

IN THE SUPREME COURT OF OHIO

WILLIAM EVANICH, et al.)
)
)
APPELLEES)
)
vs.)
)
STEVEN BRIDGE, et al.)
)
APPELLANTS)

CASE NO. **07 - 0863**

On Appeal From The
Lorain County Court of Appeals
Ninth Appellate District
Case No. 05CA008824

APPELLANTS' MEMORANDUM
IN SUPPORT OF JURISDICTION

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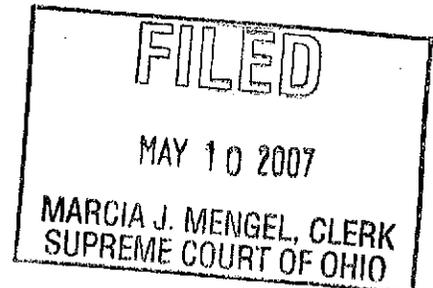


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EXPLANATION OF WHY THIS CASE IS ONE
OF PUBLIC OR GREAT GENERAL INTEREST

This case presents issues with regard to the acquisition of title by means of adverse possession in urban residential subdivisions. Nine years have come and gone since this court in *Grace v. Koch* (1998), 81 Ohio St.3rd 577, attempted a watershed break from the blind application of the doctrine. The *Grace* court seemed poised to dispose of this judicial relic, but hesitated. Perhaps the time has come to revisit the continued utility of adverse possession especially in the context of mistaken lot lines in residential subdivisions.

The decision of the court of appeals in *Evanich* is directly at odds with a central premise expressed by this court in *Grace* that adversity must be accompanied by an intention to claim title. And it is directly at odds with three other decisions of its own district concerning an adverse possessor's *intention to claim title*.

This case is one of great public interest for it, much like most adverse possessions, comes about from mistakes caused by uncertainty over boundary lines.¹ This case is no different than many others that involve insignificant pieces of land. Most are backyard boundary disputes which one author has described as being “depressingly common”.² If the neighbor does not intend to claim title, then he should not be rewarded by giving him what he did not want in the first place.

This case arises between neighbors in a residential subdivision in an urban setting. The encroachments were not extensive and consisted of a ubiquitous decorative split rail fence and

¹ Richard A. Posner, *Economic Analysis of Law* 78 (2003) noting that “most adverse possessions are mistakes caused by uncertainty over boundary lines”.

² Richard Helmholz, *Adverse Possession and Subjective Intent*, 61 Wash. U. L.Q.331, 333.

landscaping that had grown beyond any reasonable bounds. This case also involves simple errors by a lot owner in the placement of decorative matter across the lot lines of the adjacent neighbor.

It does not require much imagination to realize that honest errors between subdivision lot owners involving insignificant pieces of land will frequently arise. Who should bear the risk of loss? Should the hapless owner lose a part of his lot to the neighbor that honestly, but mistakenly, put landscaping materials on what he thought was his true lot line? Or should the risk of loss of the encroaching landscaping be placed with the person who had made the mistake; especially where he never intended to claim title to any part of the neighbor's lot?

The subdivision law of RC Chapter 711 is a comprehensive scheme in which property is platted into sublots identified by number, and their precise width and length are stated and drawn on the subdivision plat kept by the county recorder. More importantly, lots in a platted subdivision are not conveyed by metes and bounds, or courses and calls. Instead, they are conveyed by reference only to a lot number and a platted map of record.

Residential subdivisions are a favored way of developing land and providing for economy of space. Today's lot owners regularly construct decorations and plantings to promote a sense of privacy and natural beauty. But placement of aesthetic improvements such as decorative fencing and plantings is often not done precisely. If an installation error occurs it may well cross lot lines. And when an error occurs it is mostly caused by an "honest mistake." The ordinary homeowner does not put his landscaping beyond what he thinks is his lot line and into the neighbor's lot. He intends only to keep within his own lot.

The issue is one of intent. A person can not possess land without an intent. If land is occupied without the intent to claim title, it can never be adverse no matter how long the nonowner has remained on someone else's land. This has been a central theme in Ohio

jurisprudence. In *Lane v. Kennedy* (1861), 13 Ohio St. 42, this court said that in order for possession to be adverse, “there must have been an *intention on the part of the person in possession to claim title*, so manifested by his declarations or acts” that raises a presumption that the owner has surrendered his claim to title.

