[Cite as *Greene v. Partridge*, 2016-Ohio-8475.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HIGHLAND COUNTY

CHERYL GREENE,	:	
Plaintiff-Appellee,	:	Case No. 16CA13
vs.	:	
THOMAS PARTRIDGE, et al.,	:	DECISION AND JUDGMENT ENTRY
Defendants-Appellants.	:	

APPEARANCES:

Kathryn Hapner, Hillsboro, Ohio, for appellant

Susan L. Davis, Hillsboro, Ohio, for appellee

CIVIL CASE FROM COMMON PLEAS COURT
DATE JOURNALIZED: 12-14-16
ABELE, J.

{¶ 1} This is an appeal from a Highland County Common Pleas Court summary judgment in favor of Cheryl Greene, plaintiff below and appellee herein. Thomas Partridge, defendant[1] below and appellant herein, assigns the following error for review:

> "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO APPELLEE AS GENUINE ISSUES OF MATERIAL FACT EXIST REGARDING THE OWNERSHIP OF THE SUBJECT REAL ESTATE."

{¶ 2} The present appeal involves an action to quiet title. On July 8, 2015, appellee filed a

[1] None of the other defendants are involved in this appeal.

complaint against appellant (and others) and alleged that she has acquired title to a parcel of land located between her and appellant's property (the disputed land) by adverse possession.

{¶ 3} Appellant answered and filed a counterclaim. Appellant claimed that he owns the disputed land by virtue of an October 7, 1999 warranty deed. Appellant further alleged that he permitted appellee's husband to use the disputed piece of land for hunting and that he knew appellee used the land to grow corn. Appellant asserted that he was entitled to rent for appellee's use of the land.

{¶ 4} On March 2, 2016, appellee requested summary judgment and argued that no genuine issues of material fact remained regarding her adverse possession claim. In support of her motion, appellee attached five deeds to document the chain of title to her parcel of land that sits adjacent to the disputed piece of land. The earliest deed, dated April 30, 1985, granted the property to Town and Country, Inc. A December 11, 1985 quit claim deed corrected the name to Town and Country Discount, Inc. The deed indicates that Brady Greene (appellee's deceased husband) was the president of "Town and Country, Inc." A July 31, 1996 general warranty deed conveyed title from Town and Country Discount, Inc., to G.C. Equipment, Inc. This deed also indicates that Brady was the president of Town and Country. A June 1, 2000 general warranty deed conveyed the land from G.C. Equipment, Inc. to Brady Greene and appellee. This deed indicates that Brady was the president of G.C. Equipment, Inc. A November 21, 2006 deed conveyed the property from Brady Greene to appellee.

{¶ 5} Appellee also attached three affidavits to her motion: (1) her own; (2) her deceased husband's child's, Brad Greene; and (3) neighboring property owner's, Charles Dawson. In her affidavit, appellee stated that the disputed land has been fenced in for more than 21 years and

considered part of the real property that she and her predecessors in title owned. She averred that the disputed land never was treated as a separate tract of land. She additionally stated that appellant never complained about the fence that surrounded the disputed piece of land and that neither she nor her husband had any arrangements with appellant concerning the use or possession of the disputed land.

{¶ 6} In his affidavit, Brad Greene stated that he lived with his father and appellee on the land adjacent to the disputed parcel of land during the 1990s. He alleged that "as long as [he could] remember, the subject real property * * * was fenced as part of [appellee]'s property." Brad additionally averred that "the subject real property was and always has been considered by the community in general as owned by [appellee] and their predecessors since the time [appellee and her husband] purchased their real property in the 1980s."

{¶ 7} In his affidavit, Charles Dawson explained that he lived near appellee's property since the 1980s, when appellee and her husband purchased the land. Dawson stated that the disputed piece of land "has always been fenced as part of" appellee's property and was fenced when appellee and her husband first obtained the land. Dawson additionally stated that appellee's husband "cleaned areas with bull dozers on the subject property and built a road near the subject real property."

