsey

vs.

Decision & Judgment Entry

Board of Park Commissioners,
Huron County Park District, et al.

Defendant(s).

JOURNALIZED 08-02-2005
VOL 482 PG. 453

DECISION

This matter is before the Court on the Defendants' Joint Motion for Summary Judgment and Plaintiffs' Motion for Summary Judgment.

This is an action to quiet title in the Plaintiffs to what is described as a corridor of land consisting of a former railroad right of way, approximately 64 feet wide and 3,884 feet long, running generally in an east-west direction and located in Huron County, Ohio. The Plaintiffs are residents who live in the vicinity of the corridor and two of whom own properties bordering the corridor. The Defendants are county park districts who are the title holders of record of the former right of way, having acquired their title in 1998 from the Northwestern Ohio Rails to Trails Association, Inc. (NORTA), which had obtained title to the property from the railroad the year before. It is the Defendants intention to develop the corridor into a recreational trail as part of a multi-county bike and recreational walking path and in furtherance of that goal they have spent monies to purchase the right of way and to improve it in some areas.

Plaintiffs claim that title to the corridor should be quieted in them because they and their predecessors in title continuously used the railroad right of way adversely to the railroad for more than 21 years. They also claim that the railroad abandoned the right of way and assert various legal theories as to why the right of way reverted to them.

Defendants claim that title by adverse possession cannot be obtained against them because they are political subdivisions of the state and are immune to adverse possession claims. They also claim that the railroad did not abandon its right of way, that a recreational trail program is a railroad use, precluding any reversion to the heirs of the original grantor, and that even if there were a reversion, these Plaintiffs have no standing to assert the reversionary rights.

Summary judgment is a procedural vehicle used to terminate legal claims without factual foundation. Summary judgment shall be granted if: "(1) No genuine issue of material fact remains to be litigated; (2) The moving party is entitled to the judgment as a matter of law; and (3) The evidence demonstrates that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party opposing the motion." Civ. R. 56; *Temple v. Wean United, Inc.* (1977), 50 Ohio St. 2d 317, 327; *Davis v. Loopco Industries, Inc.* (1993), 66 Ohio St. 3d 64. In determining a motion for summary judgment the court is to resolve all doubts and construe the evidence in favor of the non-moving party. *Welco Industries, Inc., v. Applied Cas.* (1993), 67 Ohio St. 3d 344; *Murphy v. Reynoldsburg* (1992), 65 Ohio St. 3d 356, 359. Inferences to be drawn from the evidence submitted by the parties must be viewed by the court in a light most favorable to the non-moving party. *Hounshell v. American States Inc. Co.* (1981), 67 Ohio St. 2d 427,433; *Wills v. Frank Hoover Supply* (1986), 26 Ohio St. 3d 186, 188.

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On the other hand, the non-moving party is not without some burden. A motion for summary judgment forces the non-moving party to produce evidence on any issue for which that party bears the burden of production at trial. *Celotex Corp. v. Catrett* (1986), 477 U.S. 317; *Wing v. Anchor Media Ltd. Of Texas* (1991), 59 Ohio St. 3d 108.

In interrogatory answers Plaintiffs stated that their possession of the railroad right of way commenced on June 19, 1979, through the use by them and their predecessors in title. Plaintiffs have also submitted affidavits of Mrs. Smith and Mr. Stieber stating that Mrs. Smith's late husband, Eldon, one of the original Plaintiffs in this action, farmed property owned by Arthur Henry between 1949 and 1966 and that he continued as a tenant farmer on that same property between 1966, when Frederick Henry became its owner, until Plaintiff Richard Houck purchased it in the 1990s. She states that her husband's farming of the Henry property included the "disputed railroad property up to the railroad ties of the, then active, railroad." Mr. Stieber's affidavit verifies that "since at least 1965, Eldon Smith farmed and cultivated property up to the railroad ties * * * " The Henry-Houck property is on the north side of the corridor. Both affidavits also state that beginning in 1979 the Smiths and the Stiebers cleared brush on the railroad right of way where the train tracks used to run and in a drainage ditch adjacent thereto.

The original interrogatory answers were signed by Eldon Smith before his death. They specifically state that the predecessor to Plaintiffs' interest took possession of the property for farming on June 19, 1979.¹ The affidavit of Mrs. Smith states that her late husband farmed the property up to the railroad ties from 1949 on until the 1990s. Mr. Stieber's affidavit states that Eldon Smith "farmed and cultivated property up to the railroad ties" since at least 1965. Neither affidavit states that Eldon Smith took possession of the property on behalf of the Henrys in 1949 or at any time prior to 1979, only that he "farmed," i.e., cultivated, a portion of the north side of

¹ The predecessor he would have been referring to was Frederick Henry, his landlord for whom he tenant farmed in 1979. Frederick Henry and his father, Arthur Henry, before him were the predecessors in title to Plaintiff Houck and Greenacres Enterprises, Ltd. who now hold title to the property adjoining the corridor.

the corridor prior to 1979. The affidavits do not contradict Eldon Smith's verified answers to the interrogatories that the predecessors to Plaintiffs' title, i.e., his landlord, Frederick Henry, "took possession on or about June 19, 1979." Both affidavits describe activities that could be consistent with possessing the old railroad right of way beginning in 1979.

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The distinction drawn between Eldon Smith cultivating a portion of the north side of the railroad right of way, when he was working for Arthur Henry and tenant farming for Frederick Henry while it was still an active right of way used by the railroad for trains, and Frederick Henry taking "possession" of the railroad right of way, which Eldon Smith and the other plaintiffs averred in their interrogatory answers began on or about June 19, 1979, is a subtle but significant distinction. While Ohio law does not require that a person claiming adverse possession do so under a claim of right, the nature of the possession and the manner in which it is done is highly relevant to a determination as to whether the possession is adverse.² Cultivating or farming a portion of the railroad's right of way is not necessarily possessing the railroad's right of way in a manner that is adverse or hostile to the railroad. *Barnhart v. Detroit, Toledo & Ironton Rd. Co.* (4th Dist. Ct. App. 1929), 8 Ohio L. Abs. 22.

In *Barnhart* the court held that a plaintiff could not obtain adverse possession against a railroad where she and her predecessor in title had fenced and cultivated a strip of the railroad's right of way. The court observed:

* * * The claim of the plaintiff is that from a point near the upper end of the stone wall she and her predecessor have acquired title to a small parcel of land by reason of a fence erected by plaintiff's predecessor which took from the defendant a strip of something like twenty feet and which strip was cultivated by both plaintiff and her predecessor. The concrete question then is as to whether or not the plaintiff and her predecessor in title made such use of this strip as would amount to a disseisin of the defendant. * * *

* * * She must avail herself of the adverse occupancy by her predecessor in order to make good her claim. In this behalf she relies upon the conduct of her uncle, James Sisler, who was her predecessor in title and who built the fence in question. Mr. Sisler says that he built the fence along about 1888 and that he cultivated the land in question. During part of that time he was a section hand of the owner of the railroad. He does not testify that he put up the fence under any claim of ownership but "because there was some stock running out." During all this time the railroad had no need to occupy the property for any purpose and was only interested in keeping down vegetation that would increase the fire hazard. It is to be borne in mind that when one who has no claim to another's property, except that he has adversely occupied it for the prescribed period, such person

² 2 Ohio Jur. 3d, *Adverse Possession*, Section 28, pp. 456-457.

must make it manifest that he is asserting a purpose to dispossess that other in order that the real owner may be aware of the danger that he is encountering. The possession, therefore, to be adverse must be in some way hostile to the interests of the person about to be disseised.

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* * *

The possession of the plaintiff and her predecessors was not so adverse to the defendant's interests as to require the defendant to make any move in the premises until it had occasion to use its land. There is nothing to indicate that Sisler put up or kept up the fence because he claimed the property that clearly did not belong to him, but only because he did not want stock to wander onto the railroad track. Plaintiff has consequently not made a case.

8 Ohio L. Abs. at 22-23.

The holding in *Barnhart* is salutary. Railroads own hundreds, in some cases thousands of miles of right of way, much of which is adjacent to farm land. If railroads had to be vigilant to every incursion on their right of way by an adjoining farmer, the burden of policing and enforcing their rights of way would be extremely expensive, burdening not only the railroads but the courts. Casual cultivation by farmers of parts of railroad rights of way is common in farming areas. Unless it interferes with the railroad's use of its right of way, such cultivation, as the *Barnhart* court observed, is not adverse to the railroad and may often be beneficial in that it keeps the weeds under control.

The affidavits in this case do not state that in cultivating a portion of the railroad's right of way, Eldon Smith, the farm hand and later tenant farmer, was in any way attempting to "possess" the railroad's right of way on behalf of his employer or landlord adversely to the railroad's interest. Neither Mrs. Smith nor Mr. Stieber would be competent to aver what Mr. Smith's intention was on behalf of the Henrys, much less what the Henrys' intention was. The affidavits establish only that Eldon Smith cultivated portions of the northern side of the right of way in a manner that apparently did not conflict with the continuous use of the right of way by what Mrs. Smith describes as "the, then active, railroad." It is obvious from Eldon Smith's answers to the interrogatories that he first thought of his use as being adverse to the railroad when he on behalf of the Henrys took "possession" of the right of way in June 1979 and at that time began to clear brush in the former track area and the ditches and to use the right of way for purposes of ingress and egress to and from the farm fields. Thus, the Court concludes that any use adverse to the railroad first occurred in 1979 when Eldon Smith averred and the other Plaintiffs aver that they or their predecessors in title first "possessed" the railroad right of way in question.

The Defendant park districts hold record title to the so-called "corridor" consisting of the old railroad right of way. A park district is a political subdivision of the state. *Village of*

Willoughby Hills v. Board of Park Commissioners (1965), 3 Ohio St. 2d 49, 51. Adverse possession cannot be applied against the state or its political subdivisions. *1540 Columbus Corp. v. Cuyahoga County*. (1990), 68 Ohio App.3d 713, 718. The exception to this general rule for school districts, noted in *Brown v. Monroeville Local School Dist. Bd. of Edn.* (1969), 20 Ohio St.2d 68, which Plaintiffs advocate should be extended to park districts, has been limited to its facts. *Id.* at 719. Any claim of Plaintiffs for title by adverse possession was, therefore, cut off in 1998, when the park district Defendants took title to the land in question. Plaintiffs are not able to establish an adverse possessory interest in the land for 21 years or more. Their claim for title by adverse possession fails as a matter of law.

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There is nothing in the Plaintiffs chain of title that reserves to the Plaintiffs any interest in the railroad right of way. There is no reference to a reversionary interest. The only mention of the railroad right of way is for the purpose of excluding it from the property being conveyed to the Plaintiffs or to mark a boundary of a Plaintiff's property. Nevertheless, Plaintiffs seek to have title quieted in them on the theory that they hold a reversionary interest.

Plaintiffs' claim that the original deed from Orrin W. And Julia Head to the Toledo, Norwalk & Cleveland R.R. Co. gave the railroad only a "bare right-of-license with reversionary interest to grantor" does not square with the deed. There is in the deed no mention of a reversionary interest. The granting clause of the deed provides that the Heads " * * * do hereby grant, release, and convey to the said Toledo, Norwalk and Cleveland Rail Road Company, for the purpose of constructing their said Rail Road * * * " the property at issue. The habendum clause of the deed provides that the grantors conveyed the land to the railroad "[t]o have and to hold the above granted premises, rights and privileges, for the uses and purposes above mentioned to the said [railroad], their successors and assigns forever * * * " While these clauses do contain words of limitation ("for the purpose of constructing their said Rail Road" and "for the uses and purposes above mentioned"), they do not contain words of reversion or words of limitation that are conditional, e.g., "as long as," "so long as," "until," "during the time that," "but if," "in the event that," "provided that" or "on condition."

Plaintiffs reliance on *Walker v. Lucas County Bd. Of Comm'rs* (1991), 73 Ohio App. 3d 617, and *Waldock v. Unknown Heirs* (June 7, 1991), Eric App. No. E-89-53, unreported, 1991 Ohio App. LEXIS 2599, is misplaced. In *Walker*, which cited the court's prior holding in *Waldock*, the court held that "where the language 'upon the express condition' is used in a deed, a clause of re-entry or forfeiture is not necessary to create a qualified fee so long as such language appears in the granting clause, since such language declares a condition and imports a forfeiture." Here the language in the granting clause provides only that the property was being granted to the railroad "for the purpose of constructing their said Rail Road." Unlike the deed to the railroad in *Walker*, the grant was not made 'upon the express condition' that the land be used for that purpose. As the *Walker* court pointed out:

In Ohio, bare words of limitation or qualification or mere statements of purpose, though they appear in the granting clause of a deed, do not create a

qualified fee without other language in the deed indicating avoidance, forfeiture, reversion or re-entry. *Miller v. Brookville* (1949), 152 Ohio St. 217, 219-222, 40 O.O. 277, 278-280, 89 N.E.2d 85, 86-87.

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Hence a condition will not be raised by implication from a mere declaration in the deed that the grant is made for a special and particular purpose, without being coupled with words appropriate to make such condition.

Copps Chapel, supra, 120 Ohio St. at 314, 166 N.E. at 220.

73 Ohio App. 3d at 623. In this case the words of limitation are not coupled with language indicating avoidance, forfeiture, reversion or re-entry or with any words appropriate to make the stated purpose of the grant a condition of the grant importing a forfeiture if the land is used for other purposes.

Walker also points out that when words of limitation are used in the habendum clause "without any provision for forfeiture or reversion, such statement is not a condition or limitation of the grant." *Id.* at 622. Thus, the phrase "for the uses and purposes above mentioned" in the habendum clause of the Heads' deed to the railroad did not create a reversionary interest in the Heads or their heirs or assigns if the property was later used for another purpose.

Even were the Court to find that a reversionary interest was reserved by the original grantors, *Walker* holds that where words of forfeiture or reversion are used or can be implied from appropriate limiting language, adjoining property owners do not succeed to the reversionary interest in the railroad right of way unless they can prove "that the reversionary interests in the railway property were conveyed to them or their predecessors in title by the original grantors or their heirs." *Id.* at 625. Here Plaintiffs have offered no evidence that any reversionary interest in the railroad right of way was conveyed to them or their predecessors in title.³

³ The Plaintiffs' assert the railroad's alleged abandonment of the right of way as an independent ground upon which title should be quieted in them. In reality, the abandonment argument is not a separate ground upon which their claim of title rests, but rather their claim that the railroad abandoned the right of way when it removed the tracks in the 1970s underpins their claim that they hold a reversionary interest. Without abandonment of the right of way for railroad purposes there could be no forfeiture under their reversionary interest theory.

In order to prove an "abandonment" the Plaintiffs must establish: (1) nonuse of the right of way, and (2) an intention to abandon it. *Schenck v. The Cleveland, Cincinnati Chicago & St. Louis Railway Co.*, (1919), 11 Ohio App. 164, 167. The latter must be established in unequivocal and decisive terms. *Id.* The fact that the right of way is no longer used for railway operations does not establish abandonment absent independent evidence of the railroad's intent to abandon the right of way. *Erie Metroparks Bd. of Commrs. v. Key Trust Co. of Ohio, N.A., et al.* (2001).

Plaintiffs claims for quieting title in them to the former railroad right of way boil down to title by adverse possession or, alternatively, by a reversionary interest. Plaintiffs have failed to establish their rights as a matter of law and have failed to even created a genuine issue of material fact to draw into question the title acquired by the Defendants. Defendants are entitled to judgment as a matter of law. Their joint motion for summary judgment is granted and Plaintiffs' motion for summary judgment is denied.

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JUDGMENT ENTRY

145 Ohio App.3d 782, 790; *Rieger v. Penn Central Corp.*(May 21, 1985), Greene App. No. 85-CA-11, unreported, 1985 Ohio App. LEXIS 7876. . Since Plaintiffs bear the burden of proof at trial on that issue and Defendants have shown that they hold title through the railroad, Plaintiffs are obligated to put forward evidence in resisting the Defendants' motion for summary judgment and in supporting their own motion for summary judgment on the issue of the railroad's intent to abandon the right of way. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 296. Other than showing nonuse and failure to maintain the right of way for a period of about 20 years, Plaintiffs have offered no evidence from which the Court can conclude that the railroad intended to abandon the right of way before it was transferred to NORTA and ultimately to the Defendants or even evidence from which the Court can conclude that there is a genuine issue of material fact as to whether the railroad intended to abandon its right of way before it transferred title to NORTA..

Plaintiffs reliance on *McCarley v. O. O. McIntyre Park District* (February 11, 2000), Gallia App. No. 99 CA 07, unreported, 2000 Ohio App. LEXIS 603, to support their abandonment argument is misplaced. While the Court there found an abandonment, where the railroad before transferring the property to the park district had filed a petition for abandonment, the railroad's interest was only an easement for "the right to locate, construct and forever maintain, use and operate said road, on such line as it or them may seem best through our lands." The railroad held no fee interest in any specific property. The issue of abandonment was germane because without a fee interest the railroad had no right to use the property for other than railroad purposes. Here the railroad held and conveyed to the Defendants a fee interest for which there was no reversionary interest reserved. The issue of abandonment is not relevant under the circumstances in this case because the railroad was not restricted in its right to use its right of way. Furthermore, even were the Court to find that the limitation of use language in the deed implied a reversion, Plaintiffs have not created a genuine issue of material fact as to their right to the reverted interest. They have none.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendants' Joint Motion for Summary Judgment is granted and Plaintiffs' Motion for Summary Judgment is denied. Costs taxed to Plaintiffs.