STATEMENT OF THE CASE AND FACTS

The trial court was asked to settle a controversy that came about from a fierce windstorm in March, 2002. The Spring storm resulted in a blow down of several trees into Bridge’s rear yard. Intending to replace the storm damage with new landscaping, Bridge obtained a survey of his lot in the Briar Lake Subdivision in Elyria. Bridge wanted to ensure that his project would not encroach on his neighbor’s property.

The survey disclosed that Evanich’s landscaping along their common side lot line encroached some five feet at its farthest point onto Bridge’s property. Evanich declined to remove his landscaping materials and soon brought an action to obtain a declaration of his rights to the disputed strip of land.

It developed that in 1965 Evanich had acquired the first lot in an otherwise unimproved subdivision. In 1966, Evanich began construction of his house which was completed in the Spring of 1967. Apparently there were no other completed homes in the Briar Lake Subdivision when Evanich moved into his new home and the area was barren.

In the Spring of 1967, Evanich began landscaping the area along the side lot line that would become the Bridge lot. He said that the landscaping and placement of a decorative split rail fence were done to beautify an otherwise undeveloped subdivision.

Before starting on his landscaping activity, Evanich ran a length of string from a rear iron survey pin to a wooden tomato stake he found in his front yard. He used the string as a sight line along what he thought was his the boundary line.

Evanich testified that he went to this effort in order to remain within in his own lot. Evanich said that he thought the plantings were on his own property and would not have planted on the neighbor's property without permission. However, at that time there were no neighbors, there were no other houses in the subdivision.

Evanich further testified that "[W]e want to do, put it on our line and that's what we tried to do. He "[a]bsolutely wanted to do the right thing, and that's why [he] ran the string and looked at the stake." Evanich confirmed his testimony by saying that if he knew the disputed area was not his property, he would never have planted on it.

But he was wrong. Evanich occupied an area under a mistake as to the true boundary line and without any intention of claiming title beyond the true boundary line wherever it was ascertained to lie.

The matter was heard by the court upon Evanich's complaint asking that title be quieted against Bridge pursuant to RC §5303.01. Evanich claimed that beginning in 1967 he had placed fences and landscaping along the adjoining lot line and that a portion of the fences and landscaping were actually on Bridge's property. Evanich therefore claimed he had gained title by the doctrine of adverse possession to a narrow strip of the Bridge property bounded by the fences and landscaping.

The court held a trial in July, 2004 and on September 14, 2004 it made a decision finding that Evanich had established his claim of adverse possession by a preponderance of the evidence and entered judgment accordingly.

Bridge appealed the judgment of the trial court claiming that it had applied the wrong measure of proof. The court of appeals reversed and remanded the matter because it could not determine whether the trial court had applied the correct evidentiary burden of “clear and convincing” evidence. *Evanich v. Bridge* (“*Evanich I*”), 9th Dist No. 04CA008566, 2005-Ohio-2140.

On remand, the trial court determined that Evanich had established the elements of adverse possession by clear and convincing evidence. Bridge again appealed to the 9th District Court of Appeals which affirmed the trial court’s decision quieting title in Evanich.

Bridge argued to the court of appeals that the elements of adverse possession had not been established since there was no evidence that Evanich had an “intent to claim title”.

A divided panel of the appeals court acknowledged that the *Grace* decision required an adverse claimant have an intent to claim title. However, the majority held that this element was not required in cases of mutual mistake about lot lines. Its premise was that the doctrine of adverse possession protects a claimant that has honestly but mistakenly entered land in the belief that it was his own.

The dissent concluded that the “adversity element” for adverse possession requires a specific intent to use another’s property as one’s own and adverse to the true owner’s rights. The dissent spoke directly to this court’s language in *Grace* that there must be an intention to claim title in order to establish adversity. The dissent found there was positive evidence that Evanich had absolutely no intent to claim title. The dissenting judge believed the trial court erred as a matter of law since it failed to consider the significance of Evanich’s lack of intent on the adversity of use.

ARGUMENT IN SUPPORT OF THE PROPOSITION OF LAW

Proposition of Law No. 1:

A person can not acquire title to lands of another by adverse possession if he did not have an intention of claiming title to the true owner's lands.

