

IN THE SUPREME COURT OF OHIO

WILLIAM ARNHOLT, et al.,	:	
	:	Case No. 2011-1237
Plaintiffs -Appellees	:	
vs.	:	On Appeal from the Licking County
	:	Court of Appeals, Fifth Appellate
JOHN CARLISLE	:	District, Court of Appeals Case No.
	:	2010 CA 00091
Defendant-Appellant.	:	

**PLAINTIFFS/APPELLEES WILLIAM ARNHOLT'S AND JANIE GAIL ARNHOLT'S
MEMORANDUM OPPOSING DEFENDANT/APPELLANT'S MOTION FOR
RECONSIDERATION OF THE SUPREME COURT'S REFUSAL TO GRANT THE
DISCRETIONARY APPEAL OF APPELLANT**

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SUPREME COURT OF OHIO

I. Appellant's Motion For Reconsideration Should Be Denied As It Is Merely A Reargument Of His Memorandum In Support Of Jurisdiction, And This Appeal Is Not Of Public Or Great General Interest As It Simply Attacks The Court Of Appeals' Determination That The Jury Verdict Was Supported By The Weight Of The Evidence

Appellant's Motion for Reconsideration ("Motion") is wholly without merit and should be denied. Initially, it should be noted that Ohio Supreme Court Rule of Practice 11.2(B) specifically states that a "motion for reconsideration shall not constitute a reargument of the case" Appellant's motion ignores this admonition entirely, and repeats the same arguments that were presented in his Memorandum in Support of Jurisdiction. These arguments were that the decision of the Court of Appeals below somehow expands the doctrine of adverse possession and failed to "reinforce" that the elements of adverse possession must be proven by clear and convincing evidence and must be strictly construed. These arguments failed to demonstrate that this case is of public or great general interest, and simply restating them does nothing to make them viable when they were wholly unpersuasive in the first instance.

Appellant's discussion at pages 2 through 4 of his Motion concerning the operation of Ohio Revised Code §2305.04, which is unsupported by any cited authorities, does nothing to even remotely suggest that this appeal is a matter of public or great general interest, and is flawed in several respects. In discussing the relevant statute of limitations on which the doctrine of adverse possession is based, Appellant appears to contend that the doctrine is harsh because it is applied "regardless of whether [the record title holder] had any knowledge" that he may lose his title to real property by the operation of the doctrine. (Motion, p. 2) He also argues it is "impossible" for the record title holder to foresee the application of the doctrine to his land. (*Id.*)

These contentions may have some modest measure of plausibility if the doctrine of adverse possession did not require proof of the open and notorious possession by the adverse possessor.

But proof of open and notorious possession is an element of adverse possession. And it is an element because such open and notorious use puts the record title holder on notice that someone else is using and possessing his or her property. *See State ex.rel AAA Inv. v. Columbus* (1985), 17 Ohio St. 3d 151, 153 (“Actual knowledge is not a necessary element of adverse possession. Since the streets involved were in open, visible, and notorious possession by the city, constructive knowledge is charged to the titleholder.”); *Kaufman v. Geisken Enterprises, Ltd.*, 3rd Dist. App. No.12-2-04, 2003-Ohio-1027, ¶31 (use is open and notorious if it would be seen by a record title holder who visited the property). If that record title holder, in the 21 years he or she has to eject the adverse possessor, chooses to ignore this open and notorious adverse use, and does nothing to protect his or her property interest, then the operation of adverse possession does not seem so harsh.¹