{¶ 8} In response, appellant alleged that he holds the warranty deed to the disputed land. He also objected to the affidavits that appellee submitted with her summary judgment motion. Appellant asserted that the affiants lacked personal knowledge whether appellant had possession of his own property and that the affiants did not personally know how the community viewed the disputed property. Appellant also pointed out that he alleged in his counterclaim that appellant

gave appellee's husband permission to use the land. Appellant thus argued that appellee's and her predecessors' use was not adverse. Appellant did not, however, submit any evidence to support his claims.

{¶ 9} On April 12, 2016, the trial court granted appellee summary judgment. The court noted that appellant did not submit any evidentiary material to support the assertions that he raised in his opposition memorandum. The court thus stated that "due to the lack of any contradictory evidence presented by [appellant], the Court is required to assume that the facts set forth in [appellee]'s affidavits and exhibits are true and that there are no genuine material issues of fact to be tried."

{¶ 10} After reviewing the evidence that appellee submitted, the trial court determined that no genuine issues of material fact remained for resolution at trial concerning appellee's adverse possession claim. The court thus entered summary judgment in appellee's favor, quieted title of the disputed land to appellee, and dismissed appellant's counterclaim. This appeal followed.

{¶ 11} In his sole assignment of error, appellant asserts that the trial court improperly granted appellee summary judgment. In particular, he alleges that the trial court wrongly determined that no genuine issues of material fact remain regarding whether appellee obtained title to the disputed land by adverse possession. More specifically, appellant claims that appellee failed to show the absence of genuine issues of material fact regarding (1) whether appellee and her predecessors in interest possessed the disputed land in excess of 21 years, and (2) whether appellee's and her predecessors' use of the disputed land was open, notorious, continuous, exclusive, and adverse.

{¶ 12} With respect to his assertion that appellee failed to show the absence of a genuine

issue of material fact regarding the 21-year requirement, appellant claims that appellee did not present proper Civ.R. 56 evidence to demonstrate the absence of material fact regarding possession. Specifically, appellant challenges two deeds (Exhibits D and E) attached to appellee's summary judgment motion. He argues that they are not proper evidence to consider because the deeds do not contain a date, the signature of the grantors, or a notary confirmation. Appellant further contends that the deeds are not proper evidence because they do not contain any facts or information to show that appellee and her husband used the premises as an agent of the corporation that previously owned the lands. Appellant asserts that without these two deeds, appellee cannot prove possession for more than 21 years. Appellant additionally argues that the evidence fails to show the absence of a material fact regarding whether appellee's and her predecessors' use was open, notorious, continuous, exclusive, and adverse. Appellant alleges that appellee did not present any evidence to show that she, her husband, or her predecessors hunted or farmed upon the land. Appellant further disputes the trial court's finding that appellee's husband built a road on the premises, but instead built a road near, not on, the premises.

A

SUMMARY JUDGMENT

{¶ 13} Generally, appellate courts conduct a de novo review of trial court summary judgment decisions. *E.g., Snyder v. Ohio Dept. of Nat. Resources*, 140 Ohio St.3d 322, 2014-Ohio-3942, 18 N.E.3d 416, ¶2; *Troyer v. Janis*, 132 Ohio St.3d 229, 2012-Ohio-2406, 971 N.E.2d 862, ¶6; *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Accordingly, an appellate court must independently review the record to determine if summary judgment is appropriate and need not defer to the trial court's decision. *E.g., Brown v. Scioto Bd. of*

Commrs., 87 Ohio App.3d 704, 711, 622 N.E.2d 1153 (4th Dist.1993); *Morehead v. Conley*, 75 Ohio App.3d 409, 411–12, 599 N.E.2d 786 (4th Dist.1991). To determine whether a trial court properly granted a summary judgment motion, an appellate court must review the Civ.R. 56 summary judgment standard, as well as the applicable law. *Snyder* at ¶2. Civ.R. 56(C) provides in relevant part:

> * * * Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. * * * *

{¶ 14} Thus, pursuant to Civ.R. 56, a trial court may not grant summary judgment unless the evidence demonstrates that: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) after viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion, and that conclusion is adverse to the nonmoving party. *E.g., Snyder* at ¶20; *Transtar Elec., Inc. v. A.E.M. Elec. Servs. Corp.*, 140 Ohio St.3d 193, 2014-Ohio-3095, 16 N.E.3d 645, ¶8; *Smith v. McBride*, 130 Ohio St.3d 51, 2011-Ohio-4674, 955 N.E.2d 954, ¶12; *New Destiny Treatment Ctr., Inc. v. Wheeler*, 129 Ohio St.3d 39, 2011-Ohio-2266, 950 N.E.2d 157, ¶24; *Vahila v. Hall*, 77 Ohio St.3d 421, 429–30, 674 N.E.2d 1164 (1997).

{¶ 15} The purpose of Civ.R. 56 "is to enable movement beyond allegations in pleadings and to analyze the evidence so as to ascertain whether an actual need for a trial exists. Because it

is a procedural device to terminate litigation, summary judgment must be awarded with caution." *Ormet Primary Aluminum Corp. v. Employers Ins. of Wausau*, 88 Ohio St.3d 292, 300, 725 N.E.2d 646 (2000) (citations omitted). Thus, a court that is reviewing a summary judgment motion must construe all reasonable inferences that can be drawn from the evidentiary materials in a light most favorable to the nonmoving party. *Moore v. E.I. DuPont de Nemours Co.*, 4th Dist. Pickaway No. 15CA12, 2015–Ohio–5331, ¶20, citing *Hannah v. Dayton Power & Light Co.*, 82 Ohio St.3d 482, 485, 696 N.E.2d 1044 (1998), and *Turner v. Turner*, 67 Ohio St.3d 337, 341, 617 N.E.2d 1123 (1993). Moreover, a court must not "consider either 'the quantum' or the 'superior credibility' of evidence." *McGee v. Goodyear Atomic Corp.*, 103 Ohio App.3d 236, 242, 659 N.E.2d 317 (1995). "The purpose of summary judgment is not to try issues of fact, but rather to determine whether triable issues of fact exist. * * * Thus, a court should not pass upon the credibility of witnesses or weigh the relative value of their testimony in rendering summary judgment." *Id.* at 242–43 (citation omitted.); *see also Koeth v. Timesavers, Inc.*, 11th Dist. Geauga No. 99–G–2211 (May 26, 2000) ("It is not the province of the trial court in a summary judgment exercise to either weigh the evidence before it, or to accept one party's interpretations of that evidence in toto.").

{¶ 16} Under Civ.R. 56, the moving party bears the initial burden to inform the trial court of the basis for the motion and to identify those portions of the record that demonstrate the absence of a material fact. *Griffith v. Aultman Hosp.*, 146 Ohio St.3d 196, 2016-Ohio-1138, 54 N.E.3d 1196, ¶26; *Vahila, supra*; *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). The moving party cannot discharge its initial burden with a conclusory assertion that the nonmoving party has no evidence to prove its case. *Kulch v. Structural Fibers, Inc.*, 78 Ohio St.3d 134, 147, 677 N.E.2d 308 (1997); *Dresher, supra*. Rather, the moving party must specifically refer to the

"pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any," which affirmatively demonstrate that the nonmoving party has no evidence to support the nonmoving party's claims. Civ.R. 56(C); *Dresher, supra*.