In 1998, this court was given the opportunity to express its exasperation with the notion of adverse possession as a means of acquiring lands actually owned by another. The vehicle was *Grace v. Koch* (1998), 81 Ohio St.3rd 577.

In *Grace*, this court agreed with the lower court's conclusion that the doctrine of adverse possession had fallen into disfavor. *Id* at 580. The *Grace* court of appeals had quoted commentators that described adverse possession and the like as "relics of the past" that "reward the theft of land." *Grace v. Koch* (Oct. 9, 1996), 1st Dist. No. C-950802, unreported at p. 3. This court seemed not inclined to perpetuate this scheme since it resulted in the legal titleholder forfeiting ownership to an adverse holder without compensation". *Id* at 580.

The court used the *Grace* case to restate the elements of adverse possession that had been established in its much earlier decisions. And pointing to its decision in *Lane v. Kennedy* (1861), 13 Ohio St.42, this court also said that "to make possession adverse, "there must have been *an intention* on the part of the person in possession to *claim title*"" *Grace* at 581.

The *Lane* court explained that "[T]he fact of possession per se, is only an introductory fact to a link in the chain of tile by possession, and will not simply of itself, however long continued, bar the right of entry of him who was seized," *Lane*, supra at 46. This is the

very reason that an *intention to claim title* is necessary in order to make possession adverse. The requirement of intent is not inherent in or a part of the concept of possession.

Some 36 years after *Lane*, this court used the term “claim of right” as a determinant in the establishment of prescriptive easements. In *Pavey v. Vance* (1897), 56 Ohio St. 162, the court said that “[T]he establishment of the claim (prescriptive easement) requires proof that the claim was adverse to the real owner, *and under a claim of right.*” *Without such proof one could not be said to possess or use as an owner.*” *Id.* at 173.

The requirement of intent is especially appropriate in mistaken boundary cases. A claimant can not get title by adverse possession if he only intended to fence in or use the land he actually owned. The claimant can’t get title if he intended to claim only up to his true lot line; that is, possession is not adverse unless the claimant has an intent to claim the land regardless of the true line.

The 9th District Court of Appeals has not overlooked the notion that the presence or absence of an intention to claim title as central to the issue of adversity.

This court of appeals noted that the presence or absence of an intention to claim title had been identified as *central to the issue of adversity*. *Bohaty v. Centerpointe Plaza Assoc.* 9th Dist. No. 3143-M, 2003 -Ohio-749. And this same court said that if there is no intention to claim title, the requirement of adverseness is not satisfied. *Morris v. Andross* 9th Dist. No. 21861, 158 Ohio App.3rd 396, 2004-Ohio-4446.

Morris dealt with a trial court’s denial of a neighbor’s claim to a disputed one-half acre of property by adverse possession. At trial, the claimant presented the testimony of a prior owner who said that while he maintained the property he “wasn’t trying to take [the property].” Affirming the trial court’s denial of an adverse possession claim, the *Morris* court focused on an

intention to claim title emphasized in *Grace* and *Lane*. The *Morris* court concluded that the former owner's testimony showed "that his possession did not satisfy the test of adverse possession as defined . . . in *Grace*." *Morris*, 2004-Ohio-4446 at ¶ 15, 16.

In this case, the court of appeals did not overlook *Grace*'s requirement of claimed intent. Instead, the Evanich panel said that the parties in this case acted under mutual mistake. Since mutual mistake was not present in this court's *Grace* decision, the court of appeals determined that *Grace* was not controlling.

The interplay between mistake and intention to claim title is better illustrated by a Michigan Supreme Court case whose facts concerning the source of the mistake parallel the conduct of the appellee, Evanich.

The Michigan Supreme Court held that when a landowner takes possession of land of an adjacent owner, with an intent to hold to the true lot line, the possession is not hostile and adverse possession can not be established. *Ennis v. Stanley* (1956), 346 Mich. 296; 78 NW 2nd 114.

In illustrating this point the court referred to its earlier decision in *Warner v. Noble* (1938), 286 Mich. 654; 282 NW 855. In *Warner*, the parties had missighted along survey stakes in locating the boundary line before building a cottage, which later proved to encroach on the neighboring lot. The court concluded that there was no adverse possession because the claimant intended to hold to the true lot line, wherever it was. The claimant had failed to respect the true lot line while trying to do so and, thus, there could be no adverse possession.

