

No. 2007-0863

IN THE SUPREME COURT OF OHIO

WILLIAM EVANICH, et al.

Plaintiffs-Appellees

v.

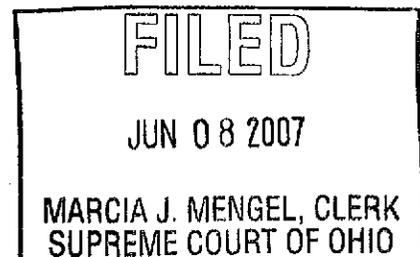
STEVEN BRIDGE, et al.

Defendants-Appellants

APPELLEES' MEMORANDUM IN RESPONSE

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WHETHER THE CASE IS OF PUBLIC OR GREAT GENERAL INTEREST

This case involves the application of a well-defined body of law to a clear fact pattern. Plaintiffs-Appellees (hereafter, the "Evanichs") acquired an undeveloped lot in a residential subdivision in 1965, and the following year began building a home on the lot. While the home was being completed the Evanich installed sections of fencing at the front corner and at the rear corner of their lot. Between the sections of fence, front and rear, they installed raised planting beds using railroad ties two deep, placed a line of sandstone blocks, and did extensive plantings of perennial, shrubs and ornamental trees. Groundcover was planted in areas between.

The Evanichs placed the sections of fence along what they mistakenly believed to be their lot line. The sections of fencing, the raised beds and the sandstone blocks were all placed along this line. Ever since the Evanichs maintained the property and occupied it exclusively as if it were their own, believing it to be so. In 1977 Defendants-Appellants (hereinafter "Bridges") acquired the lot adjoining that of the Evanichs along the line defined by the fencing and landscaping installed by Evanichs. Until Spring in the year 2002 Bridges also believed that the Evanichs owned the land within the line defined by the fencing and landscaping elements. It was not until a survey was done in that year the both parties became aware of their mutual mistake.

A dispute arose as to what should be done. The result was that Evanichs filed a claim to quiet title by virtue of adverse possession. Evanichs ultimately prevailed in their claim, and upon appeal the judgment of the trial court was sustained by the Ninth District Court of Appeals. The majority held that there was some competent and credible evidence speaking to all of the material elements of the claim. The court of appeals rejected the argument of the Bridges that the activities of the Evanichs were "minor landscaping". More significantly the appellate court rejected the argument that a mutual mistake of this nature could not sustain a claim for adverse possession, and rejected the

argument that the claimant must have a specific intent to adversely claim the property of another. The appellate court pointed to a number of cases decided by the Ninth District and others districts to the effect that mistake or mutual mistake was a proper basis for a claim to title by adverse possession.

Bridges now argue that this court should establish a requirement of specific intent as an element of such claim, apparently conceding that the current status of the case law is against them. They argue honest error about “insignificant pieces of land” are numerous. They argue that adverse possession claims should be precluded or at least discouraged in residential subdivisions established under R.C. Chapter 711 because lots are described by numbers, although they offer no law in support of this possession, and the court of appeals refused to consider this argument on the basis of *res judicata* as the matter had not been presented to the trial court.

But ultimately Bridges propose that “the issue is one of intent”, and that possession may not be legally adverse unless the possessor has the intent to take the land of another. They argue for an extension of this Court’s ruling in *Grace v. Koch* (1998), 81 Ohio St.3rd 577. The thrust of their argument is that there is a compelling public interest in favor of rewarding those who intend to intentionally wrest ownership from another, in contrast to the occupant who innocently occupies and maintains the property of another in an open, notorious and continuous manner for the requisite period of time. The Evanichs disagree for reasons more fully elaborated in connection with appellants’ proposition of law.

ARGUMENT IN SUPPORT OF APPELLEES' POSITION REGARDING THE PROPOSITION OF LAW RAISED IN THE MEMORANDUM IN SUPPORT OF JURISDICTION.

Proposition of Law No. 1:

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.

The language of appellees' proposition of law is taken directly from a case decided by the Ninth District Court of Appeals. *Vanasdal v. Brinker* (1985), 27 Ohio App.3d 298, citing *Yetzer v. Thoman* (1866) 17 Ohio St. 130. This is one of several cases decided in the Ninth District embracing this point of law. See also *Morris v. Andros* (2004), 158 Ohio App.3d 396. As pointed out in the opinion of the lower court, other districts have embraced this proposition as well. See e.g., *Patton v. Ditmyer*, 4th Dist. Nos. 05CA12, 05CA21, 05CA22, 2006-Ohio-7101; *Frank v. Young's Suburban Estates, Inc.* 6th Dist. No. OT-02-040, 2004-Ohio-1650; *Beener v. Spahr* (Dec. 15, 2000), 2d Dist. No. 2000-CA-40.

Appellants argue that an honest mistake is insufficient, and that there must be a *mens rea* or specific intent to occupy and take the land of another. This position is ostensibly derived from the ruling of this Court in *Grace v. Koch* in which it was stated that "there must be an intention on the part of the person in possession to claim title, so manifested by his declarations or 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." *Grace* at 581. Was it the intention of this language to imply that one must have the correct subjective intention or mental state, or is, in fact, the focus on the manifestations of an intent to assert the prerogatives of owners by declarations and acts plainly visible to those whose title may be affected? As noted in the court below, *Grace* was not a case that involved a mutual mistake of fact, and is therefore distinguishable from the case before this Court.

The court below correctly pointed out that the notion of adversity relates, rather, to the nature of the possession of the property of another. “Adverse or hostile use is any use inconsistent with the rights of the title owner”. *Vanasdal v. Brinker* at 298, citing *Kimbal v. Anderson* (1932), 125 Ohio St. 241. The focus is on the objective facts relating to occupation of the property, and the response it invites in the owner.

In this context the public policies which underlie the doctrine of adverse possession should be examined. Certainly one function of this rule of law is to cause ownership at some point to coincide with long-established lines of occupation. In this respect the intention of the occupant has no bearing. Also, as suggested above, one of the foundations of the doctrine would seem to be that where one has not asserted a claim to ownership in the face of a hostile occupation, an owner can be seen to have relinquished or waived his or her rights. Again, the intention of the person occupying the property of the owner is irrelevant to this notion.

Additionally, as suggested previously, the effect of appellants’ position is to essentially reward someone who forms an intent to “steal”, while conferring no benefit to one who acts in all respects as if the property were his or her own under a mistaken belief of ownership. Between the two the latter position would seem to encompass the greater equities.

Finally, proof of subjective intention is a difficult one for courts. Far better is the focus on objective facts relating to the nature and extent of possession. In this context one intends to possess adversely when one does those things which an owner of property would do, and which conversely puts the true owner on notice of the adverse claim. In this context a claimant “intends” to claim ownership when that person undertakes the outward and objective prerogatives of ownership. It is respectfully suggested that *Grace* is entirely consistent with this view of the law.

CONCLUSION

Base on the foregoing the Court should decline to exercise its discretionary jurisdiction over this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Memorandum in Response was sent via regular mail, postage prepaid, to Stephen G. Meckler, THE SPIKE & MECKLER LAW FIRM, LLP, 1551 West River Road, North, Elyria, OH 44035 on this 7th day of June, 2007



Frank S. Carlson