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EARL R. MCGIMPSEY, JUDGE

Copies to:

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- Joan C. Szuberla, Esq. and Gary D. Sikkema, Esq.
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Not Reported in N.E.2d, 1985 WL 8215 (Ohio App. 6 Dist.)
(Cite as: Not Reported in N.E.2d)

C
Anspach v. Madden. Ohio App., 1985. Only the Westlaw citation is currently available.
CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Sixth District, Sandusky County.

Walter Anspach, et al., APPELLANT

v.

John E. Madden, APPELLEE

C. A. NO. S-84-40.

S-84-40

November 1, 1985.

APPEAL FROM SANDUSKY COUNTY COMMON PLEAS COURT NO. 83 CV 850.

DECISION AND JOURNAL ENTRY
PER CURIAM

*1 This cause came on to be heard upon the record in the trial court. Each assignment of error was reviewed by the court and upon review the following disposition made:

This case comes before the court on appeal from a judgment of the Sandusky County Court of Common Pleas, wherein the court, at the end of plaintiffs-appellants' case-in-chief, granted defendant-appellee's motion for a directed verdict.

This case evolves out of the disputed ownership and right-of-way across appellants' driveway which is situated along the northern property border, between appellants' home and appellee's apartment building.

On June 7, 1924, the prior owners of the lots now in question, signed a document titled "Easement of Driveway." Said document allegedly was recorded on June 26, 1924. The easement was between J. C. Smith, owner of lot No. 3993, and Charles and Olivia Boehringer, owners of lot No. 3241.

The easement provides, in relevant part:

"The said J. C. Smith and Charles E. Boehringer for the use and convenience of a driveway of themselves and their successors and assigns desire to make said use and convenience permanent and such owners of the inlets affected by same make this easement.

"Said driveway to be for the exclusive use of J. C. Smith and Charles E. Boehringer, their successors and assigns except as specifically noted. *** Said J. C. Smith and assigns to have the right to park his car or other vehicles on the south side and only at the rear end of said driveway but no vehicles of any sort or kind shall be parked in said driveway at any other place except at rear and on south side by J. C. Smith or any other person or persons. Said J. C. Smith, Charles E. Boehringer, their successors and assigns and S. O. Bowlus shall each share and share alike pay the cost of the maintenance of said driveway."

Apparently, the easement was necessary since the driveway curved around plot No. 3993 and extended, in part, into lot No. 3241. At the time of the easement, a row of hedges served as a physical boundary between driveway and appellee's lot.

Subsequently, in December 1958, plaintiffs-appellants purchased lot No. 3993 and became successors in interest to the recorded easement. At the time of the purchase, a third party, Mr. Wilson, was to have access via the driveway to his property at the rear of the lot. In 1979, appellee, John Madden, in conjunction with his business partner, purchased lot No. 3241, and, after dissolution of the partnership, became successor in interest to the recorded easement. The property purchased by Mr. Madden was a four unit apartment building.

In late 1983, John Madden, without appellants'

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consent, removed fifteen feet of hedgerow which served as the physical border between Madden's property and appellants' driveway. The apparent purpose of said act was to allow appellee's tenants easier access to the apartment building by entering three-quarters of the way down the driveway and crossing into the rear of said property.

*2 Upset by the partial destruction of the hedgerow and the possible use of the driveway by the tenants, appellants filed a complaint, on February 27, 1984, against appellee Madden. The complaint sets forth two causes of action. The first action avers that John Madden and his predecessors in interest have abandoned and thereby given up all rights to the easement. The second action alleges that appellee unlawfully entered appellants' property and destroyed the hedges.

At trial, appellants, in their case-in-chief, testified that since 1958, they have had the sole responsibility for the maintenance of the property, including the driveway and the hedgerow. They were responsible for shoveling the driveway, repairing any damage to the surface, and for trimming the hedges. They further testified that, while they put no signs or barricades preventing individuals from using the driveway, in their opinion, they were owners of the driveway and the hedges. Additionally they testified that to the best of their knowledge, appellee Madden had never used the driveway nor participated in the maintenance of the property now in question. Appellants' testimony was corroborated, in part, by former neighbors who testified, based on their limited observations, that appellants were the only party who, since 1958, maintained the premises, and that appellee Madden had never exercised his rights to the easement. The only testimony to the contrary from these witnesses indicated that Madden had on one occasion walked onto the property to gain access to a barn at the back of the property. There is also testimony from the Anspachs which indicates that the tenants entered the opening of the driveway to gain easier access to the tenants' building complex. The tenants, however, utilized only the opening of the driveway and not any portion of the main body of the driveway.

The transcript of the proceedings indicates that appellee Madden testified that, on several occasions, he had gained access to appellants' property by walking through a hole in the hedgerow, that he had driven on the driveway to pick up Mr. Wilson who resided in a house at the rear of appellants' house, and that he had observed his tenants use the driveway to briefly park their cars, to enter and exit a taxicab, and to turn their cars around. There exists no evidence in the record which indicates that appellee, his tenants, or his predecessors in interest intended to use the main body of the driveway as a means of ingress and egress to their property via the use of an automobile.

The testimony and exhibits indicate that the driveway in question begins on appellants' property and then curves around the house to the back of the structure. At the rear of the house where the driveway ends, there is a barn which is used to store various sundry items for Mr. Wilson, appellants and appellee. The driveway as it curves around appellants' home protrudes upon appellee's property and then back onto appellants' property. As a result, the driveway is divided by a property line which places a portion of the driveway and the hedgerow on appellee's land. The hedgerow which is on appellee's land was removed in 1983 to allow appellee's tenants to have access to the rear of the apartment building. Allegedly, access to the rear of the property is necessary since appellee intends to provide a parking area for his tenants.

*3 Based upon such evidence, the trial court granted defendant-appellee's motion for a directed verdict at the end of plaintiffs-appellants' case-in-chief.

Appellants timely appealed setting forth the following assignments of error for review:

"I. THE COURT ERRED IN GRANTING DEFENDANT-APPELLEE'S MOTION TO DISMISS AND NOT FINDING THAT PLAINTIFF-APPELLANTS' POSSESSION CONSTITUTED ADVERSE POSSESSION OF THE STRIP OF LAND IN QUESTION.

"II. THE COURT ERRED IN GRANTING DEFENDANT-APPELLEE'S MOTION TO DISMISS AND NOT FINDING THAT

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DEFENDANT-APPELLEE AND HIS
PREDECESSORS HAD ABANDONED THE
EASEMENT FOR INGRESS AND EGRESS.

"III. THE COURT ERRED IN GRANTING
DEFENDANT-APPELLEE'S MOTION TO
DISMISS AND NOT FINDING THAT
PLAINTIFF-APPELLANTS HAD ACQUIRED
TITLE BY PRESCRIPTION TO THE UNUSED
EASEMENT.

"IV. THE COURT ERRED IN GRANTING
DEFENDANT-APPELLEE'S MOTION TO
DISMISS AND NOT FINDING THAT
DEFENDANT-APPELLEE'S PROPOSED USE
OF SAID EASEMENT WAS A MATERIAL
CHANGE AND BURDEN ON THE OWNER IN
FEE.

"V. THE COURT ERRED IN GRANTING
DEFENDANT-APPELLEE'S MOTION TO
DISMISS AND NOT FINDING THAT THE
DEFENDANT-APPELLEE HAD DAMAGED
PROPERTY BELONGING TO
PLAINTIFF-APPELLANTS IN REMOVING
HEDGES WHICH WERE ON THE PROPERTY
OF PLAINTIFF-APPELLANTS."

Initially we focus our attention on the trial court's judgment granting defendant-appellee's motion for a directed verdict. In Mosley v. Wells (Oct. 23, 1981), Erie App. No. E-80-77, unreported, we discussed motions for directed verdicts by stating:

"A motion for a directed verdict made pursuant to Civ. R. 50(A) shall be granted on the evidence when the movant establishes the standard set forth in Civ. R. 50(A)(4) which is as follows:

"(4) When granted on the evidence. When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue."

"This standard has been reviewed by numerous courts and most recently by the Ohio Supreme Court in Huber v. O'Neill (1981), 66 Ohio St. 2d 28 at 29, where the court stated as follows:

"**** In other words, if all the evidence relating to an essential issue is sufficient to permit only a conclusion by reasonable minds against a party, after construing the evidence most favorably to that party, it is the duty of the trial court to instruct a finding or direct a verdict on that issue against that party. Naturally, if the finding on that one issue disposes of the whole case, a duty arises to grant judgment, upon the whole case. Peters v. B. & F. Transfer Co. (1966), 7 Ohio St. 2d 143; Hamden Lodge v. Ohio Fuel Gas Co. (1934), 127 Ohio St. 469, See, also, Helms v. American Legion, Inc. (1966), 5 Ohio St. 2d 60; Archer v. City of Port Clinton (1966), 6 Ohio St. 2d 74."****

*4 In light of this standard of review, we turn our attention to appellants' assignments of error.

In appellants' first and third assignments of error, they contend that they are entitled to complete and absolute ownership of the disputed portion of the driveway and hedges based upon the principles of either adverse possession or an easement by prescription.

Initially we note that appellee Madden's right to access to the driveway evolves not only out of his ownership of the adjacent lot but also from the existence of the 1924 easement. Such circumstances give credence to appellants' alternative theories of recovery.

An easement has been described as "**** an interest in the land of another which entitles the owner of the easement to a limited use of the land in which the interest exists." Szaraz v. Consolidated Railroad Corp. (1983), 10 Ohio App. 3d 89, 91. An easement implies by such ownership, a right to use of land for a special purpose. That purpose must not be inconsistent with the general property rights of the landowner; the landowner, however, must not exercise his rights in such a manner that it unnecessarily interferes with the special purpose for which the easement was acquired. Id., at 91.

The court in Szaraz also stated:

"An easement may be extinguished by adverse possession.

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"As a general rule, an easement cannot be lost by mere nonuser, but it is subject to loss by adverse user [sic]. In order to result in the loss of an easement, the adverse use must be continued for the period necessary to create an easement, that is, the statutory period for the recovery of real property, or 21 years."

"Since the owner of the fee has all the uses incident to a piece of property not inconsistent with a dominant easement, use by the owner is not adverse unless an inconsistent right or easement is asserted. In order to destroy an easement by adverse use, the use must be adverse to the enjoyment of such easement by the owner thereof; it must be a denial of right in the owner of the easement to use it for the purposes thereof. ***' 2 Ohio Jurisprudence 3d 606, Adverse Possession, Section 94." *Id.* at 91.

To defeat the existing easement of record, appellants' claims are based, in part, upon the assertion that they are entitled to the ownership of the property by adverse possession or by an easement by prescription.

Adverse possession is an action to recover title to or possession of real property which has been held adversely to the record owner's interest for a statutory period of twenty-one years. R.C. 2305.04. Adverse possession has been defined as possession which is actual, open, exclusive, continuous and adverse. Such possession must continue for twenty-one years. *Lyman v. Ferrari* (1979), 66 Ohio App. 2d 72, 76; *Ault v. Prairie Farmers Co-Operative Co.* (Sep. 25, 1981), Wood App. No. WD-81-21, unreported.

In *Pennsylvania Rd. Co. v. Donovan* (1924), 111 Ohio St. 341, the first paragraph of the syllabus states:

"An easement by prescription may be acquired by open, notorious, continuous, adverse use for a period of 21 years. Such use never ripens into a prescriptive right unless the use is adverse and not merely permissive."

*5 From such description, it is clear that the sole element which differentiates adverse possession

from an easement by prescription is the exclusive possession of the property. *Id.* at 350. Although there are several common factors, our analysis centers on one common element of appellants' claim, that is, whether appellants provided sufficient evidence, in light of the appellate standard of review for a directed verdict, to establish that their use of the driveway and hedges was adverse to the property owner-appellee Madden.

Initially, we take note of this court's decision in *Mosely v. Wells, supra*, which in discussing adverse possession cited to the language set forth in *Barnhart v. Detroit, Toledo & Ironton Rd. Co.* (1929), 8 Ohio Law Abs. 22, 23:

"The possession, therefore, to be adverse must be in some way hostile to the interests of the person about to be disseised. As it has been put in striking language: "The disseisor must unfurl his flag on the land and keep it flying so that the owner may see, if he will, an enemy has invaded his domains and planted the standard of conquest.""

The facts and circumstances do not ripen into "adversity" where the use is permissive. *Pennsylvania Rd. Co. v. Donovan, supra*, paragraph one of the syllabus (the court discussed the permissive use of property as it relates to an easement by prescription.)

For the plaintiff's conduct to be adverse or hostile, it must be inconsistent with the owner's rights, it must deny the owner enjoyment of his property rights. Cf. *Szaraz v. Consolidated Railroad Corp., supra*, at 91. "Whether a use of land is adverse or permissive only depends upon the facts of each particular case. *Glander v. Mendenhall* (1943), 39 Ohio Law Abs. 104. Possession or use of land which is originally permissive may be changed into adverse possession by open and intentional acts adverse to the rights of the original owner. *Rex v. Hartman* (1934), 16 Ohio Law Abs. 573." *Ault v. Prairie Farmers Co-Operative Co., supra*.

In the case sub judice, the record and testimony of appellants and their witnesses indicate that appellants repaired the driveway, shoveled the snow and trimmed the hedges. These duties, however, are not inconsistent with appellee's interest. As

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was indicated in Ault, the mowing of grass or keeping of weeds down is not sufficient in itself to establish adverse possession, although it can be considered as part of the totality of the circumstances. Appellants care and upkeep of the driveway is not adverse to appellee's rights. Further, appellants, in accordance with the 1924 easement, were responsible to share the costs of the maintenance of the driveway. Additionally, appellants have not attempted to restrict, by sign or barricade, other individuals access to the driveway. Absent evidence of circumstances which would be inconsistent with appellee's ownership or restrict appellee's enjoyment of the property, appellants, in light of the existing easement, have failed to establish the element of adverse use. The trial court did not err with respect to the issues of adverse possession and an easement by prescription. Accordingly, appellants' first and third assignments of error are found not well-taken.

*6 In the second assignment of error, appellants contend that appellee has abandoned his rights to the easement.

It is recognized that the rights created by an easement may be lost due to the party's abandonment of the rights and privileges created by the easement. Junction Railroad Co. v. Ruggles (1857), 7 Ohio St. 1. "[S]uch abandonment, which depends on the intention of the owner, may be inferred from the lapse of time or other circumstances indicative of an intention on the part of the grantee to abandon ***." Id. at 11; cf. West Park Shopping Center, Inc. v. Masheter (1966), 6 Ohio St. 2d 142; Restatement of Property (1944), Section 504.

The record provides us with testimony from appellants and former neighbors indicating that Madden and his predecessors in interest had never utilized the driveway in accordance with the terms of the easement. Testimony of the various witnesses indicated that the tenants of the adjacent apartment building have also failed to utilize the driveway. The lack of use, is in no doubt due, in large part, to the presence of the hedges which prevents access to the rear of the apartment building lot. The hedges, however, have been present since

the recordation of the easement, and if Madden, or his predecessors in interest intended to avail themselves of these rights and obligations of the easement, then they could have done so in the past.

Appellee Madden, argues, however, that both he and his tenants have used the driveway by travelling over the driveway on foot, by picking up Mr. Wilson, and by the tenant's use of the opening of the driveway. First, we note that the mere passage of individuals on foot over the driveway is not fully consistent with the purpose of the easement, and has little significance when considering acts which would indicate no intention to abandon. Second, while appellee testified that he had used the driveway to pick up Mr. Wilson who resided at the rear of appellants' property, the evidence leads us to conclude that such usage was not done for the express or implied purpose of utilizing the benefits of the easement, but rather for the benefits of Mr. Wilson. Third, there is some evidence in the record to indicate, that over the past fifty years, the driveway was never used by Madden or his predecessors in interest, except for an occasional passageway on foot. And fourth, during the Anspachs' residency on lot No. 3993, Madden and his predecessors in interest have failed to share in the cost and responsibilities for the upkeep of the driveway.

Therefore, based upon the evidence in the record, the trial court erred in granting the motion for directed verdict, since construing the evidence most strongly in favor of appellants, i.e. non-movants, reasonable minds could have concluded that appellee was not entitled to enforcement of the easement due to the abandonment of said property. Accordingly, the second assignment of error is found well-taken.

In a fourth assignment of error, appellants contend that if an easement does exist, appellee's intended usage of the driveway would be an increase burden on the appellants and a material enlargement of the easement. Appellants argue that such usage should render the easement unenforceable. Appellee, who intends to use the driveway as a thoroughfare, which would allow his tenants to park in the rear of the adjacent property, argues that the easement, by

Not Reported in N.E.2d, 1985 WL 8215 (Ohio App. 6 Dist.)
(Cite as: Not Reported in N.E.2d)

its language, anticipated and provided for usage of the driveway by more than the owners of the property. Further, appellee argues that the easement does not prohibit the successors in interest from allowing other persons to use the driveway.

*7 Appellants' proposition that an increased burden or a material enlargement of the easement may render it unenforceable does have some basis in Ohio law, Joliff v. Harden Cable Television Co. (1971), 26 Ohio St. 2d 103, and is analogous to the Restatement of the Law, Property (1944), 3082-3083, Section 505, which states:

"§ 505. Estoppel.

"An easement is extinguished when action is taken by the owner of the servient tenement inconsistent with the continued existence of the easement, if

"(a) such action is taken in reasonable reliance upon conduct of the owner of the easement; and

"(b) the owner of the easement might reasonably have foreseen such reliance and the consequent action; and

"(c) the restoration of the privilege of use authorized by the easement would cause unreasonable harm to the owner of the servient tenement."