The appellee Evanich did exactly the same thing. When his house was being first constructed, he noted iron pins he believed marked his lot line. Later, when Evanich intended to beautify his lot with landscaping, some of the pins were not there, so he ran a string between

construction stakes that he believed had been substituted for the iron survey pins. His intention was to stay at the true lot line and not go beyond it. He was mistaken. But his intention was not to go beyond the true lot line wherever it may have been. Evanich occupied an area under a mistake as to the true boundary line and without any intention of claiming title to land beyond the true boundary line.

Here there was no claim by either party that they owned anything except the numbered lots mentioned and described in their deeds according to a recorded subdivision plat. There was no intention by Evanich to claim anything except the lot he had acquired and its true lines as shown on the subdivision plat in the recorder's office.

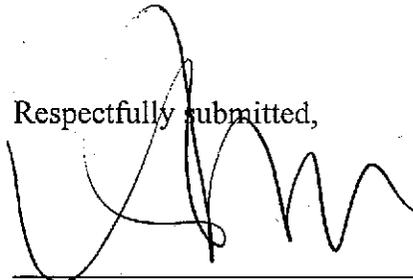
It was Evanich, the adverse possessor, that made the mistake. It was he who acted out of ignorance of the map plat and its lot lines. That, or he was simply negligent in locating his lot lines. In any event, there is no reason to reward him with the true owner's land. To do so is to say to the true owner; even though you have used the mechanism of recording provided by the state for protecting your title and making it known to the whole world, you have lost land to someone who was negligent or ignorant of the true lines of his own property even though he has no moral claim to the land just because he made an honest mistake, and even though he never intended to claim any part of your land.

In ordinary life, we do not grant bonuses to people who accidentally pick up the wrong coat or briefcase, nor would people making these sorts of honest mistakes hope for such a windfall. Such accidental conduct does not deserve a reward. There is no principled reason why a person entering my lot under an honest mistake should be treated in any different manner.

CONCLUSION

While adverse possession cases present different fact patterns, they all involve the issue of mistaken boundaries. And by far, the cases that have been decided since the 1998 *Grace* decision deal with backyard or side lot boundaries. And each deal with a mistake that was not the fault of the true owner and which easily could have been avoided by the claiming neighbor. These instances are bound to repeatedly appear especially in residential subdivisions whose lots are described by number and plat map, and not by metes and bounds. For these reasons, this case involves matters of public or great general interest.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that a copy of appellants' Memorandum in Support of Jurisdiction was served upon counsel for the appellees, William Evanich and Roselyn Evanich, by mailing the same by ordinary U.S. mail on the 9 day of May, 2007, to the following:

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APPENDIX

**Judgment entry and decision of the Lorain County Court of Appeals
(March 26, 2007)**

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

WILLIAM EVANICH, et al.

Appellees

v.

STEVEN BRIDGE, et al.

Appellants

COURT OF APPEALS	
IN THE COURT OF APPEALS	
NINTH JUDICIAL DISTRICT	
2007 MAR 26 P 1:00	C. A. No. 05CA008824
CLERK OF COMMON PLEAS	
RON HABAKOWSKI	
9th APPEAL	APPEAL FROM JUDGMENT
ENTERED IN THE	
COURT OF COMMON PLEAS	
COUNTY OF LORAIN, OHIO	
CASE No. 02CV133012	

DECISION AND JOURNAL ENTRY

ENTERED

Dated: March 26, 2007

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

CARR, Judge.

{¶1} Appellants Steven and Margaret Bridge ("Bridge") have appealed from the decision of the Lorain County Court of Common Pleas which concluded that appellees William and Roselyn Evanich ("Evanich") had gained title to a portion of their property by adverse possession. This Court affirms.

I.

{¶2} The instant matter presents a convoluted procedural history. On October 17, 2002, Evanich filed a complaint to quiet title in the Lorain County Court of Common Pleas. The complaint alleged that Evanich had gained title to a

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trial was held and on September 14, 2004, the trial court issued its decision finding that Evanich had established the elements of adverse possession and entered judgment accordingly.