Appellant’s arguments made at page 3 of his Motion that “Appellees had no incentive to openly publicize their claim,” that they did not discuss their “intentions or their knowledge” with respect to the Adverse Possession Property, or had “no incentive to call attention to their claim” ignore the central tenant of the doctrine of adverse possession as reaffirmed in *Evanich v. Bridge* (2008), 119 Ohio St.3d 260: “ [i]nto the recesses of his mind, his motives or purposes, his guilt or innocence, no inquiry is made. It is for this obvious reason that *it is the visible and adverse possession, with an intention to possess, that constitutes its adverse character, not the remote views or belief of the possessor.*’ ” *Id.* at 262, quoting *Yetzer v. Thoman* (1866), 17 Ohio St. 130, 133, quoting *French v. Pearce* (1831), 8 Conn. 439, 443 (emphasis added). The “unfurling” of

¹ Appellant also demonstrates a basic misunderstanding of the operation of adverse possession where he states on page 3 of his Motion that title is transferred to the claimant after the claimant succeeds in a lawsuit on an adverse possession claim. In fact, the adverse possessor obtains fee title to the property adversely possessed upon the expiration of the 21 year period, without filing suit. *See Heider v. Unknown Heirs*, 6th Dist. App. Nos. WD-05-012, WD-05-020, 2006-Ohio-122, ¶37. Indeed, after the running of the statute of limitations, the persons acquiring title by adverse possession do not “need to continue to act adversely to the title owner’s property interests, but only to maintain their possessory interest.” *Id.* at ¶39, citing *State ex.rel AAA Inv. v. Columbus, supra.*

Appellees' flag was not, nor was it required to be, a verbal or written pronouncement of their intentions or beliefs. Rather, Appellees' open and notorious use and possession of the Adverse Possession Property put Appellant's predecessor in title on notice. The jury below had no doubt that the open and notorious elements were proven by clear and convincing evidence. Additionally, that verdict withstood the scrutiny of the Court of Appeals' review to determine if the verdict was supported by some relevant, competent and credible evidence.

Appellant's meandering discussion of Appellees' incentives or lack thereof, his lack of contact with Appellees, and the inability of Appellant to locate the encroachment because he did not have a survey done to locate the boundaries offers no support for his later assertion that the Court of Appeals did not strictly apply the adverse possession doctrine. Rather, Appellant's specific complaints about the Court of Appeals' decision are nothing more than a rehash of his assignments of error asserting that the jury verdict was against the manifest weight of the evidence. For example, Appellant again contends that trees planted in a rural area cannot provide the basis of an adverse possession claim. In rejecting this contention below, the Court of Appeals noted that there was testimony in the record that the area where the trees were planted "was mostly open, with a smattering of large trees, allowing the jury to conclude that the ongoing sapling planting would have been visible to Householder and other interested observers." (Ct. App. Dec., ¶24) While the Appellant may not agree that this testimony was relevant, competent and credible evidence to support the jury's verdict, his disagreement as to the weight of the evidence hardly elevates this appeal to a matter of public or great general interest.

Next Appellant argues that the Court of Appeals' decision could be construed as suggesting that a record title owner has an obligation to remove encroaching trees or personal property placed on his or her real estate by an adverse possessor. That a record title holder has an obligation to act

during the 21 year limitation period to eject the trespassing adverse possessor goes to the heart of the doctrine. If the Court of Appeals' opinion below could be construed as requiring a record title owner to take some action within the 21 year period, that opinion is indeed entirely consistent with how the doctrine of adverse possession has been interpreted and applied for over the last 100 years. As such, this contention offers no support for an argument that this case is of public and great general interest, particularly where the Court of Appeals' opinion is merely applying the law of adverse possession in an manner consistent with its historical application.

Likewise, Appellant's discussion of the Court of Appeals' consideration of evidence of tacking Marie Arnholt's use of the Adverse Possession Property to the Appellees' use is yet another attack on the Court of Appeals' weight of the evidence analysis. In that analysis the Court of Appeals considered not only Marie Arnholt's continued mowing of the Adverse Possession Property, but also her use of the burn pit in that area, and her storage of a truck top and dog kennels there as well. (Ct. App. Dec., ¶21) Her use was also considered in combination with Mr. Arnholt's continued use of the Adverse Possession Property for storage of construction materials and the continued growth of trees planted there by Mr. Arnholt. (*Id.*) The Appellant is in essence reiterating his unwillingness to accept the Court of Appeals' determination that this evidence is relevant, competent and credible evidence to support the jury's verdict. However, a dispute that focuses on the manifest weight of the evidence, while important to the litigants, is not something that makes this appeal a matter of public or great general interest.

