

IN THE SUPREME COURT OF OHIO

WILLIAM ARNHOLT, ET AL :

AND :

JANIE GAIL ARNHOLT :

Case No. 2011-1237

APPELLEES :

**On Appeal from the Licking County
Court of Appeals, Fifth Appellate
District, App. No 2010 CA 00091**

v. :

JOHN CARLISLE :

APPELLANT :

**MOTION FOR RECONSIDERATION
OF THE SUPREME COURT'S REFUSAL TO GRANT JURISDICTION
TO HEAR THE DISCRETIONARY APPEAL
OF APPELLANT**

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**MOTION FOR RECONSIDERATION
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Appellant requests that this Court reconsider its decision to decline review of this case so that it may reinforce its limitations on the use of Adverse Possession and restrict the expansion of the ability of a claimant to obtain title to property through adverse possession. The decision of the Court of Appeals opens the door to claims for adverse possession substantiated only by the growth of trees while claimant is absent from the property and shifts a portion of the burden of proof to the true owner. The decision will undermine this Court's clear instruction that Adverse Possession is disfavored and that the elements of adverse possession must be strictly construed and proven by the claimant with clear and convincing evidence.

The Appellate Court decision expands the availability of adverse possession among claimants and rejects the ability of an intervening possessor to reject any claim to the property despite the decisions in *Morris v. Andros*, 158 Ohio App. 3d 396, 2004-Ohio-4446" 815 N.E.2d 1147, appeal not allowed 2005-Ohio-204, 104 Ohio St. 3d 1461, 821 N.E.2d 578, *Video Shack, Inc. v. Smith*, 7th Dist. App. No. 2001-CO-41, 2003-Ohio-5149; *Culbert v. Marconi*, 6th Dist. App No. 8-88-4, 1988 WL 114340 further lightening the claimant's burden. Because the Appellate Court decision expands the Doctrine this Court has emphatically and consistently restricted, Appellant respectfully requests this court reconsider its decision and address those questions rather than allowing the law in the Fifth District to

remain as stated.

Revised Code 2305.04, the statute underlying adverse possession, provides a shield from delinquent claims that is most often utilized as a sword to obtain title. The Plaintiffs did not cite it in their complaint, but the relevant portion should be considered: "An action to recover the title to or possession of real property shall be brought within 21 years after the cause of action accrued* * *." The accrual of the cause of action must be demonstrated by clear and convincing evidence to trigger the running of the statute of limitations. The facts which substantiate the accrual of the cause of action, or substantially similar facts, must continuously exist for the entire 21 years lest the claimant lose the benefit of this statute and be forced to start counting the years once again. This feature, and other characteristics, distinguishes adverse possession from other statutes of limitations.

The decisions interpreting this statute of limitations provides for an automatic assignment of claims not found under any other statute of limitations. The assignment, commonly described as "tacking" applies both to the claimant and the true title owner. Consequently, real property may pass through the hands of several potential claimants and several title owners before the property becomes the subject of litigation. If the claimant's chain of title fulfills the requirements of tacking, any true title owner is subject to the defense regardless of whether he had any knowledge of the existence of the defense. This characteristic makes adverse possession unique among affirmative defenses and nearly impossible to foresee. This case provides an example; while Appellant could have requested a survey of the property prior to purchasing the property and may have become aware of some

activity on a portion of what was defined as his property by the survey, he could not compel the Appellee to admit the facts that would ultimately be presented in defense of the Appellant's claim to title. The Appellees had no incentive to openly publicize their claim; instead they would benefit from maintaining the property without discussing their intentions or their knowledge. They will claim, when challenged, that they have "unfurled their flag" but they have no incentive to call attention to their claim until they must assert the defense of adverse possession.

And unlike more commonly asserted statutes of limitation, this doctrine involves parties who frequently have no contact with each other save sharing a boundary. The claims generally do not involve breach of contract, tort, or conversion but only an alleged encroachment which may or may not have occurred during the time of the true owner's possession of the property. The incursion may have begun as much as twenty years earlier leaving the subsequent purchaser unaware of the incursion without the commission of a survey to establish boundaries.

In most other cases the title owner of property subject to litigation is unknown pending the completion of the litigation; however, in an adverse possession claim, the true owner of the property is identifiable and known through review of the deed and survey. Upon the successful assertion of the defense of the expiration of the statute of limitation, title is transferred to the claimant, an unusual result in the context of the defense against a claim.

Adverse possession may be one of the only circumstances in which the Defendant is awarded the assets of the Plaintiff as the result of the successful assertion of a defense.

This Court has recognized the unique qualities of adverse possession and the consequences of its use by imposing a high burden of proof on parties invoking the doctrine and by emphasizing the fact that the use of adverse possession is highly disfavored. The decision of the Court of Appeals strays from those guidelines.

The Court of Appeals suggests the planting and growth of trees provides a basis for an adverse possession claim; such precedent allows a claim to be disguised in the imperceptible growth of vegetation in a truly rural area and a subsequent true owner, and perhaps even the initial true owner, would have no means by which to acquire notice. The unfurling flag, in the form of a growing tree, particularly in a rural area, cannot be distinguished from any other naturally growing vegetation in the area. The claimant's "flag" is concealed among the trees and will provide no notice, yet the Appellate Court Opinion supports the argument that trees remaining on the property during a thirty month absence of the claimant was notice of a claim. Not only does this precedent contradict the admonition that adverse possession is disfavored, it suggests that the true owner has an obligation to remove the trees to undermine the defense. That conclusion is supported only by the Fifth District's Decision and not by any other authority.

The Opinion also suggests that the title owner has the obligation either to remove personal property dumped on the disputed property or prove that it has been abandoned; while this may be an unintended consequence of the opinion, it is not an unreasonable reading. The Opinion lessens the claimant's obligation to establish all elements of his claim by clear and convincing evidence by shifting the burden of proof to the title owner.

The Appellate Court Opinion finds evidence of tacking though the intervening possessor expressly disclaimed any intent to possess the property, and merely mowed part of the lawn on an infrequent basis. Marie K. Arnholt explained that she knew the identity of the true owner and she merely maintained the property to control the local animal population.¹ A truck cap and some dog houses allegedly appeared on the property, but the date of their appearance and the time they remained on the property are never discussed. This decision further lessens the burden on the claimant to prove his case. This Court has held that more significant activity on property was insufficient to establish the defense of adverse possession; this case should not be any different and any contrary decision serves to expand the availability of the defense of adverse possession rather than constrict it.

CONCLUSION

The Fifth District Court of Appeals decision in this matter strays from the guidance issued by this Court and has created precedent which opens the door to claims that the planting of trees in a rural area amidst other trees is sufficient to establish adverse possession. This precedent expands the availability of adverse possession while loosening the definition to allow a claimant to succeed in asserting the defense while absent from the property. The decision will be cited to support shifting the burden of proof to the title owner and to disregard the express comments of an intervening owner who acknowledges the true owner and describes her purpose as not intending to possess the property but merely as maintenance.

The Fifth District opinion has broadened the availability of adverse possession unnecessarily;

¹This testimony was proffered after exclusion by the trial court.

Appellant requests that this Court reconsider its decision to decline to hear this matter and accept jurisdiction to reinstate the limits on the doctrine.

Respectfully submitted,



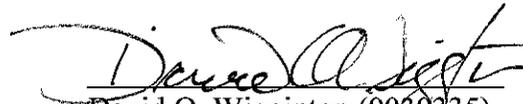
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon:

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By ordinary U. S. Mail this 14TH day of November, 2011.



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