{¶3} On September 17, 2004, Bridge appealed the judgment of the trial court. This Court reversed and remanded the matter because it was not clear from the judgment entry “what evidentiary burden the trial court applied to the facts and evidence presented at trial and upon which it based its final decision.” *Evanich v. Bridge* (“*Evanich I*”), 9th Dist. No. 04CA008566, 2005-Ohio-2140, at ¶9.

{¶4} On remand, the trial court conducted an additional hearing, at which Evanich presented the testimony of Christopher Hirzel, a registered surveyor. On September 30, 2005, the trial court determined that Evanich had established the elements of adverse possession by clear and convincing evidence.

{¶5} Bridge has timely appealed asserting three assignments of error.

II.

ASSIGNMENT OF ERROR I

“THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT DETERMINED THAT THE APPELLEES HAD GAINED TITLE BY ADVERSE POSSESSION TO A PORTION OF THE APPELLANTS’ LAND.”

{¶6} Bridge has first argued that the trial court incorrectly determined that Evanich had established the elements of adverse possession. Specifically, Bridge has argued that the trial court failed to apply the necessary element of “intent to

claim title” when determining that Evanich’s possession of Bridge’s property was adverse. This Court disagrees with Bridge’s contentions.

{¶7} When this Court reviews a trial court’s determination that the elements of adverse possession have been met, it “will not reverse the judgment of the trial court as being against the manifest weight of the evidence if the judgment is based upon some competent, credible evidence that speaks to all of the material elements of the case.” *Galehouse v. Geiser*, 9th Dist. No. 05CA0037, 2006-Ohio-766, at ¶10, quoting *Morris v. Andros*, 158 Ohio App.3d 396, 2004-Ohio-4446, at ¶18. See, also, *Heiney v. Godwin*, 9th Dist. No. 22552, 2005-Ohio-5659, at ¶13.

{¶8} “To acquire title by adverse possession, the party claiming title under the common-law doctrine must show 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, 579. Adverse possession must be proven by clear and convincing evidence. *Id.* Clear and convincing evidence is that proof which establishes in the minds of the trier of fact a firm conviction as to the allegations sought to be proved. *Cross v. Ledford* (1954), 161 Ohio St. 469, 477.

{¶9} This Court finds that the trial court’s judgment was supported by competent and credible evidence speaking to all of the material elements of adverse possession. The record indicates that Evanich first made use of the disputed property in 1967. This use continued exclusively for thirty-five years until 2002, when Bridge conducted a survey and discovered the encroachment.

Evanich's use was open and notorious, as "the use of the disputed property [was] without attempted concealment" and was "so patent that the true owner of the property could not be deceived as to the property's use." *Hindall v. Martinez* (1990), 69 Ohio App.3d 580, 583. See, also, *Hudkins v. Stratos*, 9th Dist. No. 22188, 2005-Ohio-2155, at ¶8, citing *Hindall*, supra. It is clear from the record that Evanich did not conceal the use of the property and the use was readily apparent to Bridge.

{¶10} Further, Evanich's use was adverse. Bridge has argued against this conclusion, however, the arguments are unpersuasive. This Court has held that "[a]dverse or hostile use is any use inconsistent with the rights of the title owner[.]" *Vanasdal v. Brinker* (1985), 27 Ohio App.3d 298, citing *Kimball v. Anderson* (1932), 125 Ohio St. 241. According to the record, Evanich erected a split rail fence, installed raised planting beds composed of treated railroad ties, planted bushes, flowers and at least one tree, installed large sandstone blocks and eventually replaced the split rail fencing with wrought iron fencing. Making significant aesthetic and structural improvements to the land was certainly inconsistent with Bridge's rights. Moreover, contrary to Bridge's assertions, the type of landscaping at issue in this matter is sufficient to satisfy the adversity requirement of adverse possession. That is, Evanich's use was "such use as would be made of that land by the owner." *Vanasdal*, 27 Ohio App.3d at 299.

{¶11} While concededly, there are cases supporting the contention that “minor landscaping” is insufficient to satisfy adverse use, the cases cited by Bridge generally involved activities such as mowing the lawn, pulling weeds, or minor landscaping, such as planting shrubs or flowers. However, in the present case, Evanich’s use involved more than simply planting some flower beds or mowing the lawn. It entailed erecting fencing, installing treated railroad ties as flower beds, and imbedding large sandstone blocks in the ground.