{¶ 17} "[U]nless a movant meets its initial burden of establishing that the nonmovant has either a complete lack of evidence or has an insufficient showing of evidence to establish the existence of an essential element of its case upon which the nonmovant will have the burden of proof at trial, a trial court shall not grant a summary judgment." *Pennsylvania Lumbermens Ins. Corp. v. Landmark Elec., Inc.*, 110 Ohio App.3d 732, 742, 675 N.E.2d 65 (2nd Dist.1996). Once the moving party satisfies its burden, the nomoving party bears a corresponding duty to set forth specific facts to show that a genuine issue exists. Civ.R. 56(E); *Dresher, supra*. More specifically, Civ.R. 56(E) states:

> * * * * When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

{¶ 18} Consequently, "'[m]ere speculation and unsupported conclusory assertions are not sufficient'" to meet the nonmovant's reciprocal burden to set forth specific facts to show that a genuine issue exists. *Bank of New York Mellon v. Bobo*, 2015-Ohio-4601, 50 N.E.3d 229 (4th Dist.), ¶13, quoting *Loveday v. Essential Heating Cooling & Refrig., Inc.*, 4th Dist. Gallia No. 08CA4, 2008-Ohio-4756, 2008 WL 4278129, ¶9. Additionally, "'resting on mere allegations against a motion for summary judgment * * * is insufficient'" to defeat a properly supported

summary judgment motion. *Jackson v. Alert Fire & Safety Equip., Inc.*, 58 Ohio St.3d 48, 52, 567 N.E.2d 1027, 1032 (1991), quoting *King v. K.R. Wilson Co.*, 8 Ohio St.3d 9, 10–11, 455 N.E.2d 1282 (1983). Moreover, "conclusory affidavits that merely provide legal conclusions or unsupported factual assertions are not proper under Civ. R. 56(E)" and are insufficient to establish a genuine issue of material fact. *Moore v. Smith*, 4th Dist. Washington No. 07CA61, 2008-Ohio-7004, 2008 WL 5451340, ¶15 (citations omitted); *Wertz v. Cooper*, 4th Dist. Scioto No. 06CA3077, 2006-Ohio-6844, 2006 WL 3759831, ¶13, citing and quoting *Evans v. Jay Instrument & Specialty Co.*, 889 F.Supp. 302, 310 (S.D.Ohio 1995) ("'bald self-serving and conclusory allegations are insufficient to withstand a motion for summary judgment'"); *accord Stetz v. Copley Fairlawn Sch. Dist.*, 2015-Ohio-4358, 46 N.E.3d 165, ¶17 (9th Dist.), quoting *Brannon v. Rinzler*, 77 Ohio App.3d 749, 756, 603 N.E.2d 1049 (2d Dist.1991) ("'Statements contained in affidavits must be based on personal knowledge and cannot be legal conclusions.'"); *McCartney v. Oblates of St. Francis deSales*, 80 Ohio App.3d 345, 357–358, 609 N.E.2d 216 (6th Dist.1992) (stating that a trial court considering a summary judgment motion is not required to accept conclusory allegations that are devoid of any evidence to create an issue of material fact).

{¶ 19} A nonmoving party need not try its case when defending against a summary judgment motion. A nonmoving party must, however, produce more than a scintilla of evidence to support its case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Carsey v. Alexander Cemetery, Inc.*, 4th Dist. Athens No. 00CA028, 2001-Ohio-2438, 2001 WL 315186. The essential question is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251–252.

{¶ 20} Additionally, when trial courts consider summary judgment motions, Civ.R. 56(C) specifies that the court may examine only "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, [that are] timely filed in the action." *Id.*; *Whitt v. Wolfinger*, 2015-Ohio-2726, 39 N.E.3d 809, 813–14, ¶12 (4th Dist.); *Davis v. Eachus*, 4th Dist. Pike No. 04CA725, 2004-Ohio-5720, 2004 WL 2406685, ¶36; *Wall v. Firelands Radiology, Inc.*, 106 Ohio App.3d 313, 334, 666 N.E.2d 235 (6th Dist.1995). "'Documents which are not sworn, certified, or authenticated by way of affidavit have no evidentiary value and shall not be considered by the trial court.'" *State ex rel. Shumway v. Ohio State Teachers Retirement Bd.*, 114 Ohio App.3d 280, 287, 683 N.E.2d 70 (1996), quoting *Mitchell v. Ross*, 14 Ohio App.3d 75, 470 N.E.2d 245 (8th Dist.1984). A party may, however, introduce evidentiary material that does not fall within one of the categories of evidence listed in Civ.R. 56(C) when that material is incorporated by reference in a properly framed affidavit. *Thompson v. Hayes*, 10th Dist. Franklin No. 05AP–476, 2006-Ohio-6000, 2006 WL 3291164, ¶103.

