
In The Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
NINTH APPELLATE DISTRICT
LORAIN COUNTY, OHIO
CASE No. 05CA008824

WILLIAM EVANICH, et al.
Appellees,

v.

STEVEN BRIDGE, et al.
Appellants.

MERIT BRIEF OF APPELLANTS
STEVEN and MARGARET BRIDGE

Stephen G. Meckler (00140113)
Counsel of Record
The Spike & Meckler Law Firm, LLP
1551 West River Road, North
Elyria, Ohio 44035
(440) 324-5353 Telephone
(440) 324-6529 Facsimile
smeckler@spikemeckler.com

Attorneys for Appellants
Steven Bridge & Margaret Bridge

Frank D. Carlson (0022606)
Counsel of Record
Stumphauzer & O'Toole, LPA
5155 Detroit Road
Sheffield Village, Ohio 44054
(440) 930-4001 Telephone
(440) 934-7208 Facsimile
fcarlson@sheffieldlaw.com

Attorneys for Appellees
William Evanich & Roselyn Evanich

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
I. INTRODUCTION	1
II. STATEMENT OF FACTS.....	3
The Properties	3
The Mistake.....	4
The First Appeal.....	8
Remand Proceedings.....	9
Another Appeal.....	10
III. ARGUMENT.....	11
Proposition of Law I.....	11
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.....	11
A. The Lower Court’s reliance on Mutual Mistake was incorrect.....	14
B. Mental states of an adverse possessor are material since they enter the doctrine of adverse possession through the requirement that possession be “adverse and under claim of title.”.....	16
C. In determining whether the elements of adverse possession have been proven, a trial court must consider the claimant’s mistaken purpose in not holding to the true line.....	18
D. A presumption establishing intention to claim title can be countered by an adverse claimant’s contrary belief.....	19
E. Sound public policy supports the view that a true owner should not Lose title to his land in an adverse possession proceeding because Of an “unintended possession.”.....	20
IV CONCLUSION	21

PROOF OF SERVICE 23

APPENDIX

Appendix Page

Notice of Appeal to The Supreme Court of Ohio
(May 10, 2007)001

Judgment and Opinion of The Court of Appeals
Ninth Appellate District Lorain County, Ohio 004
(March 26, 2007)

Judgment Entry on Remand from The Court of Appeals
The Lorain County Court of Common Pleas
(September 30, 2005)020

TABLE OF AUTHORITIES

<u>CASES</u>	<u>Pages</u>
Bohaty v. Centerpointe Plaza Assoc. (9 th Dist.), 2002-Ohio-749.....	13
Burkitt v. Shepherd (4 th Dist.), 155 Ohio App.3 rd 713, 2006-Ohio-3676.....	15
Ennis v. Stanley (1956), 346 Mich. 196, 78 N.W.2 nd 114.....	18
Evanich v. Bridge (9 th Dist.) 2005-Ohio-2140.....	8
Evanich v. Bridge (9 th Dist.) 2005-Ohio-648.....	8
Evanich v. Bridge (9 th Dist.), 170 Ohio App.3 rd 653, 2007-Ohio-1349.....	9,10, 11, 15
Grace v. Koch (1998), 81 Ohio St.3 rd 577, 1998-Ohio-607.....	1, 8, 11-12
Lane v. Kennedy (1861), 13 Ohio St. 42.....	2, 12
Morris v. Andross (9 th Dist.), 158 Ohio App.3 rd 396, 2004-Ohio-4446.....	13
Robinson v. Armstrong (5 th Dist.), 2004-Ohio-1463.....	15
Video Shack , Inc. v. Smith (7 th Dist.), 2003-Ohio-5149.....	13, 14
Warner v. Noble (1938), 286 Mich. 654, 282 NW 855.....	18
Yetzer v. Thoman (1866), 17 Ohio St. 130.....	17

OTHER AUTHORITIES

Pages

Richard Powell, Powell on Real Property, §91.05 (Michael Allan Wolf edit.).....16

David Farrier, Conserving Biodiversity on Private Lands:
91 Harv. L. Rev. 303 (1995).....20

John G. Sprankling, An Enviromental Critique of Adverse Possession
79 Cornell L. Rev. 816 (1994).....21

Jeffrey Evans Stake, The Uneasy Case for Adverse Possession
89 Geo. L. Rev. 2419.....16, 20, 21

I. INTRODUCTION

The decision of the court of appeals 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 other decisions of its own district concerning an adverse possessor's *intention to claim title*.

This controversy between neighbors, 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.

The appellants, Steven Bridge and Maragret Bridge, live as neighbors to the appellees, William Evanich and Roselyn Evanch, in a residential subdivision in an urban setting. The encroachments were not extensive and consisted of a ubiquitous decorative split rail fence and 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?

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.

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 error occurs in placing decorative material and landscaping, 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 non-owner has remained on someone else's land. This has been a central theme in Ohio adverse possession 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.