Comment (a) to Section 505, while indicating that this section should be liberally applied, further elaborates:

"In cases covered by this Section, however, an estoppel may arise upon a representation as to the future alone. Thus, if the owner of an easement acts as though he has no intention to make in the future the use authorized by the easement, he may become estopped to make such a use if the owner of the servient tenement acts in reliance upon the intention indicated.

"The liberality of the doctrines of estoppel in this connection indicates the influence of notions of social policy having especial significance here. That social policy originates in the feeling that unused easements constitute objectionable incumbrances upon the title to the land subject to them and obstructions to its development. Out of this feeling there arises an attitude favorable to their extinguishment. The result is that the law has developed rules favorable to the accomplishment of

that end. If such rules develop from the application of doctrines which are also applicable to other fields, they may well be more liberal than rules developed in the application of those doctrines in at least some of such fields."

The record indicates that Mr. Anspach testified that the previous owners of his residence informed him that the adjacent landowner had no car, that the easement had never been utilized, and that the easement was no longer in effect. Such information, coupled with the non-use of the driveway during Anspach's ownership of the house and the adjacent landowner's failure to fulfill the obligations in the easement to share responsibility for the maintenance of the driveway, could lead reasonable minds to conclude that Madden and his predecessors in interest had no intention to use the easement. With that conclusion in mind, the fact that Madden intends to utilize the easement for a driveway for his tenants further establishes that reasonable could conclude, that even if the easement had not been abandoned, Madden's intended use of the easement could create a undue burden on the property and a material enlargement of the easements. Such a determination by the trier of fact would deny Madden from his intended use of the driveway. Therefore, the trial court erred in granting appellee his motion for a directed verdict. Accordingly, the fourth assignment of error is found well-taken.

*8 In the fifth assignment of error, appellants contend that the trial court erred when it failed to award damages for destruction of the property. In light of our earlier discussion of assignments of error two and four, and our conclusion that the evidence would not allow reasonable minds to come to but one conclusion, i.e, in favor of the defendant-appellee, the trial court could not have properly determined whether plaintiffs-appellants were entitled to damages. This issue must be decided on remand. Accordingly, appellants' fifth assignment of error is found well-taken.

On consideration whereof, this court finds that substantial justice was not done the parties complaining and judgment of the Sandusky County

Not Reported in N.E.2d, 1985 WL 8215 (Ohio App. 6 Dist.)
(Cite as: Not Reported in N.E.2d)

Court of Common Pleas is reversed and remanded for further proceedings according to law and not inconsistent with this opinion. Costs to abide final determination.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. See also Supp. R. 4, amended 1/1/80.

John J. Connors, Jr., P.J., Peter M. Handwork, J., and Arthur Wilkowski, J., CONCUR.

Ohio App., 1985.

Anspach v. Madden

Not Reported in N.E.2d, 1985 WL 8215 (Ohio App. 6 Dist.)

END OF DOCUMENT

Not Reported in N.E.2d, 1983 WL 5960 (Ohio App. 8 Dist.)
(Cite as: Not Reported in N.E.2d)

C
BOKOVITZ, v. CLEVELAND METROPARKS SYSTEM. Ohio App., 1983. Only the Westlaw citation is currently available.
CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Eighth District,
Cuyahoga County.

EDWARD J. BOKOVITZ, ET AL.,
Plaintiff-Appellants,

v.

CLEVELAND METROPARKS SYSTEM,
Defendant-Appellee.

NO. 45215.

45215

April 28, 1983.

Civil Appeal from common pleas court No. 031,837.
Reversed and remanded for trial on the merits.

For Plaintiff-Appellants: Thomas G. Kelley, Esq.,
918 Engineers Building, Cleveland, Ohio 44114.

For Defendant-Appellee: Walter C. Kelley, Esq.,
Michael Anne Johnson, Esq., Kelley, McCann &
Livingstone, 300 National City, East Sixth
Building, Cleveland, Ohio 44114.

JOURNAL ENTRY AND OPINION

PARRINO, J.

*1 On August 24, 1981 plaintiff-appellants Edward J. and Joanne Bokovitz (hereinafter appellants) filed a complaint sounding in negligence naming the Cleveland Metroparks System as defendant.^{FN1} Appellants claimed that the defendant operated Manikiki Golf Complex as a proprietary function and that it was therefore responsible for injuries allegedly caused by negligent operation and control of the premises.

FN1 Defendant-appellee's official title is

Board of Park Commissioners of the Cleveland Metropolitan Park District, but it waived objection to the designation used by plaintiffs. The district was established under authority of R.C. Chapter 1545.

Appellants allege that on February 3, 1980, Joanne Bokovitz was sled riding in the park in an area in which defendant allowed sled riding and that she was injured when her sled hit a snow covered drainage pipe on the hill. The complaint further alleges that Edward J. Bokovitz, husband of Joanne Bokovitz, incurred expenses for his wife's medical bills and that he lost her services and consortium.

On September 25, 1981, defendant-appellee Cleveland Metroparks System (hereinafter appellee) filed a motion to dismiss containing an alternative motion for summary judgment claiming sovereign immunity. On March 22, 1982, the court granted appellee's motion for summary judgment citing and distinguishing *Schenkolewski v. Metropark* (1981), 67 Ohio St. 2d 31; the trial court determined that the appellee's maintenance of the Manikiki Golf Complex during the winter months was a governmental function and therefore sovereign immunity attached. (In *Schenkolewski* it was determined that the operation of a zoo by the defendant park system for which admission fees were required was a proprietary function and therefore sovereign immunity was not available to the defendant.)

Appellant filed a timely notice of appeal assigning two errors.^{FN2} For the reasons adduced below, these assignments of error are not specifically addressed in the manner in which they were raised.

FN2 "1. THE TRIAL COURT ERRED IN ARBITRARILY RULING THAT DEFENDANT-APPELLEE'S CONTROL AND MAINTENANCE OF THE MANAKIKI GOLF COURSE DURING

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WINTER WAS A GOVERNMENTAL FUNCTION WHICH RENDERED DEFENDANT IMMUNE FROM LIABILITY WITH RESPECT TO THE SLEDDING INJURY SUSTAINED BY THE PLAINTIFF-APPELLEE.

"2. THE TRIAL JUDGE ERRED IN GRANTING A MOTION FOR A SUMMARY JUDGMENT FILED BY THE DEFENDANT BECAUSE A TRIABLE ISSUE OF FACT, OR FACTS, WAS ESTABLISHED BY THE PLEADINGS AND OTHER PAPERS AND DOCUMENTS FILED IN THE LAWSUIT."

In Schenkolewski, supra, the Ohio Supreme Court determined that the governmental-proprietary distinction applied to the determination of immunity for municipal corporations was also to be applied to park districts established under R.C. Chapter 1545. Hence, since municipal corporations are liable in tort for negligence in performing proprietary functions so too are subject park districts. 67 Ohio St. 2d 31, 38.

*2 In the instant case the trial court applied the governmentalproprietary distinction and found the defense of sovereign immunity to be a sound one on the facts of the case.

Subsequent to Schenkolewski, however, the Ohio Supreme Court decided Haverlack v. Portage Homes, Inc. (1982), 2 Ohio St. 3d 26. The second syllabus of Haverlack reads:

"The defense of sovereign immunity is not available, in the absence of a statute providing immunity, to a municipal corporation in an action for damages alleged to be caused by the negligent operation of a sewage treatment plant."

The body of the opinion elaborates on this syllabus and briefly discusses the history of sovereign immunity and points out the difficulty of applying the governmental-proprietary distinction to the functions of municipal corporations. In setting forth its reasons for the decision in Haverlack the court states at 29-30: "Many innocent injured victims have been precluded from recovering damages from municipalities because of sovereign immunity from liability for their negligence in the

performance or nonperformance of governmental functions. Clearly, the municipality is better able to bear the cost of an injury it causes than the individual victim. The municipality should be run with the same care and circumspection as a business, protecting itself in the same manner from liability incurred by its servants. A municipality is able to obtain liability insurance and is able to spread the cost among the taxpayers."

We construe Haverlack as abolishing the distinction between governmental and proprietary functions and abolishing the doctrine of sovereign immunity of municipal corporations in the absence of specific statutory immunity. This construction is supported by the court's statement at page 30 that "a municipal corporation, unless immune by statute, is liable for its negligence in the performance or nonperformance of its acts." This construction is further supported by the concurring opinion of Chief Justice Celebrezze in Dougherty v. Torrence (1982), 2 Ohio St. 3d 69,^{FN3} wherein it is stated:

FN3 The majority opinion relied solely on R.C. 701.02 which grants immunity to firemen for damages from operating vehicles in the performance of a governmental function.

"[I]n Haverlack, sovereign immunity for a municipal corporation, unless provided by statute, was abolished. Consequently, the liability of a municipal corporation, absent a statute, now depends on the merits instead of the often difficult and inconsistent classification of municipal functions as governmental or proprietary to determine liability."

By virtue of Schenkolewski, supra, wherein it was decided that the liability of park districts is to be determined in the same manner as the liability of municipal corporations, the abolition of sovereign immunity for municipal corporations also abrogates the doctrine for park districts.

In summary, we hold that in the absence of a statute providing for sovereign immunity, the doctrine of

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sovereign immunity as applied to municipal corporations has been abolished. Haverlack, supra. The abolition of sovereign immunity as applied to municipal corporations also abrogates the doctrine of government immunity for park districts established pursuant to Chapter 1545 of the Ohio Revised Code.

*3 Accordingly, appellee's motion for summary judgment was improperly granted and the decision below is reversed and the cause remanded for trial on the merits.^{FN4}

FN4 The trial court granted appellee's motion for summary judgment on the sole ground of sovereign immunity; no other grounds or arguments were raised at the trial court level. On appeal, appellee has argued both that appellant was merely a gratuitous licensee and therefore not entitled to recovery in any event and/or that the recreational user statutes, R.C. §§ 1533.18 and 1533.181, preclude liability under the facts. As a court of review, we do not reach these issues as they have not yet been addressed to the trial court.

This cause is reversed and remanded to Common Pleas Court for trial on the merits

It is, therefore, considered that said appellant(s) recover of said appellee their costs herein.

It is ordered that a special mandate be sent to said Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

CORRIGAN, P.J., JACKSON, J., CONCUR

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for

review will begin to run.

Ohio App., 1983.
Bokovitz, v. Cleveland Metroparks System
Not Reported in N.E.2d, 1983 WL 5960 (Ohio App. 8 Dist.)

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Westlaw.

19 Ohio App. 412

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19 Ohio App. 412, 1925 WL 2485 (Ohio App. 9 Dist.), 24 Ohio Law Rep. 344
(Cite as: 19 Ohio App. 412)

C

JOSEPH v. CITY OF AKRON. Ohio App. 9 Dist. Summit Co. 1925.

Court of Appeals of Ohio, Ninth District, Summit County.
JOSEPH

v.

CITY OF AKRON.

Decided December 23, 1925.

West Headnotes

Estoppel 156 ⇐62.4

156 Estoppel

156III Equitable Estoppel

156III(A) Nature and Essentials in General

156k62 Estoppel Against Public, Government, or Public Officers

156k62.4 k. Municipal Corporations in General. Most Cited Cases

Where a recorded plot included a part of a strip of land designated in a former plot as an alley, this part of the alley was included within the boundaries of the later plot when the boundaries were fenced, city engineer in subdividing part of the plot placed monuments along the fence as indicating the boundaries of the plot, and plaintiff relying upon such monuments purchased a lot which included a portion of the strip of the alley and constructed a building upon a portion of the strip and remained in adverse possession for about 39 years, in an action to enjoin city from taking part of lot for street purposes, the city was estopped from claiming that the lot included a part of the alley.

Adverse Possession 20 ⇐8(2)

20 Adverse Possession

20I Nature and Requisites

20I(A) Acquisition of Rights by Prescription in General

20k5 Property Subject to Prescription

20k8 Property Dedicated to or Acquired for Public Use

20k8(2) k. Highways and

Turnpikes. Most Cited Cases

Estoppel 156 ⇐63

156 Estoppel

156III Equitable Estoppel

156III(B) Grounds of Estoppel

156k63 k. Inconsistency of Conduct and Claims in General. Most Cited Cases

Municipal Corporations 268 ⇐657(3)

268 Municipal Corporations

268XI Use and Regulation of Public Places, Property, and Works

268XI(A) Streets and Other Public Ways

268k657 Vacation or Abandonment

268k657(3) k. Abandonment or Nonuser. Most Cited Cases

City held estopped from claiming strip of alley held in good faith for 40 years.

Messrs. Grant, Thomas & Buckingham, for plaintiff.
Mr. H. M. Hagelbarger, director of law, and *Mr. W. A. Kelly*, for defendant.

WASHBURN, J.

*1 This is an action on appeal, in which the plaintiff claimed that the defendant, the city of Akron, was taking a part of his lot for street purposes, and asked that the city be enjoined and that his title be quieted.

The evidence establishes that in 1825 there was recorded a plat of what is now a part of the city of Akron, and that said plat established on the west side thereof an alley twenty feet wide, known as Pine alley; that in 1865 the owners of property abutting on the westerly side of Pine alley caused to be recorded a plat of said property, which included as a part thereof a narrow strip off of the west side of Pine alley, but said plat gave the width of Pine alley as twenty feet, the same as it was in the plat of 1825, and there is no record of the acceptance of either of the plats by the city. The evidence further

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discloses that thereafter the strip of land taken from the west side of Pine alley and included as a part of the plat of 1865 was fenced in and used as a part of the property adjoining it, and that said strip has been so fenced in and used since 1870, and down to the time of the bringing of this action in 1923. The evidence further shows that in 1884 the city engineer of the city of Akron prepared a plat subdividing a part of the land embraced in the plat of 1865, and adjoining Pine alley on the west, and that he at that time included said strip off the west side of Pine alley as a part of the lots adjoining thereto, as shown on the plat of the subdivision as prepared by him, and that by his plat he showed the east line of the lots along the east side of his said subdivision as being the line of the fence, and that he placed monuments along said line showing the lots abutting upon the west side of Pine alley as including said strip off of the west side of Pine alley that was then fenced in and used as a part of the adjoining land; that after said plat had been prepared by the city engineer it was shown to the plaintiff and he went upon the ground and observed said monuments and purchased one of the lots abutting upon the west side of Pine alley, his deed referring to the subdivision being executed on January 31, 1884, but the record not disclosing when it was delivered. However, it was not recorded until after said plat was recorded. The plat, although acknowledged on February 4, 1884, was not approved by the council of the city of Akron until June 2, 1884, and was left for record on June 11, 1884, and the deed was filed for record on June 19, 1884. Plaintiff went into possession of the premises as described in his deed, and as surveyed and staked out by the city engineer, which included the narrow strip off the west side of Pine alley as it was then fenced in as a part of said lot, and he has continued in the possession and occupancy of all of said lot and has maintained said fence up to the time of the bringing of this suit, and has erected a building thereon, which extends about eleven inches over onto said narrow strip.

*2 Municipal Corporations, 28 Cyc. p. 843.

The city engineer having prepared the plat of the subdivision in 1884, and having surveyed the property and placed monuments thereon showing

said narrow strip of Pine alley as being included in and a part of the adjoining lot of said subdivision, and the city having by the acceptance of said plat ratified and confirmed that which had been done by the city engineer, and the plaintiff having acted in absolute good faith and purchased and paid for said lot, relying on said acts of the city and its engineer, and having made valuable improvements on a part of said strip, which indicated a permanent and adverse occupancy inconsistent with the title of another, and the city having thereafter permitted such use and occupancy by the plaintiff for such great length of time, we conclude from these facts that the city is now estopped from claiming that said narrow strip is a part of Pine alley.

It is true that the building constructed by plaintiff did not cover the whole of the strip, or a considerable part thereof, but payment for the lot in reliance on the representation that the strip was a part thereof was in principle equivalent to placing a valuable improvement on the whole of the strip, and brings the case within the principle of *City of Cincinnati v. Evans*, 5 Ohio St., 594, as interpreted by later Supreme Court decisions. *Lane v. Kennedy*, 13 Ohio St., 42; *McClelland v. Miller*, 28 Ohio St., 488, and *Heddleston v. Hendricks*, 52 Ohio St., 460.

In Ohio, as in most states, the statute of limitations, as such, does not run against municipalities as to their title and rights in streets which they hold in trust for the public; such rights are not extinguished by mere non-use or adverse possession due to laches, negligence or non-action of municipal authorities, but Ohio, in common with many other states, recognizes the doctrine that there are exceptional cases where there has been such conduct on the part of the public authorities, relied and acted upon by an adjacent owner, as will estop the public from retaking possession of a portion of a street occupied by such adjacent owner. That is, the circumstances may be such that the private rights of individuals are of more persuasive force in a particular case than the rights of the public, and in such a case it is found to be more just to enforce an equitable estoppel against the municipality rather than permit it to retake possession of such street. We regard this doctrine as applicable to the case at bar, the plaintiff here having established his

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absolute good faith and the acts of the public authorities relied on as misleading being of such a character as would amount to a fraud if the public authorities were allowed to claim otherwise.

Finding that the plaintiff is entitled to the relief asked for a decree may be drawn accordingly.

**3 Decree accordingly.*

PARDEE, P. J., and FUNK, J., concur.
Ohio App. 9 Dist. Summit Co. 1925.
Joseph v. City of Akron
19 Ohio App. 412, 1925 WL 2485 (Ohio App. 9 Dist.), 24 Ohio Law Rep. 344

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Not Reported in N.E.2d, 1987 WL 18489 (Ohio App. 8 Dist.)
(Cite as: Not Reported in N.E.2d)

C

LTV Steel Co., Inc. v. City of Cleveland Ohio App.,
1987. Only the Westlaw citation is currently
available.

CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio, Eighth District,
Cuyahoga County.

LTV STEEL COMPANY, INC., Plaintiff-Appellee,
v.

CITY OF CLEVELAND, Defendant-Appellant.
No. 53827.

October 15, 1987.

Civil Appeal From the Probate Court Case No.
100056.

Kay Woods, Cleveland, for plaintiff-appellee.
Marilyn G. Zack, City Law Director Donald F.
Black, Assistant Law Director, Cleveland, for
defendant-appellant.

JOURNAL ENTRY AND OPINION

PER CURIAM.

*1 Appellant, the City of Cleveland's, only
assignment of error is overruled. The trial court did
not err pursuant to R.C. 2305.05 in finding that
LTV Steel Company, Inc. (LTV) and acquired title
by adverse possession to the portion of Houston
Avenue which it had fenced and paved and from
which it had excluded the public for more than the
statutorily designated twenty-one years.

Appellee, LTV, claimed that it had acquired title by
adverse possession to a portion of Houston Avenue,
S.W. under R.C. 2305.05. Carved out as an
exception to the general principle that municipal
corporations are not subject to property loss by
adverse possession or prescription,^{FNI} R.C.
2305.05 provides that where a municipal street has
not been open for public use, an adjoining property

owner who fences it in and remains in open and
uninterrupted possession for the statutory period of
twenty-one years thereby gains title to the property.
See Fondriest v. Dennison (C.P. Tuscarawas 1966),
8 Ohio Misc. 75, 80.

Appellant, the City of Cleveland, did not contest
that LTV had fenced and adversely occupied the
disputed portion of Houston Avenue for nearly
thirty years. However, appellant maintained that
such possession was unlawful under R.C. 5589.01
and that since the public had access to the area prior
to LTV's adverse possession, R.C. 2305.05 was
inapplicable. The trial court found that since the
occupied portion of Houston had not been open to
the public since 1956, and since the City of
Cleveland had not ousted LTV pursuant to its right
under R.C. 5589.01, the enclosed and adversely
occupied portion of Houston Avenue had become
the property of LTV. Appellant, the City of
Cleveland, how brings this appeal.

In Byerlyte v. City of Cleveland (Cuyahoga Cty.
App. 1940), 32 Ohio L. Abs. 609, this court
examined section 11220 G.C. (presently codified as
R.C. 2305.05). The court found that to gain title by
adverse possession to municipal streets or alleys
under the statute

it is not only necessary that there shall have been
adverse possession and occupancy for at least 21
years, but also first, that the street 'has not been
open to the public use and occupancy of the citizens
thereof or other persons' and second 'has been
enclosed with a fence by the owner or owners of the
adjacent lots.'

Id. at 616 (emphasis added). The court further
explained that 'open to the public' meant 'the
public are not denied access to it and are making
some use of it.' Id.

In the present case, LTV not only excluded the
public by erecting and maintaining a fence, but
employed a security guard to enforce the exclusion.

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(Cite as: Not Reported in N.E.2d)

For more than the statutory period, the public was denied access to the fenced portion of Houston Avenue and the City of Cleveland did not enforce its right to challenge the exclusion pursuant to R.C. 5891.01. Therefore, the trial court's finding must be affirmed.

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

FN1 See Application of Loose (Franklin Cty. App. 1958), 78 Ohio Law Abs. 399, 403.

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LTV Steel Co., Inc. v. City of Cleveland

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Not Reported in N.E.2d, 1998 WL 57085 (Ohio App. 8 Dist.)
(Cite as: Not Reported in N.E.2d)

H

Rocco v. City of Fairview Park, Ohio Ohio App. 8 Dist., 1998. Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Eighth District,
Cuyahoga County.

Frank V. ROCCO, et al. Plaintiffs-Appellants
v.

City of Fairview Park, Ohio et al.
Defendants-Appellees

No. 72263.

Feb. 12, 1998.

Civil Appeal from the Common Pleas Court Case No. CV-298645. Affirmed.

Eli Manos, Anthony J. Coyne, Thomas B. Bralliar, Jr., Mansour, Gavin, Gerlack & Manos Co. L.P.A., Cleveland, for Plaintiffs-Appellants.

Alan E. Johnson, Leo R. Ward, Ward & Associates Co., L.P.A., Patrick F. Roche, Law Director, Davis and Young Co., L.P.A., Cleveland, for Defendant-Appellee City of Fairview Park.

Elliot S. Azoff, Robert C. Petrusis, Baker & Hostetler, LLP, Cleveland, for Defendant-Appellee, Board of Park Commissioners of the Cleveland Metropolitan Park District.

JOURNAL ENTRY AND OPINION

SPELLACY, P.J.

*1 Plaintiffs-appellants, Regina L. Rocco and the estate of Frank V. Rocco ("appellants"), appeal the judgment of the trial court granting the summary judgment motions of defendants-appellees, City of Fairview Park, Ohio ("Fairview Park") and the Board of Park Commissioners of the Cleveland Metropolitan Park District ("Cleveland Metroparks"). Appellants assign the following errors for our review:

I. THE COURT OF COMMON PLEAS ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF APPELLEES, BECAUSE THE RECORD CONTAINS NO EVIDENCE THAT THE CITY OF FAIRVIEW PARK EVER HELD AN INTEREST IN THE PROPERTY DESCRIBED AS "OLD LORAIN ROAD".

II. THE COURT OF COMMON PLEAS ERRED IN CONCLUDING THAT ADVERSE POSSESSION AND THE ABANDONMENT ARE INDISTINCT LEGAL CONCEPTS.

Finding appellants' appeal to lack merit, the judgment of the trial court is affirmed.

I.

On November 20, 1995, appellant, Frank V. Rocco, now deceased, and his wife, Regina L. Rocco, filed a complaint in the Cuyahoga County Common Pleas Court against Fairview Park and Cleveland Metroparks. Appellants also listed Able Fence & Guardrail Co., Able/SS, Inc. and Markie Construction Company as defendants to the action.

Count I of appellants' complaint alleged that defendants took their property interest in Old Lorain Road without payment of just compensation and due process in violation of the Fifth and Fourteenth Amendments of the United States Constitution. Count II of appellants' complaint set forth a claim for inverse condemnation. Count III of appellants' complaint alleged a claim for trespass.

On March 20, 1996, appellants filed a motion for summary judgment. On April 22 and 23, 1996, appellees Fairview Park and Cleveland Metroparks respectively, filed separate motions for summary judgment. On June 21, 1996, Fairview Park filed a motion to strike affidavit testimony of Regina Rocco which was filed on June 12, 1996. On July 31, 1996, the trial court denied appellants' summary

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judgment motion, granted the summary judgment motions filed by Fairview Park and Cleveland Metroparks and granted Fairview Park's motion to strike affidavit of Regina Rocco.

On August 15, 1996, appellants filed a motion for relief from judgment. Appellants' motion, however, was treated by the trial court as a motion for reconsideration pursuant to Civ.R. 54(B) since appellants' claims against the other named defendants remained pending after the court ruled on the parties' motions for summary judgment. On March 3, 1997, the trial court, in its findings of fact and conclusions of law, reaffirmed its judgment denying appellants' motion for summary judgment and motion to strike the affidavit of Regina Rocco. Further, the trial court reaffirmed its judgment granting appellees' separate motions for summary judgment.

On April 15, 1997, appellants, pursuant to Civ.R. 41(A), dismissed all claims against Markie Construction Co., Able Fence and Guardrail and Able/SS, Inc.

II.

In 1958, appellant Frank V. Rocco acquired by warranty deed a certain parcel of land located in the City of Fairview Park, County of Cuyahoga, State of Ohio. The warranty deed described part of the boundary of Frank Rocco's parcel as extending "along the center line of Old Lorain Road, * * * but subject to all legal highways."

*2 Frank Rocco and Regina Rocco ("appellants") married in 1990, and appellant Frank Rocco passed away in January 1996.

In 1910, the municipality known as the City of Fairview Park was incorporated. The portion of Old Lorain Road referenced in the Rocco Deed was located within the boundaries of the municipality when it was incorporated in 1910. Prior to the incorporation, the subject portion of Old Lorain Road was a Cuyahoga County road. On May 13, 1971, the Board of County Commissioners of Cuyahoga County purported to direct "the vacation

of Old Lorain Road, as a county road * * *." (See Exhibit "C", Fairview Park's Motion for Summary Judgment).

On September 21, 1987, the City Council of Fairview Park enacted Ordinance No. 87-36, which authorized the construction of "an eight-foot wide (8) asphalt bikeway from Lorain Road (SR 10) to the Valley Parkway in the City of Fairview Park and Cleveland Metropolitan Park District, a distance of 0.30 miles more or less." (Exhibit "D", Fairview Park's Motion for Summary Judgment). The bikeway was thereafter constructed on Old Lorain Road.

III.

In their first assignment of error, appellants maintain that the lower court erred in granting Fairview Park's and the Cleveland Metropark's motions for summary judgment. In particular, appellants contend that Fairview Park never held an interest in the property described as Old Lorain Road.

The test for granting a motion for summary judgment is set forth in Civ.R. 56 and in numerous cases interpreting the rule. The law is clear that: Summary judgment is appropriately rendered when no genuine issue as to any material fact remains to be litigated; the moving party is entitled to judgment as a matter of law; it appears from the evidence that reasonable minds can come but to one conclusion; and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Lovsin, et al. v. J.C. Penney Company, Inc., et al.* (May 9, 1996), Cuyahoga App. No. 69520, unreported, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 364 N.E.2d 267; *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 375 N.E.2d 46.

The initial issue presented for our review is whether Fairview Park, in fact, obtained a legally cognizable interest in the land located within the boundaries of

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Old Lorain Road when it was incorporated in 1910. Appellants maintain that the warranty deed which Frank Rocco was presented with in 1958 established that appellants, not Fairview Park, owned a fee interest in the disputed property. The warranty deed specifically states that:

Situated in the City of Fairview Park, County of Cuyahoga and State of Ohio, and known as being part of Original Rockport Township Section No. 13 and bounded and described as follows:

Beginning at an angle point in the old center line of Lorain Road 60 feet wide, distant South 83° 50 39 East, measured along said center line, 321.11 feet from the intersection of said center line with the center line of Story Road; thence South 60° 01 16 along old center line of Lorain Road a distance of 44.94 feet; thence North 24° 07 21 East a distance of 157.13 feet to a point in the center line of old Lorain Road; then South 76° 09 40 West along the center line of old Lorain Road a distance of 202.65 feet to the Northeasterly line of land conveyed to The Wilson Properties Company by deed recorded in Volume 4274, Page 449 of Cuyahoga County Records of Deeds; thence South 60° 01 16 East along the Northeasterly line of land so conveyed The Wilson Properties Company a distance of 117.31 feet; thence South 29° 58 44 West a distance of 16 feet to a point in the old center line of Lorain Road and place of beginning, be the same more or less, but subject to all the legal highways.

*3 In *Sroka v. Green Cab Co.* (1929), 35 Ohio App. 438, 172 N.E. 531, this court held that "a county road loses its character as such as soon as it becomes located within the limits of an incorporated village. Thereafter it must be treated as one of the streets of the village." *Sroka, supra* citing *City of Steubenville v. King* (1873), 23 Ohio St. 610.

A complete review of the record in the present case reveals that when Fairview Park was incorporated in 1910, Old Lorain Road, the disputed property, was clearly located within Fairview Park's boundaries. Although the official certified map of the 1910 incorporation does not expressly depict the subject portion of Old Lorain Road, Fairview Park's

boundary lines clearly encompass the area in which Old Lorain Road was situated. Evidence in the record further reveals that Old Lorain Road was considered a county road prior to the incorporation of Fairview Park. In particular, in 1971, the Board of Cuyahoga County Commissioners purported to direct the vacation of Old Lorain Road as a county road.

In the case *sub judice*, the record does not support appellants' assertion that the property which they acquired via warranty deed in 1958 provided them with ownership interest to Old Lorain Road. The evidence, however, does support the conclusion that as of 1910, Fairview Park held an interest in Old Lorain Road. Accordingly, appellants' first assignment of error is without merit.

IV.

In their second assignment of error, appellants contend the trial court erred by failing to recognize abandonment as a distinct legal concept and subsequently granting appellees' motions for summary judgment based on the doctrine of adverse possession.

In the present case, the trial court was presented with the question of whether Fairview Park could have lost possession of Old Lorain Road by informal abandonment or non-user. The trial court, following the holding of this court in *Byerlyte Corp. v. Cleveland* (1940), 32 Ohio Law Abs. 609, 615, citing *Nail & Iron Co. v. Furnace Co.* (1889), 46 Ohio St. 544, 22 N.E. 639, stated that "the loss by mere abandonment, mere non-user, of the common right of highway, rests finally on no other or better footing than loss by adverse possession * * * ." Subsequently, the trial court proceeded in determining ownership of Old Lorain Road by applying the doctrine of adverse possession. We agree with the trial court's analysis and result.

Initially, we note, as did the trial court, that this court's decision in *Byerlyte, supra* is controlling and the doctrine of adverse possession will be applied by this court.

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In order to gain title under the doctrine of adverse possession, " * * * a party must establish that his possession was open, notorious, exclusive, adverse, hostile and continuous for more than twenty-one years." *Davis v. Konjicija* (February 12, 1993), Lake App. No. 92-L-008, unreported, at 6. However, it has generally been held that adverse possession cannot be applied against the state and its political subdivisions. *1540 Columbus Corporation v. Cuyahoga County* (1990), 68 Ohio App.3d 713, 589 N.E.2d 467. R.C. 2305.05 provides an exception to the general principle that municipal corporations are not subject to property loss by adverse possession or prescription. R.C. 2305.05 provides an exception where a municipal street has not been open for public use, and an adjoining property owner fences it in and it remains in open, uninterrupted use for the twenty-one year period. *Id.*

*4 The only evidence presented by appellants that the said property was, in fact, enclosed by a fence for the required statutory time limit was the affidavit testimony of Regina L. Rocco attached to appellants' motion for summary judgment. The trial court, however, granted appellees' motion to strike this affidavit testimony and appellants do not contest the trial court's ruling on appellee's motion. Thus, this court cannot consider the contents of Mrs. Rocco's affidavit as evidence upon review of the case *sub judice*.

The fence requirement set forth in R.C. 2305.05 is mandatory. "When a fence is not constructed, the municipality is not on notice that the use of the land is hostile, and is not in the posture of knowing it must act or lose its interest." *Wyatt v. Ohio Dept. Of Transportation* (1993), 87 Ohio App.3d 1, 621 N.E.2d 822. Thus, where a fence has not been erected, an adverse possession claim cannot survive.

Based on the foregoing, we hold that there was insufficient evidence to support a claim of adverse possession. In particular, no evidence existed in the record that appellants had erected a fence on the property and maintained said fence for the twenty-one year statutory period. Therefore, the trial court's decision to grant appellees' motions for summary judgment was based on competent,

credible evidence and its judgment did not constitute an abuse of discretion. Accordingly, appellants' second assignment of error is not well-taken.

Judgment affirmed.

It is ordered that appellees recover of appellants their costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KENNETH A. ROCCO and JAMES D. SWEENEY, JJ., concur.

N.B. This is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 27. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(B) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(B). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

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END OF DOCUMENT

ARTICLE II: LEGISLATIVE

by oath or affirmation, particularly describing the place to be searched and the person and things to be seized.

(1851)

§15 NO IMPRISONMENT FOR DEBT.

No person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud.

(1851)

§16 REDRESS FOR INJURY; DUE PROCESS.

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

(1851, am. 1912)

§17 NO HEREDITARY PRIVILEGES.

No hereditary emoluments, honors, or privileges, shall ever be granted or conferred by this State.

(1851)

§18 SUSPENSION OF LAWS.

No power of suspending laws shall ever be exercised, except by the General Assembly.

(1851)

§19 EMINENT DOMAIN.

Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

(1851)

§19A DAMAGES FOR WRONGFUL DEATH.

The amount of damages recoverable by civil action in the courts for death caused by the wrongful act, neglect, or default of another, shall not be limited by law.

(1912)

§20 POWERS RESERVED TO THE PEOPLE.

This enumeration of rights shall not be construed to impair or deny others retained by the people, and all powers, not herein delegated, remain with the people.

(1851)

ARTICLE II: LEGISLATIVE

§1 IN WHOM POWER VESTED.

The legislative power of the state shall be vested in a General Assembly consisting of a Senate and House of Representatives but the people reserve to themselves the power to propose to the General Assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided. They also reserve the power to adopt or reject any law, section of any law or any item in any law appropriating money passed by the General Assembly, except as herein after provided; and independent of the General Assembly to propose amendments to the constitution and to adopt or reject the same at the polls. The limitations expressed in the constitution, on the power of the General Assembly to enact laws, shall be deemed limitations on the power of the people to enact laws.

(1851, am. 1912, 1918, 1953)

§1A INITIATIVE AND REFERENDUM TO AMEND CONSTITUTION.

The first aforestated power reserved by the people is designated the initiative, and the signatures of ten per centum of the electors shall be required upon a petition to propose an amendment to the constitution. When a petition signed by the aforesaid required number of electors, shall have been filed with the secretary of state, and verified as herein provided, proposing an amendment to the constitution, the full text of which shall have been set forth in such petition, the secretary of state shall submit for the approval or rejection of the electors, the proposed amendment, in the manner

§ 9.82. Definitions.