{¶ 21} According to Civ.R. 56(E), a properly framed affidavit is one that is (1) "based on personal knowledge," (2) "set[s] forth such facts as would be admissible in evidence," and (3) "show[s] affirmatively that the affiant is competent to testify to the matters stated in the affidavit." Additionally, if the affiant refers to documentary evidence, "[s]worn or certified copies of all papers or parts of papers * * * shall be attached to or served with the affidavit." Civ.R. 56(E). "'The requirement of Civ.R. 56(E) that sworn or certified copies of all papers referred to in the affidavit be attached is satisfied by attaching the papers to the affidavit, coupled with a statement therein that such copies are true copies and reproductions.'" *Cincinnati Bar Assn. v. Newman*,

124 Ohio St.3d 505, 507, 2010-Ohio-928, 924 N.E.2d 359, 361, ¶7, quoting *State ex rel. Corrigan v. Seminatore*, 66 Ohio St.2d 459, 467, 423 N.E.2d 105 (1981); *see also Bobo* at ¶28, citing *Wesley v. Walraven*, 4th Dist. Washington No. 12CA18, 2013-Ohio-473, 2013 WL 544053, ¶31 ("Civ.R.56(E)'s requirement that sworn or certified copies of all papers referred to in the affidavit be attached is satisfied by attaching the papers to the affidavit with a statement contained in the affidavit that the copies are true and accurate reproductions.").

{¶ 22} Furthermore, affidavits submitted to support or to oppose a summary judgment motion must be based on personal knowledge. Civ.R. 56(E); *Bonacorsi v. Wheeling & Lake Erie Ry. Co.*, 95 Ohio St.3d 314, 320, 2002-Ohio-2220, 767 N.E.2d 707, ¶26, citing *State ex rel. Cassels v. Dayton City School Dist. Bd. of Edn.*, 69 Ohio St.3d 217, 223, 631 N.E.2d 150 (1994).

> "For obvious reasons, this is the same standard as applied to lay witness testimony in a court of law. Id.; Evid.R. 602. 'Personal knowledge' is '[k]nowledge gained through firsthand observation or experience, as distinguished from a belief based on what someone else has said.' Black's Law Dictionary (7th Ed.Rev.1999) 875. See, also, Weissenberger's Ohio Evidence (2002) 213, Section 602.1 ('The subject of a witness's testimony must have been perceived through one or more of the senses of the witness. * * * [A] witness is 'incompetent' to testify to any fact unless he or she possesses firsthand knowledge of that fact.')."

Id. "'[P]ersonal knowledge can be inferred from the nature of the facts in the affidavit and the identity of the affiant.'" *Salemi v. Cleveland Metroparks*, 145 Ohio St.3d 408, 2016-Ohio-1192, 49 N.E.3d 1296, ¶18, quoting *State ex rel. Lanham v. DeWine*, 135 Ohio St.3d 191, 2013-Ohio-199, 985 N.E.2d 467, ¶15, citing *State ex rel. Corrigan v. Seminatore*, 66 Ohio St.2d 459, 467, 423 N.E.2d 105 (1981).

{¶ 23} "If a party submits evidence that does not fall within Civ.R. 56(C)'s parameters, the opposing party may file a motion to strike the improperly-submitted evidence." *Whitt* at ¶13.