II. STATEMENT OF THE CASE AND FACTS

This litigation is about a mistaken boundary line between subdivision neighbors that resulted in the taking of the Bridges' land and giving it to Evanich, the adjoining neighbor, even though he, Evanich, never intended that result. Despite having been neighbors for the better part of 27 years, appellees' unintended mistake in staking a lot line "has propelled them to a state of hostility"³ in the ordinary sense of the word.

The Properties

The parties to this case are adjoining landowners who have been neighbors for more than twenty-seven years. Each are owners of irregularly shaped sublots in the Briar Lake Subdivision as shown on a subdivision plat recorded in the official Book of Maps of the Lorain County Recorder in 1963. Evanich acquired his property known as 385 Windward Drive on June 1, 1965. The Bridges purchased their home in June 7, 1977, which was on the adjoining subplot known as 395 Windward Drive. (Record at 10, preliminary judicial report).

The dispute involves a sliver of land running between the common side lot line. At trial Evanich claimed a narrow part of Bridge's land which he described as an acute right triangle, the base of which is five feet into the Bridge property and its apex is found at the adjoining rear lot lines.

³ Judge Milligan concurring in *Bebout v. Peffers* (Aug. 18, 1986) Knox App. 86-CA-02, 1986 WL 9303 saying "[i]t is difficult to see how a mutual mistake as to the precise location of a surveyed boundary line can propel either of the parties into a state of hostility within the concept of adverse possession."

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The trial court was asked to settle a controversy that came about from a fierce windstorm in March, 2002. That spring storm resulted in blow down of several trees in Bridge's rear yard. Intending to replace the storm damage with new landscaping, Bridge obtained a survey from K S Associates, registered surveyors. Bridge wanted to insure that his project would not encroach on his neighbor's property. The K S survey disclosed that Evanich's landscaping along their common side lot line encroached some five feet at its farthest point onto Bridge's property. (plaintiff exhibit G). Surprised by this development, Evanich obtained his own survey from a registered surveyor, Alex Kelsner. The survey confirmed what Bridge had told Evanich. His landscaping was indeed encroaching on Bridge's lot. (trial transcript page 8) (joint trial exhibit D).

The Mistake

When Evanich acquired his property on Windward Drive in 1965 it was an unimproved subplot containing trees and shrubs and other natural growth. According to Evanich, when he first came on his property in the Briar Lake Subdivision he found the rear lot line had been marked by steel pins. He also saw two wooden 'tomato' stakes at the front of his subplot. He believed they were survey lot markers. (trial transcript, pages 27-28).

In 1966, Evanich began the construction of his house which was completed in the spring of the following year. Sometime during construction, the building contractor did extensive rough grading, leveling the Evanich lot and the adjacent, unimproved sublots. In doing the grading, the builder removed the wooden stakes Evanich had seen at the front of his lot. (trial transcript pages 28 – 30).

Apparently there were no other completed homes in the Briar Lake Subdivision when Evanich moved into his new home. The area was barren. In the spring of 1967 he began landscaping the area along the side lot line adjoining what would become the Bridge lot.

But prior to starting on his landscaping activity, Evanich attempted to locate the side lot line. Evanich ran a length of string from the rear iron survey pin to a wooden stake he found at the front of his lot. He assumed this was the same stake he had seen earlier and believed that the contractor had simply replaced it on completing the rough grading of the lots. (trial transcript pages 31, 32). Evanich used this string as a sight line along what he thought was the boundary line. His purpose was to place the landscaping at the lot line.

The landscaping was made up of various materials placed along the 'string' line. At the sidewalk along Windward Drive, Evanich installed a stub split rail fence part of which ran eight feet rearward along the side lot. Beyond the split rail fence, Evanich placed a terrace of railroad ties, one on top of another. This line consisted of eight railroad ties two feet high and extended approximately sixty feet. Evanich planted taxus shrubs, a dogwood tree, flowers and perennials some three feet behind the line of railroad ties in what he called a landscape bed.

Evanich also laid some twelve sandstone blocks extending beyond the railroad ties. Each block was approximately two feet long by eight (8") inches in width. The sandstone blocks were placed approximately two feet apart, spanning a distance of thirty feet. Ivy was placed around and about the stone blocks. Evanich said that he used the

area as a bed for growing ivy because “it didn’t require maintenance”. (trial transcript pages 35 – 37).

At the rearmost part of the side lot line there was a length of wrought iron fence. This fence extended about eleven or twelve feet from the corner iron pin at the rear lot line. Evanich said that he put up the iron fence some time in 1979 to replace a split rail fence of similar length that he had removed some months earlier. (trial transcript pages 40 – 41).⁴

In May of 2002, Evanich learned from Bridge that some of his landscaping had in fact encroached on the Bridge property and beyond the true lot line. (trial transcript page 48). Later that same month Evanich received a letter from Bridge asking that something be done with the landscaping found on his property. In his letter, Bridge mentioned a survey he had obtained from KS Associates. The survey confirmed the encroachments. (Plaintiff’s Exhibit G).