As used in sections 9.82 to 9.83 of the Revised Code:

(A) "State" means the state of Ohio, including, but not limited to, the general assembly, the supreme court, the offices of all elected state officers, and all departments, boards, offices, commissions, agencies, institutions, and other instrumentalities of the state of Ohio. "State" does not include political subdivisions.

(B) "Political subdivision" means a county, city, village, township, park district, or school district.

(C) "Personal property" means tangible personal property owned, leased, controlled, or possessed by a state agency and includes, but is not limited to, chattels, movable property, merchandise, furniture, goods, livestock, vehicles, watercraft, aircraft, movable machinery, movable tools, movable equipment, general operating supplies, and media.

(D) "Media" means all active information processing material, including all forms of data, program material, and related engineering specifications employed in any state agency's information processing operation.

(E) "Property" means real and personal property as defined in divisions (C) and (F) of this section and any other property in which the state determines it has an insurable interest.

(F) "Real property" means land or interests in land whose title is vested in the state or that is under the control of the state through a lease purchase agreement, installment purchase, mortgage, lien, or otherwise, and includes, but is not limited to, all buildings, structures, improvements, machinery, equipment, or fixtures erected on, above, or under such land.

(G) "State agency" means every department, bureau, board, commission, office, or other organized body established by the constitution or laws of this state for the exercise of any function of state government, the general assembly, all legislative agencies, the supreme court, and the court of claims. "State agency" does not include any state-supported institutions of higher education, the public employees retirement system, the Ohio police and Fire A pension fund, the state teachers retirement system, the school employees retirement system, the state highway patrol retirement system, or the city of Cincinnati retirement system.

HISTORY: 127 v 667 (Eff 9-17-57); 129 v 582 (Eff 1-10-61); 145 v H 23 (Eff 9-20-93); 148 v H 222. Eff 11-2-99.

Ä Division (G), so in enrolled bill. The amendment in HB 222 (148 v -) changed the fund name from police and fireman's disability and pension fund to the Ohio police and fire pension fund.

§ 1545.07. Board of park commissioners; employees.

The commissioners appointed in accordance with section 1545.05 or pursuant to section 1545.041 [1545.04.1] of the Revised Code shall constitute the board of park commissioners of the park district. Such board shall be a body politic and corporate, and may sue and be sued as provided in sections 1545.01 to 1545.28 of the Revised Code. Such board may employ a secretary and such other employees as are necessary in the performance of the powers conferred in such sections. The board may appoint a treasurer to act as custodian of the board's funds and as fiscal officer for the park district. For the purposes of acquiring, planning, developing, protecting, maintaining, or improving lands and facilities thereon under section 1545.11 of the Revised Code, and for other types of assistance which it finds necessary in carrying out its duties under Chapter 1545. of the Revised Code, the board may hire and contract for professional, technical, consulting, and other special services, including, in accordance with division (D) of section 309.09 of the Revised Code, the legal services of the prosecuting attorney of the county in which the park district is located, and may purchase goods. In procuring any goods, the board shall contract as a contracting authority under sections 307.86 to 307.91 of the Revised Code, to the same extent and with the same limitations as a board of county commissioners. In procuring services, the board shall contract in the manner and under procedures established by the bylaws of the board as required in section 1545.09 of the Revised Code.

HISTORY: GC § 2976-6; 107 v 65, § 6; Bureau of Code Revision, 10-1-53; 134 v H 595 (Eff 11-25-71); 142 v H 231 (Eff 10-5-87); 146 v H 268. Eff 5-8-96.

§ 1545.11. Power to acquire property.

The board of park commissioners may acquire lands either within or without the park district for conversion into forest reserves and for the conservation of the natural resources of the state, including streams, lakes, submerged lands, and swamplands, and to those ends may create parks, parkways, forest reservations, and other reservations and afforest, develop, improve, protect, and promote the use of the same in such manner as the board deems conducive to the general welfare. Such lands may be acquired by such board, on behalf of said district, (1) by gift or devise, (2) by purchase for cash, by purchase by installment payments with or without a mortgage, by entering into lease-purchase agreements, by lease with or without option to purchase, or, (3) by appropriation. In furtherance of the use and enjoyment of the lands controlled by it, the board may accept donations of money or other property, or may act as trustees of land, money, or other property, and use and administer the same as stipulated by the donor, or as provided in the trust agreement. The terms of each such donation or trust shall first be approved by the probate court before acceptance by the board.

In case of appropriation, the proceedings shall be instituted in the name of the board, and shall be conducted in the manner provided in sections 163.01 to 163.22, inclusive, of the Revised Code.

This section applies to districts created prior to April 16, 1920.

HISTORY: GC § 2976-7; 107 v 65, § 7; 108 v PtII, 1097; 113 v 659; Bureau of Code Revision, 10-1-53; 125 v 903(930) (Eff 10-1-53); 129 v 235 (Eff 8-4-61); 131 v 539 (Eff 1-1-66); 134 v S 247. Eff 10-20-72.

§ 1545.13. Designated law enforcement officers.

(A) As used in this section, "felony" has the same meaning as in section 109.511 [109.51.1] of the Revised Code.

(B) The employees that the board of park commissioners designates for that purpose may exercise all the powers of police officers within and adjacent to the lands under the jurisdiction and control of the board or when acting as authorized by section 1545.131 [1545.13.1] or 1545.132 [1545.13.2] of the Revised Code. Before exercising the powers of police officers, the designated employees shall comply with the certification requirement established in section 109.77 of the Revised Code, take an oath, and give a bond to the state in the sum that the board prescribes, for the proper performance of their duties in that respect. This division is subject to division (C) of this section.

(C) (1) The board of park commissioners shall not designate an employee as provided in division (B) of this section on a permanent basis, on a temporary basis, for a probationary term, or on other than a permanent basis if the employee previously has been convicted of or has pleaded guilty to a felony.

(2) (a) The board of park commissioners shall terminate the employment of an employee designated as provided in division (B) of this section if the employee does either of the following:

(i) Pleads guilty to a felony;

(ii) Pleads guilty to a misdemeanor pursuant to a negotiated plea agreement as provided in division (D) of section 2929.43 of the Revised Code in which the employee agrees to surrender the certificate awarded to the employee under section 109.77 of the Revised Code.

(b) The board shall suspend from employment an employee designated as provided in division (B) of this section if the employee is convicted, after trial, of a felony. If the employee files an appeal from that conviction and the conviction is upheld by the highest court to which the appeal is taken or if the employee does not file a timely appeal, the board shall terminate the employment of that employee. If the employee files an appeal that results in the employee's acquittal of the felony or conviction of a misdemeanor, or in the dismissal of the felony charge against the employee, the board shall reinstate that employee. An employee who is reinstated under division (C)(2)(b) of this section shall not receive any back pay unless that employee's conviction of the felony was reversed on appeal, or the felony charge was dismissed, because the court found insufficient evidence to convict the employee of the felony.

(3) Division (C) of this section does not apply regarding an offense that was committed prior to January 1, 1995.

(4) The suspension from employment, or the termination of the employment, of an employee under division (C)(2) of this section shall be in accordance with Chapter 119 of the Revised Code.

HISTORY: GC § 2976-10h; 108 v PtII, 1097; Bureau of Code Revision, 10-1-53; 140 v H 759 (Eff 3-28-85); 144 v S 174 (Eff 7-31-92); 146 v H 566. Eff 10-16-96; 149 v H 490, § 1, eff. 1-1-04.

§ 1545.20. Tax levy.

A board of park commissioners may levy taxes upon all the taxable property within the park district in an amount not in excess of one-half of one mill upon each dollar of the district tax valuation in any one year, subject to the combined maximum levy for all purposes otherwise provided by law. After the budget commission of the county in which the district is located certifies such levy, or such modification thereof as it considers advisable, to the county auditor, he shall place it upon the tax duplicate. The board may then borrow money in anticipation of the collection of such tax, and issue the negotiable notes of such board therefor in an amount not in excess of fifty per cent of the proceeds of such tax, based upon the amount of the current tax valuation. Such notes shall not be issued for a period longer than one year, and shall be payable out of the proceeds of such levy. To the extent of such notes and the interest which accrues thereon such levy shall be exclusively appropriated to the payment of such notes. Any portion of such notes remaining unpaid through any deficiency in such levy shall be payable out of the next ensuing levy which shall be made by said board in the next ensuing year in an amount at least sufficient to provide for the payment of said notes, but not in excess of one half of one mill in accordance with section 133.17 of the Revised Code.

HISTORY: GC § 2976-10; 107 v 65, § 10; 123 v 347; Bureau of Code Revision, 10-1-53; 143 v H 230. Eff 10-30-89.

§ 2305.05. Real estate dedicated to public uses.

If a street or alley, or any part thereof, laid out and shown on the recorded plat of a municipal corporation, has not been opened to the public use and occupancy of the citizens thereof, or other persons, and has been enclosed with a fence by the owners of the inlots, lots, or outlots lying on, adjacent to, or along such street or alley, or part thereof, and has remained in the open, uninterrupted use, adverse possession, and occupancy of such owners for the period of twenty-one years, and if such street, alley, inlot, or outlot is a part of the tract of land so laid out by the original proprietors, the public easement therein shall be extinguished and the right of such municipal corporation, the citizens thereof, or other persons, and the legislative authority of such municipal corporation and the legal authorities thereof, to use, control, or occupy so much of such street or alley as has been fenced, used, possessed, and occupied, shall be barred, except to the owners of such inlots or outlots lying on, adjacent to, or along such streets or alleys who have occupied them in the manner mentioned in this section.

HISTORY: RS § 4977; S&C 944; 51 v 57, § 9; 77 v 303; 83 v 74; 86 v 300; GC § 11220; Bureau of Code Revision. Eff 10-1-53.

§ 2743.02. State waiver of immunity; civil action against state officer or employee.

(A) (1) The state hereby waives its immunity from liability, except as provided for the office of the state fire marshal in division (G)(1) of section 9.60 and division (B) of section 3737.221 [3737.22.1] of the Revised Code and subject to division (H) of this section, and consents to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with the same rules of law applicable to suits between private parties, except that the determination of liability is subject to the limitations set forth in this chapter and, in the case of state universities or colleges, in section 3345.40 of the Revised Code, and except as provided in division (A)(2) or (3) of this section. To the extent that the state has previously consented to be sued, this chapter has no applicability.

Except in the case of a civil action filed by the state, filing a civil action in the court of claims results in a complete waiver of any cause of action, based on the same act or omission, which the filing party has against any officer or employee, as defined in section 109.36 of the Revised Code. The waiver shall be void if the court determines that the act or omission was manifestly outside the scope of the officer's or employee's office or employment or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

(2) If a claimant proves in the court of claims that an officer or employee, as defined in section 109.36 of the Revised Code, would have personal liability for the officer's or employee's acts or omissions but for the fact that the officer or employee has personal immunity under section 9.86 of the Revised Code, the state shall be held liable in the court of claims in any action that is timely filed pursuant to section 2743.16 of the Revised Code and that is based upon the acts or omissions.

(3) (a) Except as provided in division (A)(3)(b) of this section, the state is immune from liability in any civil action or proceeding involving the performance or nonperformance of a public duty, including the performance or nonperformance of a public duty that is owed by the state in relation to any action of an individual who is committed to the custody of the state.

(b) The state immunity provided in division (A)(3)(a) of this section does not apply to any action of the state under circumstances in which a special relationship can be established between the state and an injured party. A special relationship under this division is demonstrated if all of the following elements exist:

(i) An assumption by the state, by means of promises or actions, of an affirmative duty to act on behalf of the party who was allegedly injured;

(ii) Knowledge on the part of the state's agents that inaction of the state could lead to harm;

(iii) Some form of direct contact between the state's agents and the injured party;

(iv) The injured party's justifiable reliance on the state's affirmative undertaking.

(B) The state hereby waives the immunity from liability of all hospitals owned or operated by one or more political subdivisions and consents for them to be sued, and to have their liability determined, in the court of common pleas, in accordance with the same rules of law applicable to suits between private parties, subject to the limitations set forth in this chapter. This division is also applicable to hospitals owned or operated by political subdivisions which have been determined by the supreme court to be subject to suit prior to July 28, 1975.

(C) Any hospital, as defined in section 2305.113 [2305.11.3] of the Revised Code, may purchase liability insurance covering its operations and activities and its agents, employees, nurses, interns, residents, staff, and members of the governing board and committees, and, whether or not such

insurance is purchased, may, to such extent as its governing board considers appropriate, indemnify or agree to indemnify and hold harmless any such person against expense, including attorney's fees, damage, loss, or other liability arising out of, or claimed to have arisen out of, the death, disease, or injury of any person as a result of the negligence, malpractice, or other action or inaction of the indemnified person while acting within the scope of the indemnified person's duties or engaged in activities at the request or direction, or for the benefit, of the hospital. Any hospital electing to indemnify such persons, or to agree to so indemnify, shall reserve such funds as are necessary, in the exercise of sound and prudent actuarial judgment, to cover the potential expense, fees, damage, loss, or other liability. The superintendent of insurance may recommend, or, if such hospital requests the superintendent to do so, the superintendent shall recommend, a specific amount for any period that, in the superintendent's opinion, represents such a judgment. This authority is in addition to any authorization otherwise provided or permitted by law.

(D) Recoveries against the state shall be reduced by the aggregate of insurance proceeds, disability award, or other collateral recovery received by the claimant. This division does not apply to civil actions in the court of claims against a state university or college under the circumstances described in section 3345.40 of the Revised Code. The collateral benefits provisions of division (B)(2) of that section apply under those circumstances.

(E) The only defendant in original actions in the court of claims is the state. The state may file a third-party complaint or counterclaim in any civil action, except a civil action for two thousand five hundred dollars or less, that is filed in the court of claims.

(F) A civil action against an officer or employee, as defined in section 109.36 of the Revised Code, that alleges that the officer's or employee's conduct was manifestly outside the scope of the officer's or employee's employment or official responsibilities, or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner shall first be filed against the state in the court of claims, which has exclusive, original jurisdiction to determine, initially, whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code and whether the courts of common pleas have jurisdiction over the civil action. The officer or employee may participate in the immunity determination proceeding before the court of claims to determine whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code.

The filing of a claim against an officer or employee under this division tolls the running of the applicable statute of limitations until the court of claims determines whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code.

(G) Whenever a claim lies against an officer or employee who is a member of the Ohio national guard, and the officer or employee was, at the time of the act or omission complained of, subject to the "Federal Tort Claims Act," 60 Stat. 842 (1946), 28 U.S.C. 2671, et seq., then the Federal Tort Claims Act is the exclusive remedy of the claimant and the state has no liability under this section.

(H) If an inmate of a state correctional institution has a claim against the state for the loss of or damage to property and the amount claimed does not exceed three hundred dollars, before commencing an action against the state in the court of claims, the inmate shall file a claim for the loss or damage under the rules adopted by the director of rehabilitation and correction pursuant to this division. The inmate shall file the claim within the time allowed for commencement of a civil action under section 2743.16 of the Revised Code. If the state admits or compromises the claim, the director shall make payment from a fund designated by the director for that purpose. If the state denies the claim or does not compromise the claim at least sixty days prior to expiration of the time allowed for commencement of a civil action based upon the loss or damage under section 2743.16 of the Revised Code, the inmate may commence an action in the court of claims under this chapter to recover damages for the loss or damage.

The director of rehabilitation and correction shall adopt rules pursuant to Chapter 119. of the Revised Code to implement this division.

HISTORY: 135 v H 800 (Eff 1-1-75); 136 v H 682 (Eff 7-28-75); 136 v H 1192 (Eff 1-30-76); 136 v H 82 (Eff 9-29-76); 137 v H 149 (Eff 2-7-78); 138 v S 76 (Eff 3-13-80); 142 v H 267 (Eff 10-20-87); 143 v H 111 (Eff 7-1-89); 145 v S 172 (Eff 9-29-94); 149 v S 115 (Eff 3-19-2003); 149 v S 281. Eff 4-11-2003; 150 v H 95, § 1, eff. 9-26-03; 150 v H 316, § 1, eff. 3-31-05; 151 v H 25, § 1, eff. 11-3-05.

§ 2744.01. Definitions.

As used in this chapter:

(A) "Emergency call" means a call to duty, including, but not limited to, communications from citizens, police dispatches, and personal observations by peace officers of inherently dangerous situations that demand an immediate response on the part of a peace officer.

(B) "Employee" means an officer, agent, employee, or servant, whether or not compensated or full-time or part-time, who is authorized to act and is acting within the scope of the officer's, agent's, employee's, or servant's employment for a political subdivision. "Employee" does not include an independent contractor and does not include any individual engaged by a school district pursuant to section 3319.301 [3319.30.1] of the Revised Code. "Employee" includes any elected or appointed official of a political subdivision. "Employee" also includes a person who has been convicted of or pleaded guilty to a criminal offense and who has been sentenced to perform community service work in a political subdivision whether pursuant to section 2951.02 of the Revised Code or otherwise, and a child who is found to be a delinquent child and who is ordered by a juvenile court pursuant to section 2152.19 or 2152.20 of the Revised Code to perform community service or community work in a political subdivision.

(C) (1) "Governmental function" means a function of a political subdivision that is specified in division (C)(2) of this section or that satisfies any of the following:

(a) A function that is imposed upon the state as an obligation of sovereignty and that is performed by a political subdivision voluntarily or pursuant to legislative requirement;

(b) A function that is for the common good of all citizens of the state;

(c) A function that promotes or preserves the public peace, health, safety, or welfare; that involves activities that are not engaged in or not customarily engaged in by nongovernmental persons; and that is not specified in division (G)(2) of this section as a proprietary function.