The failure to file a motion to strike or otherwise object to evidence that fails to comply with Civ.R. 56(C) results in a forfeiture of the issue on appeal. *State ex rel. Chuvalas v. Tompkins*, 83 Ohio St.3d 171, 1998-Ohio-114, 699 N.E.2d 58 (1998). "'A trial court may consider evidence other than the evidence specified in Civ.R. 56(C) where no objection has been raised.'" *Carr v. State*, 4th Dist. Vinton No. 14CA697, 2015-Ohio-3895, 2015 WL 5607709, ¶31, quoting *Cowen v. Lucas*, 4th Dist. Scioto No. 96CA2456, 1997 WL 362013, *3 (June 30, 1997), and citing *Rice v. Lewis*, 4th Dist. Scioto No. 13CA3551, 2013–Ohio–5890, ¶23 (holding that appellant's failure to object to improper summary judgment evidence waived any error that the trial court may have committed by considering the evidence); *accord Worthington v. Speedway*, 4th Dist. Scioto No. 04CA2938, 2004-Ohio-5077, 2004 WL 2260501, fn.1 (citations omitted) ("When the opposing party fails to object to the admissibility of the evidence under Civ.R. 56, the court may, but need not, consider such evidence when it determines whether summary judgment is appropriate.").

{¶ 24} In the case at bar, while appellant unsuccessfully objected to the affidavits appellee attached to her summary judgment motion, appellant did not file a motion to strike, or otherwise object to, the deeds. He therefore forfeited the right to challenge on appeal the evidentiary quality of the deeds, and we may consider them on appeal.

B

ADVERSE POSSESSION

{¶ 25} Under the doctrine of adverse possession, a plaintiff may acquire legal title to another's real property if the plaintiff proves exclusive possession that is open, notorious, continuous, and adverse for 21 years. *Evanich v. Bridge*, 119 Ohio St.3d 260, 2008-Ohio-3820, 893 N.E.2d 481, ¶7; *Houck v. Bd. of Park Commrs. of the Huron Cty. Park Dist.*, 116 Ohio St.3d

148, 2007–Ohio–5586, 876 N.E.2d 1210, ¶10; *Grace v. Koch*, 81 Ohio St.3d 577, 579, 692 N.E.2d 1009 (1998). "While adverse possession is a recognized common law method of obtaining title to real property, it is not favored." *Hoosier v. Hoosier*, 4th Dist. Pike No. 14CA846, 2014-Ohio-5810, 2014 WL 7466546, ¶23, citing *Grace* at 580 ("A successful adverse possession action results in a legal titleholder forfeiting ownership to an adverse holder without compensation. Such a doctrine should be disfavored, and that is why the elements of adverse possession are stringent."); *accord Hardert v. Neumann*, 4th Dist. Adams No. 13CA977, 2014-Ohio-1770, 2014 WL 1691649, ¶9. "'Viewed from its ultimate effect, it is the ripening of hostile possession, under proper circumstances, into title by lapse of time.'" *Hoosier* at ¶23, citing 2 Ohio Jurisprudence 3d, Adverse Possession and Prescription, Section 1.

{¶ 26} The party seeking title by adverse possession bears the burden of proving its elements by clear and convincing evidence. *E.g.*, *Grace* at syllabus.

> Clear and convincing evidence is "that measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established."

State ex rel. Pietrangelo v. Avon Lake, 2016-Ohio-5725, 2016 WL 4895410, ¶14, quoting *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus.

{¶ 27} In the case at bar, appellant asserts, in essence, that genuine issues of material fact remain regarding each element necessary to establish title by adverse possession. Appellant claims that appellee failed to produce proper Civ.R. 56(C) evidence demonstrating the absence of genuine issues of material fact. As we explain below, we disagree with appellant. Instead, the evidence appellee submitted shows the absence of any genuine issue of material fact regarding

whether appellee and her predecessors exclusively, openly, notoriously, continuously, and adversely possessed the disputed land for 21 years.