Evanich conceded that the entire disputed area was used by him strictly for landscape plantings. In fact he used foundation plantings because they were low maintenance and he didn’t have to mow the area. His purpose was to beautify that corner of the yard and he did not use it for anything else except for plantings. (trial transcript page 56). He acknowledged that over the years the plantings and landscape had become overgrown. (trial transcript page 57). He also agreed that on occasion the upper ties of the landscaping timber had fallen off the lower ties and down onto Bridge’s lawn. (trial transcript pages 62 – 63). Evanich never told Bridge to keep away from his planting

⁴ Curiously, Bridge’s survey indicated that the iron fence was within Evanich’s lot and the survey Evanich obtained showed that the fence encroached on Bridge’s lot, albeit by inches. Wm. Evanich deposition, page 35.

areas. In fact Evanich never told him to do anything one way or the other. (trial transcript page 65).

For his part, Steven Bridge testified that when he bought his house and property in June of 1977 there was a split rail fence at the front of the lot. Though he had seen Evanich move the top railroad ties he had never seen Evanich move any of the bottom ties. He also was aware of some sandstone blocks and although he thought they had been moved several times they remained substantially in the same position where they were surrounded by a ground cover of ivy.

Bridge said he was never told to stay away from the planters or stay off the Evanich property. (trial transcript page 83). In fact he had gone into the area to trim because it had become so overgrown and not maintained. To Bridge, the side lot area was deplorable looking. (trial transcript page 78).

Bridge disputed that Evanich had installed the wrought iron fence in 1979. Bridge testified he had seen Evanich install the wrought iron fence in the spring of 1982; that the split rail fence at the rear had been taken down in 1979; and nothing had been put in its place for approximately three years. To confirm this, he provided photographs of the Evanich rear side yard which showed in the spring of 1982 there was no fencing. (trial transcript pages 76 – 77, 80 – 82).

In October, 2002, Evanich sought a declaration of his rights to the sliver of Bridge's land that contained his landscaping. Evanich's amended complaint asked the court to quiet title against Bridge pursuant to RC §5303.01. Evanich claimed that beginning in 1967 he had placed landscaping and fences along the adjoining lot line of the Bridges. Relying on the doctrine of adverse possession Evanich claimed he had

gained title to a narrow strip of the Bridge property that was bounded by the fences and landscaping. (record 11, amended complaint).

The trial court conducted a bench trial on July, 27, 2004 and entered judgment for Evanich finding that he had established his adverse possession claim by a preponderance of the evidence. The judgment contained no description of the encroaching area Evanich gained by adverse possession. (Appx. 0020, judgment entry September 14, 2004).

The First Appeal

Bridge appealed to the Ninth District Court of Appeals which reversed the trial court on two different grounds. Because the trial court's judgment alluded to differing standards of proof, the Court of Appeals could not say with certainty that the trial court had applied the clear and convincing standard of proof mandated by the Supreme Court's decision in *Grace v. Koch* (1998), 81 Ohio St.3rd 577. *Evanich v. Bridge*, 9th Dist. No. 04CA008566, 2005-Ohio-2140, ¶ 4 (*Evanich I*). The Appeals Court also found merit in Bridge's claim that the judgment was faulty for it lacked any description of the land taken from him and given to Evanich. *Id* at ¶ 12. The case was remanded to the trial court with instructions that it apply the proper standard of proof and make a specific determination of the land given to Evanich.

While the case was on appeal, the trial court entered a Civ. R. 60(A) entry amending its judgment; saying, by clerical error, it had mentioned an incorrect standard of proof. Bridge again appealed, complaining that the trial court lacked jurisdiction to alter its judgment then on appeal. The court of appeals agreed and vacated the Civ. R.

60(A) order.⁵ *Evanich v. Bridge*, 9th Dist. No. 05CA008666, 2005-Ohio-648 (*Evanich II*).

Remand Proceedings

Upon remand the trial court took the testimony of Chris Herzal, a registered surveyor called as a witness by Evanich. In order to provide a description of the encroaching area, the surveyor said he first obtained the recorded subdivision maps for Briar Lake. From the plat maps he was able to locate the true boundary line between the adjoining lots and from that he prepared a survey map that depicted the Bridge and Evanich lots. (plaintiff exhibit RH-1).

Herzal said that after identifying the true boundary line between the lots he proceeded to survey and map “material” seen at the southeasterly corner of the Evanich lot. He found “landscaping items, one of which was the split rail fence that faced Windward Drive. One arm of this “L” shaped fence paralleled Windward Drive and intruded some five feet into Bridge’s lot. The other arm extended southwesterly toward the rear of the lot a distance of eight feet. Moving from the end of the fence, he surveyed along 61 feet of landscape timbers, and then further rearward and 43 feet along “various items of vegetation” to a wrought iron fence that did lie on the true lot line. (Vol. II, remand transcript pages 21-24). From this survey, Hirzel then prepared a map of the encroachment. (plaintiff exhibits RH-1 & RH-2).