As for Appellant's assertion that the Court of Appeals engaged in burden shifting below, that argument has no more merit now than it did when it was asserted in his Memorandum in Support of Jurisdiction. The Court of Appeals did not shift the burden of proof to Appellant in any respect. Its comments about what the evidence showed were made in the context of determining whether there

was relevant, competent and credible evidence in the record to support the jury's verdict. The Appellant is confusing the burden of proof with the burden of persuasion, the latter of which often shifts at trial. Moreover, even if there was an inappropriate shifting of the burden of proof, which there was not, Appellant cannot argue such a purported error makes this case of public or great general interest.

The problem with Appellant's attack of the Court of Appeals' treatment of specific pieces of evidence is that Appellant ignores the premise that each case of adverse possession rests on its own peculiar facts. *See, e.g., Rodgers v. Pahoundis* (2008), 178 Ohio App. 3d 229, 242; *Bullion v. Gahm* (2005), 164 Ohio App.3d 344, 349. "Bright line" rules such as those sought by the Appellant should be avoided in adverse possession because whether a particular use of real property is relevant to intent to possess depends upon the location and setting of the real property. *Kaufman v. Geisken Enterprises, Ltd., supra.*, at ¶32. This appeal is not a matter of public or great general interest where the Appellant seeks a result which would prevent juries from deciding each adverse possession case based upon its own peculiar facts.

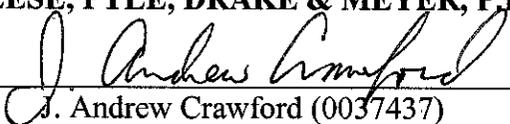
Finally, the Court of Appeals did not "expand" the application of adverse possession in its treatment of evidence concerning Marie Arnholt's subjective intent regarding the Adverse Possession Property. To the contrary, the Court of Appeals merely applied this Court's holding in *Evanich* that intent to possess is proven objectively, not subjectively. *Evanich, supra.*, at Syl. *Evanich* reaffirmed only three years ago a rule that has been followed in Ohio jurisprudence more than 140 years. Given this Court's recent pronouncement on this issue, and Appellant's failure to provide any citations or authorities questioning the *Evanich* holding, Appellant has failed to show that this issue, or any other aspect of this case for that matter, is of public or great general interest.

II. CONCLUSION

Appellant's dissatisfaction with the results of the jury verdict and the Court of Appeals opinion is not grounded in any issues which are a matter of public or great general interest. Rather, they are grounded in the interpretation of the evidence that was presented in the Trial Court, and the Court of Appeals' assessment as to whether there was some relevant, competent and credible evidence to support the jury verdict. The Court of Appeals did not expand the operation of adverse possession. Rather, it appropriately and strictly applied that doctrine to the peculiar facts of this case. This Court correctly declined to exercise its jurisdiction to hear this appeal because it is not a matter of public or great general interest. Appellant's Motion for Reconsideration should be denied.

Respectfully Submitted,

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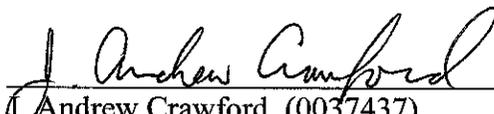
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CERTIFICATE OF SERVICE

The undersigned hereby certified that a true and accurate copy of the foregoing was duly served upon David Q. Wigginton, 32 North Park Place, Newark, Ohio 43055, counsel for Defendant-Appellant, by ordinary U.S. Mail, postage prepaid, this 23rd day of November, 2011.


J. Andrew Crawford (0037437)