1.

21 Years

{¶ 28} Appellant first argues that appellee failed to demonstrate the absence of genuine issues of material fact concerning whether appellee and her predecessors possessed the disputed land for 21 years. He claims that the deeds appellee attached to her summary judgment motion do not fulfill Civ.R. 56(C)'s requirements. As we indicated above, however, appellant did not object to the deeds during the trial court proceedings. He cannot, therefore, challenge their evidentiary quality on appeal.

{¶ 29} Additionally, the evidence appellee submitted shows the absence of a genuine issue of material fact regarding the 21-year requirement. In *Zipf v. Dalgarn*, 114 Ohio St. 291, 151 N.E. 174 (1926), the Supreme Court stated:

> "Successive adverse users by different persons may be tacked in order to make up the prescriptive period, provided there is privity or contractual connection between them, and there is no interval between the successive possessions during which the use was not adverse. Thus the term of enjoyment requisite for a prescription is deemed to be uninterrupted when it is continued from ancestor to heir, and from seller to buyer."

Id. at 296, quoting 1, Thompson on Real Property, Section 404. Consequently, "[a]n individual may tack on a prior property owner's adverse use in order to establish the twenty-one year possession." *Patton v. Ditmyer*, 4th Dist. Athens Nos. 05CA12, 05CA21, and 05CA22,

2006-Ohio-7107, 2006 WL 3896780, ¶47 (citations omitted).

{¶ 30} In the case sub judice, appellee submitted deeds showing the chain of title for her adjoining property that dates to 1985. The deeds plainly reveal that (1) appellee has solely owned the adjoining property since 2006, (2) appellee and her husband jointly owned the adjoining property between 2000 and 2006, (3) one of appellee's husband's companies owned the adjoining property between 1996 and 2000 (the deed indicates appellee's husband's capacity as "president"), (4) another one of appellee's husband's companies owned the adjoining property between 1985 and 1996 (the deed indicates appellee's husband's capacity as "president"). Thus, the deeds show that appellee and her predecessors have possessed the adjoining land for 21 years.

{¶ 31} Furthermore, appellee produced evidence to show that she and her predecessors possessed the disputed land for 21 years. The neighbor's affidavit stated that he observed appellee and her husband using the disputed land when they acquired the property in the mid 1980s. The neighbor apparently was unaware that the corporation held legal title, but he did observe appellee and her husband using the disputed land. Furthermore, this neighbor averred that the disputed land was a fenced part of appellee's adjoining land when she and her husband first acquired the adjoining property. Moreover, appellee attested in her affidavit that the disputed land has been a fenced part of her adjoining land for 21 years. The affidavits appellee submitted thus demonstrate that appellee and her predecessors have possessed the disputed land for at least 21 years.

{¶ 32} We therefore disagree with appellant that the evidence fails to show that appellee and her predecessors possessed the disputed land for 21 years.

2.