Hirzel said that, according to his survey, the Evanich encroachment formed an “irregularly –shaped polygon” that contained an area of 97/10,000ths of an acre or .0097 acres. The surveyor attributed this segmented shape to having followed along the split rail

⁵ Inadvertently, the appeals court judgment stated that the “judgment of the Lorain County Court of Appeals is vacated.” 2005-Ohio-648, ¶ 7.

fence, landscape timbers and vegetation all of which did not form a straight line. (remand transcript, pages 24, 28).

On September 30, 2005 the trial court again made findings of fact and conclusions of law. The Court determined that the “plaintiffs-Evanich had proved their case by clear and convincing evidence” and “[j]udgment is entered in their favor.” (trial court judgment entry September 30, 2005, at Appx 21).

Another Appeal

Bridge again appealed to the 9th District Court of Appeals. Among other issues⁶, Bridge argued that the elements of adverse possession had not been established since there was no evidence that Evanich had an “intent to claim title.” Instead, the evidence clearly showed that Evanich had made an unintentional mistake in sighting along stakes and that he disavowed any intention to claim Bridge’s land.

The majority opinion of the court of appeals disagreed and affirmed the trial court judgment. *Evanich v. Bridge*, 2007-Ohio-1349 (Appx. 0005) The majority 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.

Judge Slaby dissented. It was his opinion that the trial court erred as a matter of law when it failed to consider the significance of Evanich’s lack of intent as it related to the issue of adversity. Speaking directly to this Court’s language in *Grace* that there must

⁶ Bridge also claimed the judgment was against the manifest weight of the evidence. However, the appeals court found there was *some* competent and credible evidence going to each of the elements of Evanich’s adverse possession claim. Bridge further argued that public policy precluded application of the adverse possession doctrine to lot line disputes in urban residential subdivisions. The court declined to address this issue on the grounds of *res judicata*.

be an intention to claim title in order to establish adversity, Judge Slaby found there was positive evidence that Evanich had absolutely no intention to claim title. Even though Evanich had made an honest mistake, Judge Slaby “could see no reason why in the case of mutual mistake, that the rights of the adverse possessor should be put ahead of those of the true owner.” *Evanich v. Bridge*, 2007-Ohio-1349, (Appx.0018, ¶36-37). Consequently, he concluded that the element of adversity had not been established and the judgment could not stand.

In response to this adverse decision, the Bridges timely filed a discretionary appeal to this Court. (Appx. 0001). On August 29, 2007, this Court accepted jurisdiction. The record and an index were transmitted to the Court on September 26 but the court of appeals clerk failed to send a copy of the index to counsel of record.

III. 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 use of the doctrine 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 more than a century earlier. Looking back to its decision in *Lane v. Kennedy* (1861), 13 Ohio St. 42, the Grace Court reiterated the elements that must be established in order to gain title by adverse possession. 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 nor a part of the concept of possession.

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 where the true line might be located.

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

Beginning in 2003, 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*. It explained that if there was no intention to claim title, then the clamant’s possession could not be adverse. *Bohaty*

v. Centerpointe Plaza Assoc. (9th Dist. No. 3143-M), 2003 -Ohio-749, page two. In the following year, 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 prescriptive easement by adverse possession over a disputed one-half acre of property. 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 the 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 adverseness as defined . . . in *Grace*.” *Morris v. Andross*, supra at ¶ 15, 16.

Another court of appeals applied a similar analysis in denying an adverse possession claim. However, this appeals court used an analysis that demonstrated the difference between an appearance of possession and an intent to claim title based on that possession.

In *Video Shack, Inc. v. Smith* (7th Dist.), 2003-Ohio-5149, the trial court had found that Smith, the claimant, gained title by adverse possession to a strip of property between a fence line and the true survey line. To support his claim, Smith provided the testimony of a predecessor who used the strip for keeping chickens. In addition, she had used a shed located in the strip, had mowed the area and had allowed her children to play up to the fence line. She also testified that she “just knew that some of the land was not ours”.

On appeal, the true owner argued that the predecessor’s testimony contradicted any claim of adverse possession. The 7th District Appeals Court agreed.

It found that the predecessor's use of the shed and maintenance of the area between the shed could manifest to others that she believed she owned the property. However, the court found that her testimony indicated she never intended to claim title. Citing the *Grace* decision, the appeals court said that since she did not intend to claim the land as her own, her possession was not adverse to the title owner's claim. And since her possession was not adverse, the trial court was precluded from finding that the claimant owned the property by adverse possession. *Video Shack, Inc.*, 2003-Ohio-5148, ¶ 22. While appearances associated with physical possession may make it obvious that an occupier believes the land is his, an expression of a contrary intent undercuts the notion that the property is being held adversely.