{¶12} Bridge has also argued that Evanich did not have the necessary intent to claim title as required by *Grace*, supra. In support of his argument, Bridge has pointed to Evanich’s testimony in which he explicitly stated that he never intended to encroach on Bridge’s property. On appeal, Evanich has argued that he did not form the requisite intent because he was under the mistaken impression that the property belonged to him, not to Bridge. It is undisputed that both parties believed that the land in question belonged to Evanich.

{¶13} In making this argument, Bridge has essentially contended that the trial court failed to properly apply the law in the case, i.e., that the trial court failed to apply intent as a requisite element of adversity. This is a challenge to the trial court’s legal conclusions and accordingly, this Court will review it de novo. *State v. Hummel*, 9th Dist. No. 04CA008513, 2005-Ohio-595, at ¶16. While *Grace* does appear to require a form of specific intent with regard to adverse use, it is important to note that *Grace* did not deal with a case of mutual mistake as

presented in the matter before this Court. Furthermore, in the cases from this District in which *Grace's* intent requirement was used, neither involved mutual mistake. See *Morris*, supra; *Bohaty v. Centerpointe Plaza Assoc. Ltd. Partnership* (Feb. 20, 2002), 9th Dist. No. 3143-M.

{¶14} This Court has previously held that the doctrine of adverse possession protects the adverse possessor in the case of mutual mistake. See *Vanasdal*, 27 Ohio App.3d at 299. “The doctrine of adverse possession protects one who has honestly entered and held possession in the belief that the land was his own, as well as one who knowingly appropriates the land of others *for the purpose of acquiring title.*” (Emphasis added). *Id.* This view has been espoused by numerous districts, even in the wake of *Grace*. See e.g., *Patton v. Ditmyer*, 4th Dist. Nos. 05CA12, 05CA21, 05CA22, 2006-Ohio-7107, at ¶48; *Franck v. Young's Suburban Estates, Inc.*, 6th Dist. No. OT-02-040, 2004-Ohio-1650, at ¶19; *Beener v. Spahr* (Dec.15, 2000), 2d Dist. No. 2000-CA-40.

{¶15} As *Grace* did not deal with a case of mutual mistake, this Court cannot say that its holding abrogated the longstanding principle that adverse possession protects an adverse possessor who in good faith believes that he is utilizing his own property. Accordingly, this Court finds that Evanich used the disputed property exclusively, openly, notoriously, continuously, and adversely for a period of twenty-one years. Therefore, Evanich satisfied all of the elements of

adverse possession by clear and convincing evidence and the trial court did not err in granting judgment to Evanich.

{¶16} Bridge's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

“THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT EXCEEDED THE SCOPE OF THE APPELLATE COURT’S MANDATE ON REMAND.”

{¶17} In the second assignment of error, Bridge has argued that the trial court exceeded this Court’s mandate on remand by conducting a hearing at which it took evidence from a new surveyor hired by Evanich and accepted into evidence a new survey map of the encroachment.

{¶18} It is well established that “[a] trial court must follow the mandate of the appellate court[.]” (Quotations omitted). *State v. Pendergrass*, 9th Dist. No. 04CA008437, 2004-Ohio-5688, at ¶9. This Court has held:

“When this Court, as is its customary practice, remands a case for further proceedings, this does not necessarily mean that we order some sort of hearing to be held upon remand. Rather, this language simply designates that the case is to return to the trial court to ‘take further action in accordance with applicable law.’” *Id.* at ¶10, quoting *Chapman v. Ohio State Dental Bd.* (1986), 33 Ohio App.3d 324, 328.

{¶19} Further, an appellate court may or may not specify the nature of the further proceedings, and in fact, should not do so if the trial court has the discretion as to the nature of the remand proceedings. *Id.*, citing *State v. Chinn* (Aug. 21, 1998), 2d Dist. No. 16764 (Grady, J., concurring and dissenting).

{¶20} In *Evanich I*, this Court determined that the trial court's judgment entry granting adverse possession to Evanich failed to adequately describe the property and remanded for proceedings consistent with the opinion. This Court did not specify the nature of the proceedings.