(2) A "governmental function" includes, but is not limited to, the following:

(a) The provision or nonprovision of police, fire, emergency medical, ambulance, and rescue services or protection;

(b) The power to preserve the peace; to prevent and suppress riots, disturbances, and disorderly assemblages; to prevent, mitigate, and clean up releases of oil and hazardous and extremely hazardous substances as defined in section 3750.01 of the Revised Code; and to protect persons and property;

(c) The provision of a system of public education;

- (d) The provision of a free public library system;
- (e) The regulation of the use of, and the maintenance and repair of, roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, and public grounds;
- (f) Judicial, quasi-judicial, prosecutorial, legislative, and quasi-legislative functions;
- (g) The construction, reconstruction, repair, renovation, maintenance, and operation of buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses;
- (h) The design, construction, reconstruction, renovation, repair, maintenance, and operation of jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code;
- (i) The enforcement or nonperformance of any law;
- (j) The regulation of traffic, and the erection or nonerection of traffic signs, signals, or control devices;
- (k) The collection and disposal of solid wastes, as defined in section 3734.01 of the Revised Code, including, but not limited to, the operation of solid waste disposal facilities, as "facilities" is defined in that section, and the collection and management of hazardous waste generated by households. As used in division (C)(2)(k) of this section, "hazardous waste generated by households" means solid waste originally generated by individual households that is listed specifically as hazardous waste in or exhibits one or more characteristics of hazardous waste as defined by rules adopted under section 3734.12 of the Revised Code, but that is excluded from regulation as a hazardous waste by those rules.
- (l) The provision or nonprovision, planning or design, construction, or reconstruction of a public improvement, including, but not limited to, a sewer system;
- (m) The operation of a job and family services department or agency, including, but not limited to, the provision of assistance to aged and infirm persons and to persons who are indigent;
- (n) The operation of a health board, department, or agency, including, but not limited to, any statutorily required or permissive program for the provision of immunizations or other inoculations to all or some members of the public, provided that a "governmental function" does not include the supply, manufacture, distribution, or development of any drug or vaccine employed in any such immunization or inoculation program by any supplier, manufacturer, distributor, or developer of the drug or vaccine;
- (o) The operation of mental health facilities, mental retardation or developmental disabilities facilities, alcohol treatment and control centers, and children's homes or agencies;
- (p) The provision or nonprovision of inspection services of all types, including, but not limited to, inspections in connection with building, zoning, sanitation, fire, plumbing, and electrical codes, and the taking of actions in connection with those types of codes, including, but not limited to, the approval of

plans for the construction of buildings or structures and the issuance or revocation of building permits or stop work orders in connection with buildings or structures;

(q) Urban renewal projects and the elimination of slum conditions;

(r) Flood control measures;

(s) The design, construction, reconstruction, renovation, operation, care, repair, and maintenance of a township cemetery;

(t) The issuance of revenue obligations under section 140.06 of the Revised Code;

(u) The design, construction, reconstruction, renovation, repair, maintenance, and operation of any school athletic facility, school auditorium, or gymnasium or any recreational area or facility, including, but not limited to, any of the following:

(i) A park, playground, or playfield;

(ii) An indoor recreational facility;

(iii) A zoo or zoological park;

(iv) A bath, swimming pool, pond, water park, wading pool, wave pool, water slide, or other type of aquatic facility;

(v) A golf course;

(vi) A bicycle motocross facility or other type of recreational area or facility in which bicycling, skating, skate boarding, or scooter riding is engaged;

(vii) A rope course or climbing walls;

(viii) An all-purpose vehicle facility in which all-purpose vehicles, as defined in section 4519.01 of the Revised Code, are contained, maintained, or operated for recreational activities.

(v) The provision of public defender services by a county or joint county public defender's office pursuant to Chapter 120. of the Revised Code;

(w) (i) At any time before regulations prescribed pursuant to 49 U.S.C.A. 20153 become effective, the designation, establishment, design, construction, implementation, operation, repair, or maintenance of a public road rail crossing in a zone within a municipal corporation in which, by ordinance, the legislative authority of the municipal corporation regulates the sounding of locomotive horns, whistles, or bells;

(ii) On and after the effective date of regulations prescribed pursuant to 49 U.S.C.A. 20153, the designation, establishment, design, construction, implementation, operation, repair, or maintenance of a public road rail crossing in such a zone or of a supplementary safety measure, as defined in 49 U.S.C.A. 20153, at or for a public road rail crossing, if and to the extent that the public road rail crossing is

excepted, pursuant to subsection (c) of that section, from the requirement of the regulations prescribed under subsection (b) of that section.

(x) A function that the general assembly mandates a political subdivision to perform.

(D) "Law" means any provision of the constitution, statutes, or rules of the United States or of this state; provisions of charters, ordinances, resolutions, and rules of political subdivisions; and written policies adopted by boards of education. When used in connection with the "common law," this definition does not apply.

(E) "Motor vehicle" has the same meaning as in section 4511.01 of the Revised Code.

(F) "Political subdivision" or "subdivision" means a municipal corporation, township, county, school district, or other body corporate and politic responsible for governmental activities in a geographic area smaller than that of the state. "Political subdivision" includes, but is not limited to, a county hospital commission appointed under section 339.14 of the Revised Code, board of hospital commissioners appointed for a municipal hospital under section 749.04 of the Revised Code, board of hospital trustees appointed for a municipal hospital under section 749.22 of the Revised Code, regional planning commission created pursuant to section 713.21 of the Revised Code, county planning commission created pursuant to section 713.22 of the Revised Code, joint planning council created pursuant to section 713.231 [713.23.1] of the Revised Code, interstate regional planning commission created pursuant to section 713.30 of the Revised Code, port authority created pursuant to section 4582.02 or 4582.26 of the Revised Code or in existence on December 16, 1964, regional council established by political subdivisions pursuant to Chapter 167. of the Revised Code, emergency planning district and joint emergency planning district designated under section 3750.03 of the Revised Code, joint emergency medical services district created pursuant to section 307.052 [307.05.2] of the Revised Code, fire and ambulance district created pursuant to section 505.375 [505.37.5] of the Revised Code, joint interstate emergency planning district established by an agreement entered into under that section, county solid waste management district and joint solid waste management district established under section 343.01 or 343.012 [343.01.2] of the Revised Code, community school established under Chapter 3314. of the Revised Code, the county or counties served by a community-based correctional facility and program or district community-based correctional facility and program established and operated under sections 2301.51 to 2301.58 of the Revised Code, a community-based correctional facility and program or district community-based correctional facility and program that is so established and operated, and the facility governing board of a community-based correctional facility and program or district community-based correctional facility and program that is so established and operated.

(G) (1) "Proprietary function" means a function of a political subdivision that is specified in division (G)(2) of this section or that satisfies both of the following:

(a) The function is not one described in division (C)(1)(a) or (b) of this section and is not one specified in division (C)(2) of this section;

(b) The function is one that promotes or preserves the public peace, health, safety, or welfare and that involves activities that are customarily engaged in by nongovernmental persons.

(2) A "proprietary function" includes, but is not limited to, the following:

(a) The operation of a hospital by one or more political subdivisions;

(b) The design, construction, reconstruction, renovation, repair, maintenance, and operation of a public cemetery other than a township cemetery;

(c) The establishment, maintenance, and operation of a utility, including, but not limited to, a light, gas, power, or heat plant, a railroad, a busline or other transit company, an airport, and a municipal corporation water supply system;

(d) The maintenance, destruction, operation, and upkeep of a sewer system;

(e) The operation and control of a public stadium, auditorium, civic or social center, exhibition hall, arts and crafts center, band or orchestra, or off-street parking facility.

(H) "Public roads" means public roads, highways, streets, avenues, alleys, and bridges within a political subdivision. "Public roads" does not include berms, shoulders, rights-of-way, or traffic control devices unless the traffic control devices are mandated by the Ohio manual of uniform traffic control devices.

(I) "State" means the state of Ohio, including, but not limited to, the general assembly, the supreme court, the offices of all elected state officers, and all departments, boards, offices, commissions, agencies, colleges and universities, institutions, and other instrumentalities of the state of Ohio. "State" does not include political subdivisions.

HISTORY: 141 v H 176 (Eff 11-20-85); 141 v H 205, § 1 (Eff 6-7-86); 141 v H 205, § 3 (Eff 1-1-87); 142 v H 295 (Eff 6-10-87); 142 v H 815 (Eff 12-12-88); 142 v S 367 (Eff 12-14-88); 143 v H 656 (Eff 4-18-90); 144 v H 210 (Eff 5-1-92); 144 v H 723 (Eff 4-16-93); 145 v H 152 (Eff 7-1-93); 145 v H 384 (Eff 11-11-94); 146 v H 192 (Eff 11-21-95); 146 v H 350 (Eff 1-27-97); 147 v H 215 (Eff 6-30-97); 148 v H 205 (Eff 9-24-99); 149 v S 108, § 2.01 (Eff 7-6-2001); 149 v S 24, § 1 (Eff 10-26-2001); 148 v S 179, § 3 (Eff 1-1-2002); 149 v S 108, § 2.03 (Eff 1-1-2002); 149 v S 24, § 3 (Eff 1-1-2002); 149 v S 106. Eff 4-9-2003; 150 v S 222, § 1, eff. 4-27-05; 151 v H 162, § 1, eff. 10-12-06.

The provisions of §§ 3, 4 of SB 106 (149 v -) read as follows:

SECTION 3. Sections 723.01, 1533.18, 2744.01, 2744.02, 2744.03, 2744.04, 2744.05, 2744.06, 2744.07, 4582.27, 5511.01, 5591.36, and 5591.37 of the Revised Code, as amended by this act, apply only to causes of action that accrue on or after the effective date of this act. Any cause of action that accrues prior to the effective date of this act is governed by the law in effect when the cause of action accrued.

SECTION 4. Section 2744.01 of the Revised Code is presented in this act as a composite of the section as amended by both Sub. S.B. 24 and Sub. S.B. 108 of the 124th General Assembly. The General Assembly, applying the principle stated in division (B) of section 1.52 of the Revised Code that amendments are to be harmonized if reasonably capable of simultaneous operation, finds that the composite is the resulting version of the section in effect prior to the effective date of the section as presented in this act.

The provisions of § 3(C) of SB 108 (149 v -) read as follows:

(C) In Section 2.03 of this act sections 2744.01 and 2744.03 of the Revised Code are amended effective January 1, 2002, to continue the amendments made to those sections by Section 2.01 of this act as explained in division (A)(1) of this section. Sections 2744.01 and 2744.03 were amended subsequently to Am. Sub. H.B. 350 by Am. Sub. S.B. 179 of the 123rd General Assembly, effective January 1, 2002.

Effect of Amendments

151 v H 162, effective October 12, 2006, in (F), added the language beginning "the county or counties served" to the end and made related changes.

150 v S 222, effective April 27, 2005, in (F), inserted "board of hospital commissioners ... 749.22 of the Revised Code".

IN THE SUPREME COURT OF OHIO

RICHARD HOUCK, *et al.*, / OHIO SUPREME COURT
/ CASE NO. 06-1262
Appellants /
/ vs. / ON APPEAL FROM ERIE COUNTY
/ COURT OF APPEALS,
BOARD OF PARK COMMISSIONERS / SIXTH APPELLATE DISTRICT
/ HURON COUNTY PARK DISTRICT, *et al.* /
Appellees /
/

* * * *

**SUPPLEMENT TO THE
MERIT BRIEF OF APPELLANT RICHARD HOUCK**

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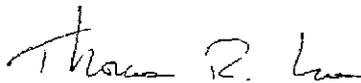
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Attorneys for Appellees

Pursuant to The Rules of Practice of the Supreme Court of Ohio, Rule VII, § 1(A), appellants submit the attached in supplement of their Merit Brief. The attached map and affidavits of Richard Houck, Mary Margaret Smith, and Robert E. Stieber constitute those portions of the record necessary to enable the Supreme Court of Ohio to determine the questions presented.

Respectfully submitted:



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419-627-0400
Attorneys for Appellants

PROOF OF SERVICE

This is to certify that a copy of the foregoing Supplement to Merit Brief has been sent by ordinary United States mail, postage prepaid, on this 21st day of December, 2006 to:

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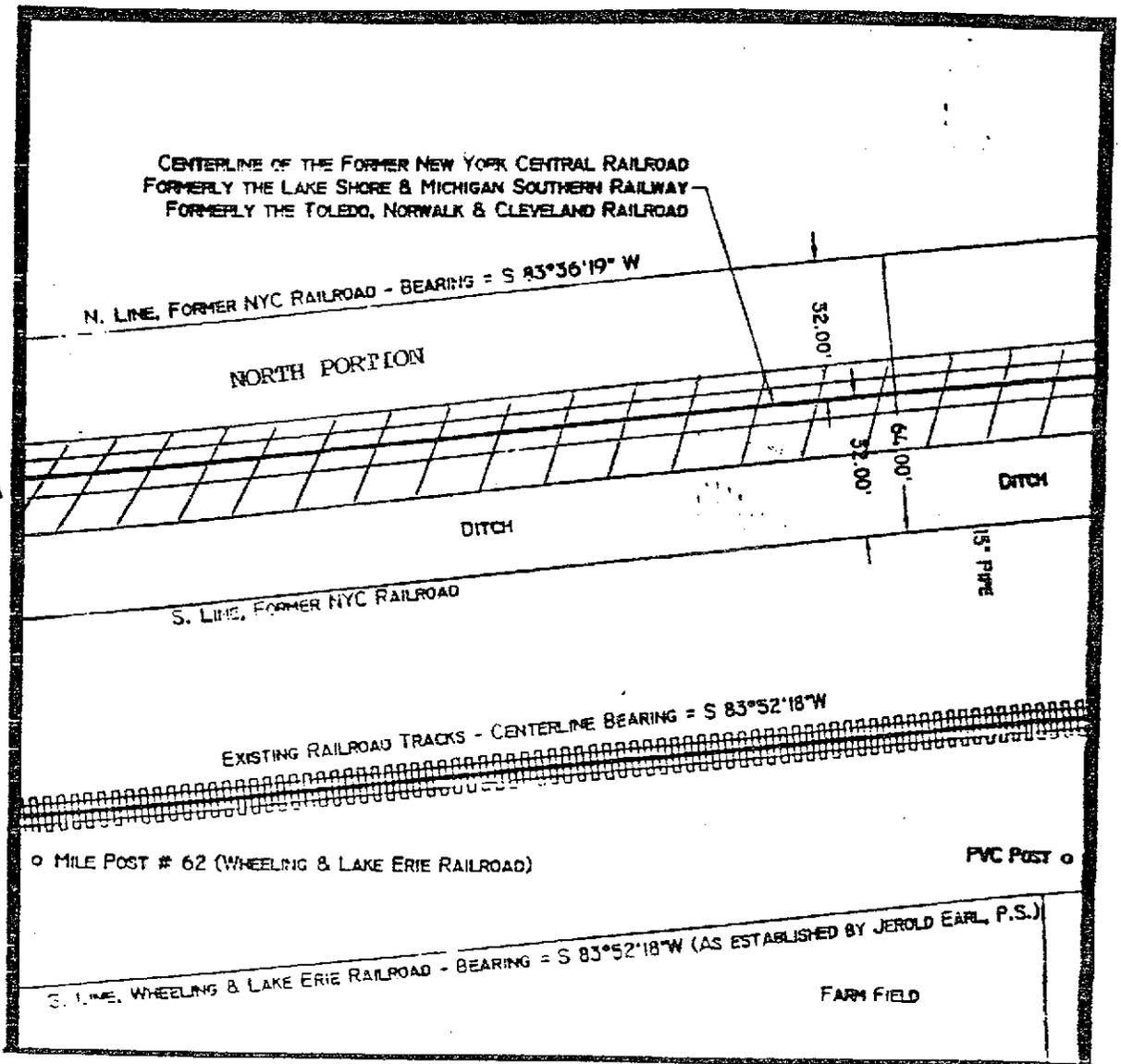
Affidavit of Richard HouckPage S2

Notary Public Seal.....Page S3

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Affidavit of Robert E. StieberPage S5

Detail 2 - 1" = 40'



SWORN TO AND SUBSCRIBED before me, a Notary Public, in and for the State of Ohio, Huron County, on this the 14th day of June, 2005.

Lori J. Demres

NOTARY PUBLIC

my commission expires:

LORI J. DEMRES
NOTARY PUBLIC, STATE OF OHIO
MY COMMISSION EXPIRES APR. 4, 2006

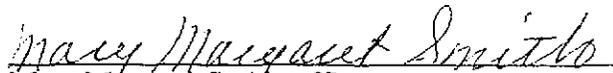


State of Ohio)
County of Huron)

ss. AFFIDAVIT OF MARY MARGARET SMITH

I, Mary Margaret Smith, being first sworn and of statutory age and sound mind, do swear and state the following:

1. That I was born on January 14, 1927 and that I currently reside at 2246 U.S. Route 20, Monroeville, Ohio 44847.
2. That my deceased husband, Eldon Smith, was a named plaintiff in the matter styled *Houck et al. v. Board of Park Commissioners Huron County Park District.*, currently pending in the Huron County Common Pleas Court, Case No. CVH 2003 0946.
3. That I testify to all items sworn to in this affidavit by my own personal knowledge.
4. That to my own personal knowledge, in 1949 my husband, Eldon Smith, continuously began farming and cultivating property owned by Arthur F. Henry, who owned the property prior to his son, Frederic C. Henry.
5. That this property included the disputed railroad property up to the railroad ties of the, then active, railroad.
6. My husband farmed the property, described in the previous paragraph, up to the railroad ties on behalf of Arthur F. Henry from 1949 through 1966.
7. That my husband became a tenant farmer and farmed this same property, in his own right and for his own benefit, from 1966 until the property was sold to plaintiff Richard Houck in the 1990's.
8. That in 1979, I assisted my husband and others in clearing away underbrush and overgrowth on the railroad right-of-way and that in 1979 my husband began to farm the land where the railroad tracks had previously been located.
9. In September 1979, there were no railroad tracks, railroad ties, or appreciable ballast located on the site where the railroad tracks used to run. There were only bushes, shrubs and small trees which I helped to remove at that time.
10. Further, affiant sayeth naught...