Evanich was clear that he created the disputed lot line by running a line from a survey pin at the rear of his property to a grading stake that he believed was a survey marker. He did this in order to "put it (the plantings and timbers) on our line and that's what we had tried to do." (Evanich deposition, Supp. 0019.) He thought he was putting the plantings on his own property. And that's why looked for the stake and ran the string from it to the rear iron survey pin. He thought the line between the two points delineated his side lot property line. He was deliberately careful because he wanted to stay within his own lot. Clearly, his intent was only to claim up to the true line separating his from Bridge's lot.

By his own testimony and, more importantly, by his actions, Evanich demonstrated that he did not have any intention to claim title to a sliver of land that was not his. Because Evanich did not have the requisite intention to claim title, he failed to establish that his possession was adverse. Having failed to clearly and convincingly establish this element, he can not now get title to a portion of Bridge's lot by way of adverse possession.

A. The Lower Court's Reliance on Mutual Mistake was Incorrect

The trial court and the appeals court essentially determined that mutual mistake and acquiescence dispensed with a need for Evanich to make a showing of an intention to claim title.

In this case, the court of appeals did not overlook *Grace's* requirement of claimed intent. Instead, the majority opinion of the 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. *Evanich v. Bridge*, 170 Ohio App.3rd 653, 658 at ¶ 15, 2007-Ohio-1349; (Appx. 0009-0010) .

First, it is difficult to accept that both parties were mutually mistaken as to the true lot line. It is true that during the time the Bridges lived next door to Evanich they had no reason to question whether the neighbor's landscaping was on their property. But the encroachment occurred several years before any of the neighboring lots were developed. The mistake was clearly unilateral.

Mutually mistaken lot owners can establish a boundary by acquiescence. The doctrine of acquiescence is used when adjoining landowners occupy their properties up to a certain line and mutually recognize and treat that line as if it is the true boundary separating them. *Robinson v. Armstrong* (5th Dist.), 2004-Ohio-1463 at ¶ 35.

The 4th District Appeals Court, explained that acquiescence rests on the practical reality that the true location of most boundaries is uncertain and that the neighbors may establish between themselves a boundary evidenced by monuments, such as a fence. *Burkitt v. Shepherd* (4th Dist.), 2006-Ohio-3673 at ¶ 15.

In this case there was no proof that the true location of the lot line was uncertain. Both the adjoining lots were identified by number and their boundaries were depicted on a plat map of

the Briar Lake Subdivision. The uncertainty about the true line, if it existed, came about solely because of Evanich's use of an expedient measure to identify his lot lines.

Evanich suggested that there was an agreement about the lot line he had created. Referring to the string line, Evanich in pretrial testimony said “. . . what was established was, that was agreeable to the previous two owners prior to the Bridges, [they] had no problems with that particular line.” (Evanich deposition, Supp. 0014). But he also said that he had no discussions with the previous two neighbors about his landscaping. His belief that there was agreement was based solely on the fact that “No one else had a survey to dispute the location of the line.” (*Id* at Supp. 0015)

- B. Mental States of an adverse possessor are material since they enter the doctrine of adverse possession through the requirement that possession be “adverse and under claim of title.”

Professor Jeffrey Stake has said that the most difficult element of adverse possession is an interpretation of what the term “adverse” means. According to Stake, there is no consensus because the element goes by a variety of names, including ‘adverse’, ‘under claim of title’, ‘under claim of right’ and hostile and under claim of right.’” Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, (2001) 89 Geo. L.J. 2419, 2426. With regard to holding ‘under claim of title’ courts have given differing views about whether or not an intention to claim title involves consideration of the claimant's belief when first entering the true owner's property.

Despite a lack of consensus, one commentator has separated the decisions into two groupings. *Richard Powell, Powell on Real Property, §91.05 (Michael Allan Wolf edit.)*.

One group gives no consideration to the actual belief of the claimant and has been regarded as the majority view. Under this interpretation the issues of mistake and actual belief

are not relevant in resolving adverse possession cases. The necessary 'adverse' element can exist even though possession was taken by mistake. This 'objective' standard measures the requirement of a claim under title based solely on the claimant's actions.

The other group, a minority, looks to the claimant's subjective state of mind and is called the Maine rule. This rule says that mistaken possession is simply not 'adverse' because claimants would not have trespassed had they known of the true boundary.

Almost 150 years ago, Ohio adopted the majority view. In *Yetzer v. Thoman* (1866), 17 Ohio St. 130, the Supreme Court indicated that Ohio law does not require proof of subjective purpose and that even in the case of mutual mistake about the true boundary line, property still can be obtained by adverse possession. In essence, actual physical possession alone is sufficient for adverse possession. Under this interpretation, actual possession has become the analog of an intention to claim title. Under *Yetzer*, the requirement of intending to claim title becomes superfluous. It is simply read out of the elements of adverse possession.