{¶21} Bridge has argued that a hearing was unnecessary under *Pendergrass*. However, this Court notes that *Pendergrass* states that a remand for further proceedings "does not necessarily mean" that a hearing need be held. However, *Pendergrass* does not preclude the trial court from conducting a hearing in the absence of specific instructions from the appellate court.

{¶22} Bridge has also argued that this Court cited *Oeltjen v. Akron Associated Invest. Co.* (1958), 106 Ohio App. 128, for an appropriate way to correct the error on remand. This argument misconstrues our mandate. This Court cited *Oeltjen* for the proposition that a legal description of the encroachment should be incorporated into the trial court's judgment entry quieting title to the adverse possessor. In fact, in *Oeltjen*, this Court simply directed counsel for the adverse possessor to procure a survey to be incorporated into the judgment entry. In the instant matter, the record indicates that Evanich did just that: procured a survey to be incorporated into the record.

{¶23} Ultimately, this Court did not direct the trial court to incorporate a specific survey, nor did it direct the trial court to simply incorporate a survey without holding a hearing. Under our mandate in *Evanich I*, the trial court was

given the discretion to proceed in accordance with our opinion and the applicable law. This Court cannot find that the trial court abused its discretion by allowing a new survey of the encroachment to be presented on remand. Further, this Court cannot say that the trial court abused its discretion by allowing the surveyor to testify as to the survey where Bridge had ample opportunity to cross examine.

{¶24} Bridge's second assignment of error is overruled.

ASSIGNMENT OF ERROR III

“THE TRIAL COURT ERRED AS A MATTER OF LAW IN NOT DETERMINING THAT PUBLIC POLICY INTERESTS PRECLUDED APPLICATION OF THE ADVERSE POSSESSION DOCTRINE TO STATUTORILY PLATTED RESIDENTIAL SUBDIVISIONS[.]”

{¶25} In the third assignment of error, Bridge has argued that the trial court erred in not determining that public policy considerations precluded application of the adverse possession doctrine to statutorily platted residential subdivisions. This Court finds that Bridge's argument is barred by the doctrine of res judicata.

{¶26} Under the doctrine of res judicata, any “issue that could have been raised on direct appeal and was not is res judicata and not subject to review in subsequent proceedings.” *In re S.J.*, 9th Dist. No. 23199, 2006-Ohio-6381, at ¶14, quoting *State v. Saxon*, 109 Ohio St .3d 176, 2006-Ohio-1245, at ¶16. See, also, *Grava v. Parkman Twp.* (1995), 73 Ohio St.3d 379, at syllabus. Moreover, “[w]here an argument could have been raised on an initial appeal, res judicata dictates that it is inappropriate to consider that same argument on a second appeal

following remand.” *In re S.J.*, at ¶14, quoting *State v. D’Ambrosio* (1995), 73 Ohio St.3d 141, 143. See, also, *State v. Gillard* (1997), 78 Ohio St.3d 548, 549 (on appeal after remand, “new issues” are barred by the doctrine of res judicata). “Res judicata promotes the principle of finality of judgments by requiring plaintiffs to present every possible ground for relief in the first action.” *Kirkhart v. Kieper*, 101 Ohio St.3d 377, 2004-Ohio-1496, at ¶5.

{¶27} In the case sub judice, Bridge could have raised the argument proposed in this assignment of error on the initial appeal, but did not. Bridge has argued in the current appeal that this public policy argument was presented at trial and that the trial court erred in dismissing it. Yet, Bridge chose not to raise the public policy issue on the initial appeal. Therefore, Bridge is barred from raising this argument on appeal, after remand, by the doctrine of res judicata.

{¶28} Bridge’s third assignment of error is overruled.

III.

{¶29} Bridge’s three assignments of error are overruled. The judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

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

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

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

Costs taxed to appellants.

DONNA J. CARR
FOR THE COURT

MOORE, J.
CONCURS

SLABY, P. J.
DISSENTS, SAYING:

{¶30} I respectfully dissent from the majority because I would find that the adversity element for adverse possession requires a specific intent to use another's property as one's own and adverse to the true owner's rights.