Mary Margaret Smith, affiant

SWORN TO AND SUBSCRIBED before me, a Notary Public, in and for the State of Ohio, Huron County, on this the 13th day of June, 2005.


NOTARY PUBLIC

my commission expires:

THOMAS R. LUCAS
Notary Public/Attorney At Law
My Commission Does Not Expire
O.R.C. 147.03

State of Ohio)
) ss. AFFIDAVIT OF ROBERT E. STIEBER
County of Huron)

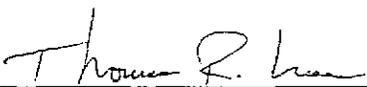
I, Robert E. Stieber, being first sworn and of statutory age and sound mind, do swear and state the following:

1. That I was born on September 29, 1931 and that I currently reside at 4390 Huber Road, Norwalk, Ohio 44857.
2. That I am a named plaintiff in the matter styled *Houck et al. v. Board of Park Commissioners Huron County Park District.*, currently pending in the Huron County Common Pleas Court, Case No. CVH 2003 0946. As such, I have personal knowledge of the property matters in dispute in that litigation.
3. That I testify to all items sworn to in this affidavit by my own personal knowledge.
4. That to my own personal knowledge, since at least 1965, Eldon Smith farmed and cultivated property up to the railroad ties at approximately the location of the occupational line as marked in the attached maps in detail #1, #2, #3. Beginning in 1979, Eldon Smith's farming and cultivation also included the property marked in the attached maps as a stone drive.
5. In June 1979, I paid Harold H. Slessman approximately \$2,267.90 for the removal of bushes, shrubs, and small trees located in the drainage ditch adjacent to the former railroad right-of-way.
6. In 1979, I was leasing farmland for the growing of crops and I utilized the drainage ditch for the proper drainage of crops planted in my leased farmland adjacent to the former railroad right-of-way.
7. In September 1979, there were no railroad tracks, railroad ties, or appreciable ballast located on the site where the railroad tracks used to run.
8. That entrance upon the former railroad right-of-way is necessary for access to the drainage ditch in order to maintain the ditch and keep it clear from debris and that I have maintained the drainage ditch and access road continuously from 1979 through the present.
9. Further, affiant sayeth naught...



Robert E. Stieber, affiant

SWORN TO AND SUBSCRIBED before me, a Notary Public, in and for the State of Ohio, Huron County, on this the 14th day of June, 2005.



NOTARY PUBLIC

my commission expires:

THOMAS R. LUCAS
Notary Public/Attorney At Law
My Commission Does Not Expire
O.R.C. 147.03

§ 1519.01. Purposes and use of state trails.

The director of natural resources shall plan and administer a state system of recreational trails for hiking, bicycling, horseback riding, ski touring, canoeing, and other nonmotorized forms of recreational travel. The system may interconnect state parks, forests, wildlife areas, nature preserves, scenic rivers, and other places of scenic or historic interest to the maximum practicable extent. It shall provide circuit trails for day use and access trails wherever possible. The director may, by the adoption of rules in accordance with Chapter 119 of the Revised Code, restrict uses of the trails to insure user safety, prevent damage to the trail routes, and prevent conflicting uses. As used in this chapter, "state trail" means any trail acquired by the director, or trail established or maintained pursuant to an agreement, under section 1519.02 of the Revised Code, and any other trail on lands under his jurisdiction that he designates as a state trail by entry in his journal. Any person who owns land along a state trail may use or authorize use of motorized vehicles across the trail for purposes incident to ownership and management of his land.

HISTORY: 134 v S 247 (Eff 10-20-72); 142 v H 514. Eff 2-11-88.



§ 1519.02. Trail right-of-way acquisition, improvement, maintenance, and supervision.

The director of natural resources may acquire real property or any estate, right, or interest therein for the purpose of establishing, protecting, and maintaining any state recreational trail. The director may appropriate real property or any estate, right, or interest therein for trail purposes only along a canal, watercourse, stream, existing or abandoned road, highway, street, logging road, railroad, or ridge or other landform or topographic feature particularly suited for nonmotorized vehicular recreational use, and may not appropriate more than twenty-five acres including land purchased with or without appropriation proceedings along any mile of trail. Any state department or agency or any political subdivision may transfer real property or any estate right, or interest therein to the director for such purpose, or may enter into an agreement with the director for the establishment, protection, and maintenance of a trail. The director may transfer real property or any estate, right, or interest therein to any political subdivision pursuant to an agreement whereby the political subdivision maintains and protects a trail. The director may enter into agreements with private organizations or with agencies of the United States to provide for maintenance of any trail or section thereof. The director shall provide campsites, shelters, footbridges, water, sanitary [sanitation], watercraft launching, and other facilities for recreational use, nature and historical interpretation, and administration of the state trails system. The director may cooperate with the director of highways in providing appropriate means for trails to cross highways. The director may restore historical sites along a trail. The director shall publish and distribute maps, guides, pamphlets, and other interpretative literature on the state trails system and on individual trails which the director considers suitable for extensive public use.

Any instrument by which real property is acquired pursuant to this section shall identify the agency of the state that has the use and benefit of the real property as specified in section 5301.012 [5301.01.2] of the Revised Code.

HISTORY: 134 v S 247 (Eff 10-20-72); 148 v H 19. Eff 10-26-99.

[§ 1533.18.1] § 1533.181. Immunity from liability to recreational users.

(A) No owner, lessee, or occupant of premises:

- (1) Owes any duty to a recreational user to keep the premises safe for entry or use;
- (2) Extends any assurance to a recreational user, through the act of giving permission, that the premises are safe for entry or use;
- (3) Assumes responsibility for or incurs liability for any injury to person or property caused by any act of a recreational user.

(B) Division (A) of this section applies to the owner, lessee, or occupant of privately owned, nonresidential premises, whether or not the premises are kept open for public use and whether or not the owner, lessee, or occupant denies entry to certain individuals.

HISTORY: 130 v H 179, § 1 (Eff 9-24-63); 146 v H 117. Eff 9-29-95.

The effective date is set by section 197 of HB 117.

§ 1545.11. Power to acquire property.

The board of park commissioners may acquire lands either within or without the park district for conversion into forest reserves and for the conservation of the natural resources of the state, including streams, lakes, submerged lands, and swamplands, and to those ends may create parks, parkways, forest reservations, and other reservations and afforest, develop, improve, protect, and promote the use of the same in such manner as the board deems conducive to the general welfare. Such lands may be acquired by such board, on behalf of said district, (1) by gift or devise, (2) by purchase for cash, by purchase by installment payments with or without a mortgage, by entering into lease-purchase agreements, by lease with or without option to purchase, or, (3) by appropriation. In furtherance of the use and enjoyment of the lands controlled by it, the board may accept donations of money or other property, or may act as trustees of land, money, or other property, and use and administer the same as stipulated by the donor, or as provided in the trust agreement. The terms of each such donation or trust shall first be approved by the probate court before acceptance by the board.

In case of appropriation, the proceedings shall be instituted in the name of the board, and shall be conducted in the manner provided in sections 163.01 to 163.22, inclusive, of the Revised Code.

This section applies to districts created prior to April 16, 1920.

HISTORY: GC § 2976-7; 107 v 65, § 7; 108 v PIII, 1097; 113 v 659; Bureau of Code Revision, 10-1-53; 125 v 903(930) (Eff 10-1-53); 129 v 235 (Eff 8-4-61); 131 v 539 (Eff 1-1-66); 134 v S 247. Eff 10-20-72.

§ 2744.02. Classification of functions of political subdivisions; liability; exceptions.

(A) (1) For the purposes of this chapter, the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. Except as provided in division (B) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function.

(2) Subject to statutory limitations upon their monetary jurisdiction, the courts of common pleas, the municipal courts, and the county courts have jurisdiction to hear and determine civil actions governed by or brought pursuant to this chapter.

(B) Subject to sections 2744.03 and 2744.05 of the Revised Code, a political subdivision is liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows:

(1) Except as otherwise provided in this division, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent operation of any motor vehicle by their employees when the employees are engaged within the scope of their employment and authority. The following are full defenses to that liability:

(a) A member of a municipal corporation police department or any other police agency was operating a motor vehicle while responding to an emergency call and the operation of the vehicle did not constitute willful or wanton misconduct;

(b) A member of a municipal corporation fire department or any other firefighting agency was operating a motor vehicle while engaged in duty at a fire, proceeding toward a place where a fire is in progress or is believed to be in progress, or answering any other emergency alarm and the operation of the vehicle did not constitute willful or wanton misconduct;

(c) A member of an emergency medical service owned or operated by a political subdivision was operating a motor vehicle while responding to or completing a call for emergency medical care or treatment, the member was holding a valid commercial driver's license issued pursuant to Chapter 4506. or a driver's license issued pursuant to Chapter 4507. of the Revised Code, the operation of the vehicle did not constitute willful or wanton misconduct, and the operation complies with the precautions of section 4511.03 of the Revised Code.

(2) Except as otherwise provided in sections 3314.07 and 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions.

(3) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by their negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads, except that it is a full defense to that liability, when a bridge within a municipal corporation is involved, that the municipal corporation does not have the responsibility for maintaining or inspecting the bridge.

(4) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property that is caused by the negligence of their employees and that occurs within or on the grounds of, and is due to physical defects within or on the grounds of, buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code.

(5) In addition to the circumstances described in divisions (B)(1) to (4) of this section, a political subdivision is liable for injury, death, or loss to person or property when civil liability is expressly imposed upon the political subdivision by a section of the Revised Code, including, but not limited to, sections 2743.02 and 5591.37 of the Revised Code. Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon a political subdivision, because that section provides for a criminal penalty, because of a general authorization in that section that a political subdivision may sue and be sued, or because that section uses the term "shall" in a provision pertaining to a political subdivision.

(C) An order that denies a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability as provided in this chapter or any other provision of the law is a final order.

HISTORY: 141 v H 176 (Eff 11-20-85); 143 v H 381 (Eff 7-1-89); 145 v S 221 (Eff 9-28-94); 146 v H 350 (Eff 1-27-97); 147 v H 215 (Eff 6-30-97); 149 v S 108, § 2.01 (Eff 7-6-2001); 149 v S 106. Eff 4-9-2003.

See provisions, § 3 of SB 106 (149 v -) following RC § 2744.01.

§ 2744.03. Defenses or immunities of subdivision and employee.

(A) In a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability:

(1) The political subdivision is immune from liability if the employee involved was engaged in the performance of a judicial, quasi-judicial, prosecutorial, legislative, or quasi-legislative function.

(2) The political subdivision is immune from liability if the conduct of the employee involved, other than negligent conduct, that gave rise to the claim of liability was required by law or authorized by law, or if the conduct of the employee involved that gave rise to the claim of liability was necessary or essential to the exercise of powers of the political subdivision or employee.

(3) The political subdivision is immune from liability if the action or failure to act by the employee involved that gave rise to the claim of liability was within the discretion of the employee with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee.

(4) The political subdivision is immune from liability if the action or failure to act by the political subdivision or employee involved that gave rise to the claim of liability resulted in injury or death to a person who had been convicted of or pleaded guilty to a criminal offense and who, at the time of the injury or death, was serving any portion of the person's sentence by performing community service work for or in the political subdivision whether pursuant to section 2951.02 of the Revised Code or otherwise, or resulted in injury or death to a child who was found to be a delinquent child and who, at the time of the injury or death, was performing community service or community work for or in a political subdivision in accordance with the order of a juvenile court entered pursuant to section 2152.19 or 2152.20 of the Revised Code, and if, at the time of the person's or child's injury or death, the person or child was covered for purposes of Chapter 4123, of the Revised Code in connection with the community service or community work for or in the political subdivision.

(5) The political subdivision is immune from liability if the injury, death, or loss to person or property resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner.

(6) In addition to any immunity or defense referred to in division (A)(7) of this section and in circumstances not covered by that division or sections 3314.07 and 3746.24 of the Revised Code, the employee is immune from liability unless one of the following applies:

(a) The employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities;

(b) The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner;

(c) Civil liability is expressly imposed upon the employee by a section of the Revised Code. Civil liability shall not be construed to exist under another section of the Revised Code merely because that

section imposes a responsibility or mandatory duty upon an employee, because that section provides for a criminal penalty, because of a general authorization in that section that an employee may sue and be sued, or because the section uses the term "shall" in a provision pertaining to an employee.

(7) The political subdivision, and an employee who is a county prosecuting attorney, city director of law, village solicitor, or similar chief legal officer of a political subdivision, an assistant of any such person, or a judge of a court of this state is entitled to any defense or immunity available at common law or established by the Revised Code.

(B) Any immunity or defense conferred upon, or referred to in connection with, an employee by division (A)(6) or (7) of this section does not affect or limit any liability of a political subdivision for an act or omission of the employee as provided in section 2744.02 of the Revised Code.

HISTORY: 141 v H 176 (Eff 11-20-85); 141 v S 297 (Eff 4-30-86); 145 v S 221 (Eff 9-28-94); 146 v H 350 (Eff 1-27-97); 147 v H 215 (Eff 6-30-97); 149 v S 108, § 2.01 (Eff 7-6-2001); 148 v S 179, § 3 (Eff 1-1-2002); 149 v S 108, § 2.03 (Eff 1-1-2002); 149 v S 106. Eff 4-9-2003.

See provisions, § 3 of SB 106 (149 v -) following RC § 2744.01.

See provisions, § 3(C) of SB 108 (149 v -) following RC § 2744.01.

ORC Ann. **2305.05** (2006)

§ **2305.05**. Real estate dedicated to public uses

If a street or alley, or any part thereof, laid out and shown on the recorded plat of a municipal corporation, has not been opened to the public use and occupancy of the citizens thereof, or other persons, and has been enclosed with a fence by the owners of the inlots, lots, or outlots lying on, adjacent to, or along such street or alley, or part thereof, and has remained in the open, uninterrupted use, adverse possession, and occupancy of such owners for the period of twenty-one years, and if such street, alley, inlot, or outlot is a part of the tract of land so laid out by the original proprietors, the public easement therein shall be extinguished and the right of such municipal corporation, the citizens thereof, or other persons, and the legislative authority of such municipal corporation and the legal authorities thereof, to use, control, or occupy so much of such street or alley as has been fenced, used, possessed, and occupied, shall be barred, except to the owners of such inlots or outlots lying on, adjacent to, or along such streets or alleys who have occupied them in the manner mentioned in this section.

City of Bryan v. Killgallon

Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Sixth District, Williams County.

City of Bryan, APPELLEE,

v.

William Carpenter Killgallon, et al., APPELLANTS.

COURT OF APPEALS NO. WMS-81-6, TRIAL COURT NO. 22551.

September 25, 1981.

DECISION AND JOURNAL ENTRY

PER CURIAM

----- 1981 WL 5791 *1 -----

Finding all assignments of error not well taken, judgment of the Williams County Common Pleas Court is affirmed at appellants' costs and cause is remanded to said court for execution of judgment and assessment of costs. See Opinion by Douglas, J., on file.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. See also Supp. R. 4, amended 1/1/80.

Andy Douglas, J., John H. Barber, J., George M. Glasser, J., concur.

Judge George M. Glasser, Lucas County Common Pleas Court, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

City of Bryan, Plaintiff-Appellee,

v.

William Carpenter Killgallon, et al., Defendants-Appellants.

C.A. No. WMS-81-6, C.P. No. 22551.

Court of Appeals of Ohio, Williams County.

September 25, 1981.

Messrs. Craig L. Roth and Robert T. Lowe, Counsel for Appellants.

Mr. Joseph R. Kiacz, Counsel for Appellee.

DOUGLAS, J.

OPINION



A municipal corporation is not subject to the loss of its property by adverse possession except as set forth under R.C. 2305.05.

This cause came before this court on appeal from judgment of the Williams County Court of Common Pleas which ordered appellants, William and Susan Killgallon, to remove any portion of appellants' fence, at 805 Noble Drive, Bryan, Ohio, that encroached upon appellee city of Bryan's right-of-way along Noble Drive. Bryan, Ohio.

On October 15, 1979, appellee filed a complaint in the Williams County Court of Common Pleas seeking an order directing appellants to remove a fence they had constructed within the seventy foot right-of-way of Noble Drive, a dedicated street in the city of Bryan, Ohio. Appellants filed an answer and counterclaim and an amended answer and counterclaim in which appellants claimed ownership in the right-of-way by virtue of adverse possession and raised the defenses of estoppel, abandonment and laches. On November 13 and 14, 1980, a trial was held to the court. On February 11, 1981, the trial court entered judgment in favor of appellee. From that judgment, appellants appeal.