Possession itself presumes an "intention to claim title" regardless of whether it occurred intentionally or by mistake. But if that is true, then it conflicts with the point made in *Grace and Lane v. Kennedy* (1861), 13 Ohio St. 42, that in order to make possession adverse there has to be an intention to claim title.

The policy concern in *Yetzer* was that if actual beliefs mattered then land thieves and pirates would get title to lands knowing that they belonged to another. And this minority Maine rule would penalize "a party that honestly entered and held possession in the belief that it was his own." *Yetzer*, supra at 133. Since the Civil War decision in *Yetzer*, the doctrine of adverse possession in Ohio has applied to those 'honest' but mistaken persons as well those who

are not relevant in resolving adverse possession cases. The necessary ‘adverse’ element can exist even though possession was taken by mistake. This ‘objective’ standard measures the requirement of a claim under title based solely on the claimant’s actions.

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knowingly appropriate land for the purpose of getting title. However, under either the majority or minority rule, the intentional trespasser would still get title to the land.

- C. In determining whether the elements of adverse possession have been proven, a trial court must consider the claimant's mistaken purpose in not holding to the true line.

The interplay between mistake and intention to claim title is 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 an adjacent owner's land, 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.

To demonstrate 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 mis-sighted along survey stakes in locating the boundary line before building a cottage, which later proved to encroach on the neighboring lot. The Michigan Supreme 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 and tomato stakes which 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 from a wooden stake 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.

- D. A presumption establishing intention to claim title can be countered by an adverse claimant's contrary belief.

It may be that a claimant's actual yet mistaken belief that he holds to the true line can not be used to defeat, outright, his claim of adverse possession. But this not to say that actual belief plays no role whatsoever in cases of adverse possession.

According to *Yetzer v. Thoman*, actual physical possession gives rise to the presumption that the property is being occupied with an intention to claim title. Nonetheless, evidence of a mistaken belief does play some role.

The possessor's mistaken belief may or may not detract from the soundness of the presumption made in his favor. At the least, it may serve to make the claimant's case something less than direct, clear and convincing. Where, as in this case, there is some evidence of a claimant's mistaken belief, a trial court should give that evidence appropriate consideration since that evidence directly affects the persuasiveness of the presumption. When testimony of the claimant concerning intent to possess is contrary to evidence of the acts of possession, a court may find that physical possession is insufficient to satisfy the burden of proof.

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, who made the mistake. It was he who acted out of ignorance of the Briar Lake map plat and its lot lines. Either 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 Bridges; 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 that you are the true owner, you have still lost land to your neighbor who was negligent or ignorant of the true lines of his own property. And this is so 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.

At the very least, the impact of a claimant's mistaken belief should be weighed against the notion that a presumption based on simple possession stands as sufficient evidence of the adverse element of intention to claim title.

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.

- E. Sound public policy supports the view that a true owner should not lose title to land because of an "unintended possession."

The lower court took the position that any possession, no matter how unintentional, is sufficient to establish an intention to claim title and therefore meets the 'adverse' element.

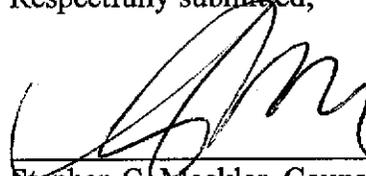
The heart of American property is owner autonomy. See David Farrier, *Conserving Biodiversity on Private Lands: Incentives for Management or compensation for Lost Expectations?*, 91 Harv. L. Rev.303, 307-08 (1995). "The fundamental idea of property is that it can not be taken away against the owner's wishes." Jeffrey Stake, *Uneasy Case* at 2420. The adverse possession doctrine "strikes at the heart" of our concepts because it allows property to be taken from a rightful owner without compensation. *Id.* The owner feels like a "victim of theft."

rightful owners of their title.” Stake, *The Uneasy Case for Adverse Possession*, 89 Georgetown L. Rev. 2419, 2448. (1994). Its use should be discrete.

The Bridges submit that the court of appeals erred in determining that the appellees had clearly and convincingly established that their possession was “adverse and under claim of title.”

The Bridges respectfully request an order reversing the majority opinion of the appeals court and ask that a mandate issue from the Court directing the trial court to enter an order of dismissal of the appellees’ complaint.