{¶31} Initially, I would address the issue of the applicable standard of review. Normally, when this Court reviews a trial court's determination that the

elements of adverse possession have been met, it “will not reverse the judgment of the trial court as being against the manifest weight of the evidence if the judgment is based upon some competent, credible evidence that speaks to all of the material elements of the case.” *Galehouse v. Geiser*, 9th Dist. No. 05CA0037, 2006-Ohio-766, at ¶10, quoting *Morris v. Andros*, 158 Ohio App.3d 396, 2004-Ohio-4446, at ¶18. See, also, *Heiney v. Godwin*, 9th Dist. No. 22552, 2005-Ohio-5659, at ¶13. However, when an appellant challenges a trial court’s legal conclusions, this Court affords them no deference and reviews them de novo. *Morris* at ¶18.

{¶32} Specifically, Bridge has made the argument that intent to claim title is an essential element of adversity pursuant to *Grace v. Koch* (1998), 81 Ohio St.3d 577, and that the trial court erred as a matter of law when it found Evanich adversely used his property despite evidence that Evanich had absolutely no intent to claim title to the disputed tract. Essentially, Bridge’s argument is that the trial court failed to correctly apply the law, to wit, the intent test for adversity; and such an argument clearly falls within the realm of a legal challenge. Accordingly, I would apply the de novo standard of review. *Morris* at ¶18.

{¶33} “To acquire title by adverse possession, the party claiming title under the common-law doctrine must show exclusive possession and open, notorious, continuous, and adverse use for a period of twenty-one years.” *Grace*, 81 Ohio St.3d at 579. In *Grace*, the Supreme Court added that for possession to be adverse ““there must have been an intention on the part of the person in

possession to *claim title, so manifested* by his declarations or his acts, that a failure of the owner to prosecute within the time limited, raises a presumption of an extinguishment or a surrender of his claim.” (Emphasis sic.) *Grace*, 81 Ohio St.3d at 581, quoting *Lane v. Kennedy* (1861), 13 Ohio St. 42, 47.

{¶34} Adverse possession is a disfavored doctrine in Ohio. See *Grace*, 81 Ohio St.3d at 580; *Morris* at ¶12. As such, the doctrine’s elements are stringent. *Id.* Therefore, I would opt to interpret *Grace*’s intent requirement strictly and conclude that in order for possession to be adverse, the party in possession must have the knowing intent to use another’s property as his own, adverse to the true owner’s rights. Anything short of such intent is insufficient to establish the adversity required to justify “a legal title holder forfeiting ownership to an adverse holder without compensation.” *Morris* at ¶12, citing *Grace*, 81 Ohio St.3d at 580.

{¶35} The record in the present matter indicates a lack of any intent at all on the part of Evanich. In his deposition, Evanich testified that he erected the planter and planted the foliage on what he believed was his own property. Additionally, Evanich testified that he actively attempted to remain on his own lot by running a string from an iron survey pin to what he thought was another lot survey marker. Further, Evanich testified that had he known he was utilizing his neighbor’s property, he would not have proceeded without asking permission. Finally, Evanich testified that he would not have intentionally crossed a property line to place the plantings. At the trial, Evanich confirmed his deposition

testimony, stating that he never would have planted on the property if he had known it did not belong to him.

{¶36} As the majority points out, this case presents a case of mutual mistake. That is, each party believed that the disputed property was owned by Evanich. I am also aware of the litany of cases affording the protection of the adverse possession doctrine to “one who has honestly entered and held possession in the belief that the land was his own[.]” *Vanasdal v. Brinker* (1985), 27 Ohio App.3d 298, 299. However, “there are no equities in favor of a person seeking to acquire property of another by adverse holding[.]” See *Grace*, 81 Ohio St.3d at 580, citing 10 Thompson on Real Property (Thomas Ed.1994) 108, Section 87.05. I see no reason why in the case of mutual mistake, this Court should put the rights of the adverse possessor ahead of those of the true owner.

{¶37} Based on the foregoing, I would find that the trial court erred as a matter of law in that it failed to consider the impact of Evanich’s lack of intent on the adversity of the use. This failure is evinced by the fact that the trial court found that Evanich adversely used Bridge’s property despite undisputed evidence that he did not intend to do so, but only sought to beautify what he thought was his own property. Accordingly, I would reverse the lower court’s judgment, and therefore, I respectfully dissent.

APPEARANCES:

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