Appellants present five assignments of error. Appellants' first assignment of error is as follows:

"1. THE TRIAL COURT ERRED IN RULING THAT THE DEFENDANTS COULD NOT RELY UPON ADVERSE POSSESSION PURSUANT TO R.C. 2305.04."

Appellants contend that the trial court erred in determining that appellants could not acquire title to the right-of-way by virtue of adverse possession pursuant to R.C. 2305.04. In support of this contention, appellants urge consideration of a line of early cases, such as Cincinnati v. First Presbyterian Church (1838), 8 Ohio 299, and Williams v. First Presbyterian Society (1853), 1 Ohio St. 478, which held that "Municipal corporations are subject to the operation of the statute of limitations, in the same manner and to the same extent as natural persons." Cincinnati v. Evans (1855), 5 Ohio St. 594, at the syllabus.

Those early cases were subsequently severely criticized by the Ohio Supreme Court and other courts. See, for example, Heddleston v. Hendricks (1895), 52 Ohio St. 460; Gallipolis v. Gallia County Fair Co. (1929), 34 Ohio App. 116. In the later cases, several lines of authority developed with respect to the applicability of the doctrine of adverse possession and the statute of

----- 1981 WL 5791 *2 -----

In other cases, the courts recognized the earlier rule as to municipal property owned in connection with a private and proprietary function, but held property owned in a public and governmental capacity exempt from the operation of the statute of limitations. See Wright v. Oberlin (1902), 3 C.C. (N.S.) 242 at 248. With respect to public highways and streets, three theories developed under which such property was held exempt from acquisition by adverse possession.

The first theory, in harmony with the concept of property held in a public capacity discussed above, held ". . . that no public body holding rights in the streets or highways can lose the same by such methods [adverse possession]." In re Application of Loose (1958), 107 Ohio App. 47 at 51. The second held that any encroachment upon a public highway or street constituted a public nuisance in favor of which the statute of limitations does not run. Heddleston, supra. (Based upon Section 6921 of the Ohio Revised Statutes. See also, R.C. 5589.01). The third held encroachments upon public highway property to be a matter of sufferance until such time as the property was needed for its designated purpose and, therefore, not adverse to the right of the public entity in such property. McClelland v. Miller (1876), 28 Ohio St. 488.

Thus, our review of the case law in this area leads us to the conclusion that the title to municipal property dedicated for public streets cannot be acquired by adverse possession pursuant to R.C. 2305.04. We find this conclusion to be in accord with R.C. 2305.05, the enactment of which evidences the legislative intent to limit acquisition of such property by adverse possession to cases in which the statutory requirements have been met.

With respect to municipal property in general, our review of the law reveals that the weight of authority is to the effect that, in the absence of legislation to the contrary, title by adverse possession cannot be acquired as against a municipal corporation just as it cannot be so acquired as against a state. See 55 A.L.R. 612, Section 34. From the standpoint of public policy, we find this to be the better rule. The setting aside of land for future public use in order to provide for orderly development is, in and of itself, a valuable use of land resources. That the public might later be deprived of the use of such land by operation of the statute of limitations imposes upon municipalities the burden of continual inspection of all public lands. Such a burden would be prohibitive and contrary to the public interest. Further, having considered the case law in Ohio, we find that while the early Ohio rule has not been specifically overruled, it has, in effect, been overruled by the limitations placed upon it by the later cases. For the foregoing reasons, we find the rule in Ohio to be that municipal property cannot be acquired by adverse possession except as set forth under R.C. 2305.05. We, therefore, find appellants' first assignment of error not well taken.

Appellants' second assignment of error is as follows:

"2. THE TRIAL COURT ERRED IN RULING THAT R.C. 2305.05 WAS INAPPLICABLE."

Appellants contend that the trial court erred in determining that the requirements of R.C. 2305.05 had not been met. R.C. 2305.05 provides that:

"If a street or alley, or any part thereof, laid out and shown on the recorded plat of a municipal corporation, has not been opened to

the public use and occupancy of the citizens thereof, or other persons, and has been enclosed with a fence by the owners of the inlots, lots, or outlots lying on, adjacent to, or along such street or alley, or part thereof, and has remained in the open, uninterrupted use, adverse possession, and occupancy of such owners for the period of twenty-one years, and if such street, alley, inlot, or outlot is a part of the tract of land so laid out by the original proprietors, the public easement therein shall be extinguished and the right of such municipal corporation, the citizens thereof, or other persons, and the legislative authority of such municipal corporation and the legal authorities thereof, to use, control, or occupy so much of such street or alley as has been fenced, used, possessed, and occupied, shall be barred, except to the owners of such inlots or outlots lying on, adjacent to, or along such streets or alleys who have occupied them in the manner mentioned in this section."

----- 1981 WL 5791 *3 -----

Thus, R.C. 2305.05 requires, in addition to adverse possession and occupancy for at least twenty-one years, that the street has not been opened to the public use and that the street has been enclosed with a fence by the owner or owners of adjacent lots. Our review of the record reveals that Noble Drive had been open to the public and that the portion of the drive in issue had not been completely enclosed by the fence. See Application of Loose, supra. We, therefore, find that the trial court properly determined that the requirements of R.C. 2305.05 had not been met. We further find appellants' second assignment of error not well taken.

We shall consider appellants' third, fourth and fifth assignments of error together since the same issues are raised therein. Appellants present those assignments of error as follows:

"3. THE TRIAL COURT ERRED IN RULING THAT THE CLAIMS AND DEFENSES OF ESTOPPEL, WERE NOT SUBSTANTIATED.

"4. THE TRIAL COURT ERRED IN RULING THAT THE CLAIMS AND DEFENSES OF ABANDONMENT WERE NOT SUBSTANTIATED.

"5. THE TRIAL COURT ERRED IN RULING THAT THE CLAIMS AND DEFENSES OF LACHES WERE NOT SUBSTANTIATED."

Appellants contend that appellee's action should have been barred by equitable principles. Appellants argue that appellee had acquiesced in appellants' use of the right-of-way by not asserting its right therein earlier and that appellants had relied thereon to their detriment.

We find the case of Fleming v. Steubenville (1931), 14 Ohio Law Abs. 51, to be dispositive of these issues. We note particularly the language quoted by the court therein, at 54, which is as follows:

"It has been held that non-user is evidence of abandonment; and many of the courts, influenced, perhaps, by the hardships that would result from a contrary holding in the particular cases under consideration, have applied the doctrine of equitable estoppel where the claimant had made expensive improvements and acquired, or apparently acquired, rights of such a nature and under such circumstances that to deprive him of them seemed highly inequitable and unjust. We doubt, however, if the doctrine of some, if not most, of these cases can be sustained upon principle, at least where the city or the local authorities have done no affirmative act to mislead the claimant. It is difficult to conceive upon what principle an equitable estoppel can be securely placed in such cases, for the person who encroaches upon a public way must know, as a matter of law, that the way belongs to the public, and that the local authorities can neither directly nor indirectly alien the way, and that they can not divert it to a private use. As the person who uses the highway must possess this knowledge, and in legal contemplation does possess it, one of the chief elements of an estoppel is absent. An estoppel can not exist where the knowledge of both parties is equal and nothing is done by the one to mislead the other. In addition to this consideration may be noted another influential one already suggested in a different connection, and that is, the private use of the public way was in the beginning and wrong each day of its continuance, and it is a strange perversion of principle to declare that one who bases his claim on an original and continued wrong may successfully appeal to equity to sanction and establish such a claim. It is, at all events, a great stretch of the doctrine of estoppel and a wide departure from the rule laid down by the earlier decisions and confirmed by many of the modern authorities. And even in states in which the general doctrine of equitable estoppel is recognized and applied in particular cases it is generally held that mere encroachment on a highway by a fence or the like, especially if not of such a character as to charge the municipality with notice, will not estop the public from asserting its right to the land actually belonging to the highway. The mere fact that there is such an encroachment or possession or that the public officials saw or might have seen some improvement in course of construction where the municipality has done nothing to induce it or mislead is usually, and we think correctly, held insufficient. It may be, however, that where there has been an abandonment or there have been misleading acts or other peculiar circumstances, as in some of the cases cited in the first two notes to this section, and improvements have been made and rights acquired on the faith thereof, such a case may be made as will justify the application of the doctrine of estoppel." (Emphasis added).

----- 1981 WL 5791 *4.-----

Applying the reasoning set forth in the Fleming case, above to the circumstances of this case, we find that the trial court did not err in dismissing appellants' claims and defenses of estoppel, abandonment, and laches. We, therefore, find appellants' third, fourth, and fifth assignments of error not well taken.

On consideration whereof, the court finds substantial justice has been done the parties complaining, and judgment of the Williams County Court of Common Pleas is affirmed.

This cause is remanded to said court for execution of judgment and assessment of costs. Costs to appellants.

JUDGMENT AFFIRMED.

Barber and Glasser, JJ., concur.

Judge George M. Glasser, Common Pleas Court of Lucas County, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

LawDesk

Requestor:

Project Name: None

January 16, 2007 10:55:46 AM

City of Bryan v. Killgallon

Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Sixth District, Williams County.

City of Bryan, APPELLEE,

v.

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COURT OF APPEALS NO. WMS-81-6, TRIAL COURT NO. 22551.

September 25, 1981.

DECISION AND JOURNAL ENTRY

PER CURIAM

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Finding all assignments of error not well taken, judgment of the Williams County Common Pleas Court is affirmed at appellants' costs and cause is remanded to said court for execution of judgment and assessment of costs. See Opinion by Douglas, J., on file.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. See also Supp. R. 4, amended 1/1/80.

Andy Douglas, J., John H. Barber, J., George M. Glasser, J., concur.

Judge George M. Glasser, Lucas County Common Pleas Court, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

City of Bryan, Plaintiff-Appellee,

v.

William Carpenter Killgallon, et al., Defendants-Appellants.

C.A. No. WMS-81-6, C.P. No. 22551.

Court of Appeals of Ohio, Williams County.

September 25, 1981.

Messrs. Craig L. Roth and Robert T. Lowe, Counsel for Appellants.

Mr. Joseph R. Kiacz, Counsel for Appellee.

DOUGLAS, J.

OPINION

A municipal corporation is not subject to the loss of its property by adverse possession except as set forth under R.C. 2305.05.

This cause came before this court on appeal from judgment of the Williams County Court of Common Pleas which ordered appellants, William and Susan Killgallon, to remove any portion of appellants' fence, at 805 Noble Drive, Bryan, Ohio, that encroached upon appellee city of Bryan's right-of-way along Noble Drive, Bryan, Ohio.

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Appellants present five assignments of error. Appellants' first assignment of error is as follows:

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Appellants contend that the trial court erred in determining that appellants could not acquire title to the right-of-way by virtue of adverse possession pursuant to R.C. 2305.04. In support of this contention, appellants urge consideration of a line of early cases, such as Cincinnati v. First Presbyterian Church (1838), 8 Ohio 299, and Williams v. First Presbyterian Society (1853), 1 Ohio St. 478, which held that "Municipal corporations are subject to the operation of the statute of limitations, in the same manner and to the same extent as natural persons." Cincinnati v. Evans (1855), 5 Ohio St. 594, at the syllabus.

Those early cases were subsequently severely criticized by the Ohio Supreme Court and other courts. See, for example, Heddleston v. Hendricks (1895), 52 Ohio St. 460; Gallipolis v. Gallia County Fair Co. (1929), 34 Ohio App. 116. In the later cases, several lines of authority developed with respect to the applicability of the doctrine of adverse possession and the statute of

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In other cases, the courts recognized the earlier rule as to municipal property owned in connection with a private and proprietary function, but held property owned in a public and governmental capacity exempt from the operation of the statute of limitations. See Wright v. Oberlin (1902), 3 C.C. (N.S.) 242 at 248. With respect to public highways and streets, three theories developed under which such property was held exempt from acquisition by adverse possession.

The first theory, in harmony with the concept of property held in a public capacity discussed above, held "... that no public body holding rights in the streets or highways can lose the same by such methods [adverse possession]." In re Application of Loose (1958), 107 Ohio App. 47 at 51. The second held that any encroachment upon a public highway or street constituted a public nuisance in favor of which the statute of limitations does not run. Heddleston, supra. (Based upon Section 6921 of the Ohio Revised Statutes. See also, R.C. 5589.01). The third held encroachments upon public highway property to be a matter of sufferance until such time as the property was needed for its designated purpose and, therefore, not adverse to the right of the public entity in such property. McClelland v. Miller (1876), 28 Ohio St. 488.

Thus, our review of the case law in this area leads us to the conclusion that the title to municipal property dedicated for public streets cannot be acquired by adverse possession pursuant to R.C. 2305.04. We find this conclusion to be in accord with R.C. 2305.05, the enactment of which evidences the legislative intent to limit acquisition of such property by adverse possession to cases in which the statutory requirements have been met.

With respect to municipal property in general, our review of the law reveals that the weight of authority is to the effect that, in the absence of legislation to the contrary, title by adverse possession cannot be acquired as against a municipal corporation just as it cannot be so acquired as against a state. See 55 A.L.R. 612, Section 34. From the standpoint of public policy, we find this to be the better rule. The setting aside of land for future public use in order to provide for orderly development is, in and of itself, a valuable use of land resources. That the public might later be deprived of the use of such land by operation of the statute of limitations imposes upon municipalities the burden of continual inspection of all public lands. Such a burden would be prohibitive and contrary to the public interest. Further, having considered the case law in Ohio, we find that while the early Ohio rule has not been specifically overruled, it has, in effect, been overruled by the limitations placed upon it by the later cases. For the foregoing reasons, we find the rule in Ohio to be that municipal property cannot be acquired by adverse possession except as set forth under R.C. 2305.05. We, therefore, find appellants' first assignment of error not well taken.

Appellants' second assignment of error is as follows:

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----- 1981 WL 5791 *3 -----

Thus, R.C. 2305.05 requires, in addition to adverse possession and occupancy for at least twenty-one years, that the street has not been opened to the public use and that the street has been enclosed with a fence by the owner or owners of adjacent lots. Our review of the record reveals that Noble Drive had been open to the public and that the portion of the drive in issue had not been completely enclosed by the fence. See Application of Loose, supra. We, therefore, find that the trial court properly determined that the requirements of R.C. 2305.05 had not been met. We further find appellants' second assignment of error not well taken.

We shall consider appellants' third, fourth and fifth assignments of error together since the same issues are raised therein. Appellants present those assignments of error as follows:

"3. THE TRIAL COURT ERRED IN RULING THAT THE CLAIMS AND DEFENSES OF ESTOPPEL, WERE NOT SUBSTANTIATED.

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Appellants contend that appellee's action should have been barred by equitable principles. Appellants argue that appellee had acquiesced in appellants' use of the right-of-way by not asserting its right therein earlier and that appellants had relied thereon to their detriment.

We find the case of Fleming v. Steubenville (1931), 14 Ohio Law Abs. 51, to be dispositive of these issues. We note particularly the language quoted by the court therein, at 54, which is as follows:

"It has been held that non-user is evidence of abandonment; and many of the courts, influenced, perhaps, by the hardships that would result from a contrary holding in the particular cases under consideration, have applied the doctrine of equitable estoppel where the claimant had made expensive improvements and acquired, or apparently acquired, rights of such a nature and under such circumstances that to deprive him of them seemed highly inequitable and unjust. We doubt, however, if the doctrine of some, if not most, of these cases can be sustained upon principle, at least where the city or the local authorities have done no affirmative act to mislead the claimant. It is difficult to conceive upon what principle an equitable estoppel can be securely placed in such cases, for the person who encroaches upon a public way must know, as a matter of law, that the way belongs to the public, and that the local authorities can neither directly nor indirectly alien the way, and that they can not divert it to a private use. As the person who uses the highway must possess this knowledge, and in legal contemplation does possess it, one of the chief elements of an estoppel is absent. An estoppel can not exist where the knowledge of both parties is equal and nothing is done by the one to mislead the other. In addition to this consideration may be noted another influential one already suggested in a different connection, and that is, the private use of the public way was in the beginning and wrong each day of its continuance, and it is a strange perversion of principle to declare that one who bases his claim on an original and continued wrong may successfully appeal to equity to sanction and establish such a claim. It is, at all events, a great stretch of the doctrine of estoppel and a wide departure from the rule laid down by the earlier decisions and confirmed by many of the modern authorities. And even in states in which the general doctrine of equitable estoppel is recognized and applied in particular cases it is generally held that mere encroachment on a highway by a fence or the like, especially if not of such a character as to charge the municipality with notice, will not estop the public from asserting its right to the land actually belonging to the highway. The mere fact that there is such an encroachment or possession or that the public officials saw or might have seen some improvement in course of construction where the municipality has done nothing to induce it or mislead is usually, and we think correctly, held insufficient. It may be, however, that where there has been an abandonment or there have been misleading acts or other peculiar circumstances, as in some of the cases cited in the first two notes to this section, and improvements have been made and rights acquired on the faith thereof, such a case may be made as will justify the application of the doctrine of estoppel." (Emphasis added).

Applying the reasoning set forth in the Fleming case, above to the circumstances of this case, we find that the trial court did not err in dismissing appellants' claims and defenses of estoppel, abandonment, and laches. We, therefore, find appellants' third, fourth, and fifth assignments of error not well taken.

On consideration whereof, the court finds substantial justice has been done the parties complaining, and judgment of the Williams County Court of Common Pleas is affirmed.

This cause is remanded to said court for execution of judgment and assessment of costs. Costs to appellants.

JUDGMENT AFFIRMED.

Barber and Glasser, JJ., concur.

Judge George M. Glasser, Common Pleas Court of Lucas County, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.