Respectfully submitted,

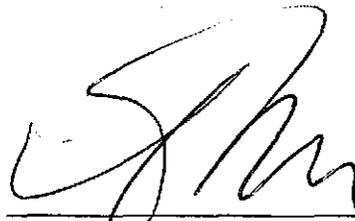


Stephen G. Meckler, Counsel of Record
Ohio Registration No. 0014013
THE SPIKE & MECKLER LAW FIRM, LLP
1551 West River Road, North
Elyria, Ohio 44035
(440)324-5353
Counsel for Appellants
Steven Bridge & Margaret Bridge

CERTIFICATE OF SERVICE

This is to certify that a copy of appellants' Merit Brief was served upon counsel for the appellees, William Evanich and Roselyn Evanich, by mailing the same by ordinary U.S. mail on the 21 day of November, 2007, to the following:

Frank D. Carlson, Esq. (0022606)
Stumphauzer & O'Toole
A Legal Professional Association
5155 Detroit Road
Sheffield Village, OH 44054
Attorney for Appellees



Stephen G. Meckler, Counsel of Record
Ohio Registration No. 0014013
THE SPIKE & MECKLER LAW FIRM, LLP
1551 West River Road, North
Elyria, Ohio 44035
(440)324-5353
Counsel for Appellants
Steven Bridge & Margaret Bridge

APPENDIX

IN THE SUPREME COURT OF OHIO

WILLIAM EVANICH, et al.

APPELLEES

vs.

STEVEN BRIDGE, et al.

APPELLANTS

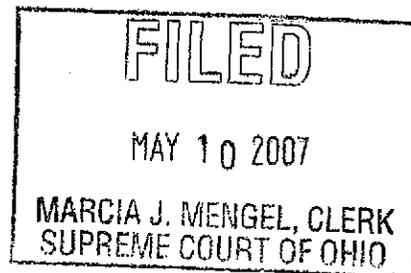
CASE NO. **07 - 0863**

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

NOTICE OF APPEAL

Stephen G. Meckler (0014013), Counsel of Record
The Spike & Meckler Law Firm, LLP
1551 West River Road, North
Elyria, OH 44035
(440) 324-5353 Telephone
(440) 324-6529 Facsimile
smeckler@spikemeckler.com
Counsel for Appellants, Steven Bridge
& Margaret Bridge

Frank D. Carlson, Esq. (0022606), Counsel of Record
Stumphauzer & O'Toole
A Legal Professional Association
5155 Detroit Road
Sheffield Village, OH 44054
(440) 930-4001 Telephone
(440) 934-7208 Facsimile
Counsel for Appellees, William Evanich
& Roselyn Evanich



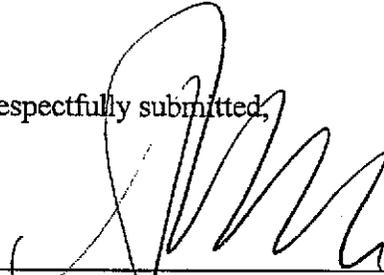
000001

NOTICE OF APPEAL OF APPELLANTS
STEVEN BRIDGE & MARGARET BRIDGE

Appellants, Steven Bridge and Margaret Bridge, hereby give notice of their appeal to the Supreme Court of Ohio from the judgment of the Lorain County Court of Appeals, Ninth Appellate District, entered in Court of Appeals Case No. 05CA008824 on March 26, 2007.

This case is one of public or great general interest.

Respectfully submitted,



Stephen G. Meckler, Counsel of Record
Ohio Registration No. 0014013
THE SPIKE & MECKLER LAW FIRM, LLP
1551 West River Road, North
Elyria, Ohio 44035
(440)324-5353
Counsel for Appellants
Steven Bridge & Margaret Bridge

CERTIFICATE OF SERVICE

This is to certify that a copy of this Notice of Appeal 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:

Frank D. Carlson, Esq. (0022606)
Stumphauzer & O'Toole
A Legal Professional Association
5155 Detroit Road
Sheffield Village, OH 44054
Attorney for Appellees



Stephen G. Meckler, Counsel of Record
Ohio Registration No. 0014013
THE SPIKE & MECKLER LAW FIRM, LLP
1551 West River Road, North
Elyria, Ohio 44035
(440)324-5353
Counsel for Appellants

000009

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 NABAKOWSKI

9th 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

Journal 112 Page 136
Court of Appeals of Ohio, Ninth Judicial District

000004

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IN THE COURT OF APPEALS
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Appellees

v.

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ENTERED IN THE
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CASE No. 02CV133012

Appellants

DECISION AND JOURNAL ENTRY

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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 portion of Bridge’s property by adverse possession. On July 27, 2004, a bench

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:

STEPHEN G. MECKLER, Attorney at Law, for appellants.

FRANK D. CARLSON, Attorney at Law, for appellees.

JEFFREY H. WEIR, II., Attorney at Law, for defendant.

J. G. MORRISSON, Attorney at Law, for Lorain County Treasurer.

X

FILED
LORAIN COUNTY
THE COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

2005 SEP 28 10:01
CLERK OF COMMON PLEAS
RON NABAKOWSKI

CASE NO. 02CV133012

WILLIAM EVANICH, ET AL.,
PLAINTIFF

V.

JUDGMENT ENTRY

STEVEN BRIDGE, ET AL.,
DEFENDANTS.

September 27, 2005

This matter came before the Court for further hearing pursuant to the decision of the Ninth District Court of Appeals in Case No. 04CA008566. The Court finds as follows:

- (1) Plaintiffs and Defendants are adjoining land owners in the Briar Lake Subdivision located in the City of Elyria, County of Lorain, State of Ohio.
- (2) Plaintiffs are the owners of the property located at 385 Windward Drive. Plaintiff William Evanich acquired the property by deed dated May 12, 1965 and recorded in June 1, 1965.
- (3) Defendants are the owners of the property located at 395 Windward Drive by deed dated May 22, 1977 and recorded on June 7, 1977.
- (4) In 1967, Plaintiffs installed a split rail fence at the right front corner of their lot. Plaintiffs installed raised planting beds from a point behind the fence post using treated railroad ties stacked on top of each other to form a narrow planting bed. Bushes, flowers and at

EXHIBIT A

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least one tree were planted in the beds. Large sandstone blocks were placed at intervals behind the planting bed toward the rear of the lot. The blocks end at a corner post of a wrought iron fence which now enclose Plaintiff's swimming pool. Originally, the fence was two portions of split rail fencing but was later changed to wrought iron when the swimming pool was installed.

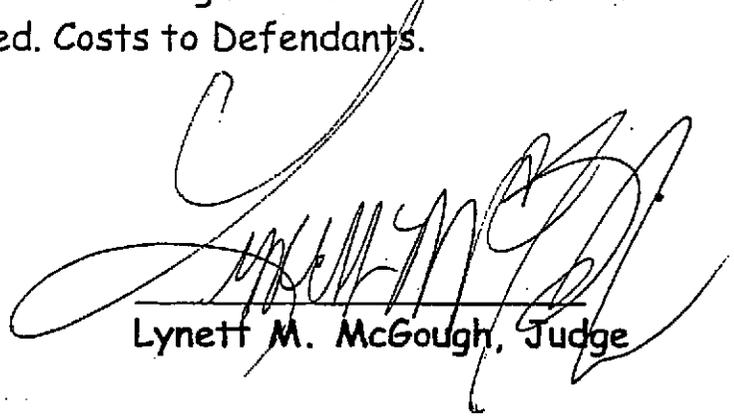
- (5) Plaintiffs have brought this action to quiet title to a triangular strip of land running between their common side lot lines which extend five feet into Defendants' property at the base, which is bordered by the split rail fence, and the apex of which is the adjoining rear lot lines. See Joint Exhibit C which is incorporated by reference.
- (6) A legal description of the triangular strip of land, referred to as the encroachment parcel and marked as Exhibit RH-3, was prepared by Christopher Hirzel, a registered surveyor in the State of Ohio. See transcript of hearing on September 20, 2005. Exhibit RH-3 is incorporated by reference.
- (7) It is undisputed that until Defendant had a survey done in 2002, both parties believed that the property in question belonged to the Plaintiffs.
- (8) Plaintiffs' burden is to prove their case by clear and convincing evidence. When the law requires proof by "clear and convincing evidence," the evidence in the record must be sufficient to establish "in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established". *Cross v. Lledford* (1954), 161 Ohio St. 469.
- (9) In order to prove adverse possession, Plaintiffs must prove that they had actual, open, notorious, continuous,

hostile and exclusive possession of the land for 21 years.

- (10) Open and notorious means apparent to an owner visiting the land, considering the character of the land and the type of possession that an owner of such land would usually maintain.
- (11) Continuous means without substantial interruption, considering the character of the land and the type of possession that an owner would usually maintain.
- (12) Hostile means without permission of the defendant and opposed to all other claims to the land. It does not mean full of hate or full of fight. The motive or good faith of the plaintiff makes no difference.
- (13) Exclusive means not shared.
- (14) The Court finds that the Plaintiffs' use of the disputed property was open and notorious. The landscaping and fencing clearly indicate that Plaintiff was the owner of the land.
- (15) Further, the apparent ownership was continuous and exclusive from 1967 when the first fencing was put in place.
- (16) Plaintiffs' use was hostile in that they never received permission to use the property. In fact, Defendant s believed that the property was Plaintiffs' property. Defendants never asserted their right to the property until 2002.
- (17) The Court further finds that Plaintiffs' actual use of the property involved more than mowing the lawn or planting a few flowers and shrubs. Plaintiffs' use of the disputed tract of property included split rail and wrought iron fencing, railroad tie planters and sandstone blocks.

This Court finds that Plaintiffs have proved their case by clear and convincing evidence. Judgment is entered in favor of Plaintiffs. Case closed. Costs to Defendants.

IT IS SO ORDERED.



Lynett M. McGough, Judge

VOL. _____ PAGE _____