Exclusive Possession

{¶ 33} Appellant next claims that appellee failed to establish that her possession of the property was exclusive. Generally, an adverse possession claimant may establish exclusive possession by presenting evidence (1) that the claimant has used the property as a true owner would, and (2) that the claimant's use has been """exclusive of the true owner entering onto the land and asserting his right to possession.""" *Pottmeyer v. Douglas*, 4th Dist. Washington No. 10CA7, 2010-Ohio-5293, 2010 WL 4273232, ¶26, quoting *Crown Credit Co. v. Bushman*, 170 Ohio App.3d 807, 2007-Ohio-1230, 869 N.E.2d 83 (3rd Dist.), ¶53, quoting *Klinger v. Premier Properties*, 3rd Dist. Logan No. 8-97-10, 1997 WL 722771 (Nov. 17, 1997), *3. """The possession necessary is that * * * shown by overt acts of an unequivocal character which clearly indicate an assertion of ownership of the premises to the exclusion of the rights of the real owner.""" *Diefenthaler v. Schuffenecker*, 190 Ohio App.3d 509, 2010-Ohio-5380, 942 N.E.2d 1137, ¶28 (6th Dist.), quoting *Suever v. Kinstle*, 3rd Dist. No. 1–88–24, 1989 WL 145169 (Nov. 29, 1989), *3, quoting *Briegel v. Knowlton*, 3rd Dist. Allen No. 1-87-45, 1989 WL 71130, *3, citing *Gill v. Fletcher*, 74 Ohio St. 295, 78 N.E. 433 (1906). Additionally, although fencing property is not necessary to establish exclusive use, it ordinarily indicates exclusive possession and "'"warn[s] the true owner of the necessity for him to take protective measures."'" *Diefenthaler* at ¶28, quoting *Suever, supra*, quoting *Briegel, supra*; *accord Huber v. Cardiff*, 186 Ohio App.3d 384, 2009-Ohio-3433, 928 N.E.2d 742 (2nd Dist.), ¶12, citing *Wood v. Nelson*, 57 Wash.2d 539, 540, 358 P.2d 312 (1961) (stating that "[a] fence is the usual means relied upon to exclude strangers and establish the dominion and control characteristic of ownership").

{¶ 34} In the case at bar, appellee submitted evidence that she and her predecessors exclusively possessed the disputed land. She presented her affidavit in which she averred that the

disputed land has been a fenced part of her adjoining land for more than 21 years. In his affidavit, the neighbor stated that the disputed land has been a fenced part of appellee's adjoining land since the 1980s, when the neighbor believed appellee and her husband acquired it (even though, at the time, one of the husband's companies held title to the property). No other evidence exists that other individuals claimed title to the disputed land during the time that it was a fenced part of appellee's adjoining land. Appellant failed to present any evidence to show that appellee and her predecessors did not exclusively possess the disputed land.

{¶ 35} Therefore, we disagree with appellant that appellee failed to show the absence of a genuine issue of material fact regarding whether her and her predecessors' use of the land was exclusive.

3.

Open and Notorious

{¶ 36} Appellant further argues that appellee failed to establish the absence of a genuine issue of material fact concerning whether her and her predecessors' use was open and notorious. "'Open' and 'notorious' use requires that the actual use be of a character that is capable of giving the legal owner notice." *Dunn v. Ransom*, 4th Dist. Pike No. 10CA806, 2011–Ohio–4253, ¶78. For possession to be considered open, the property must be used "'without attempted concealment.'" *Id.*, quoting *Hindall v. Martinez*, 69 Ohio App.3d 580, 584, 591 N.E.2d 308 (3rd Dist.1990). To be notorious the use must be "'known to some who might reasonably be expected to communicate their knowledge to the owner if he maintained a reasonable degree of supervision.'" *Dunn* at ¶78, quoting *Hindall* at 584. "In other words, the use of the property must be so patent that the true owner of the property could not be deceived as to the property's

use." *Hindall* at 583.

{¶ 37} In the case sub judice, we agree with the trial court's conclusion that no genuine issues of material fact remain regarding whether appellee and her predecessors' use of the property was open and notorious. Appellee presented evidence that she and her predecessors used the disputed land over the course of more than 21 years and that during this time, the disputed land was a fenced part of her adjoining land. Appellee's husband bulldozed part of the disputed land. Fencing in land and bulldozing it constitute uses that are "so patent that the true owner of the property could not be deceived as to the property's use." *Id.* at 583. *See Huber v. Cardiff*, 186 Ohio App.3d 384, 2009-Ohio-3433, 928 N.E.2d 742 (2nd Dist.), ¶10, quoting *Glaser v. Bayliff*, 2nd Dist. Miami No. 98CA34, 1999 WL 34709 (Jan. 29, 1999), *3, citing *Rader v. Brock*, 12th Dist. Preble No. CA 97–03–007, 1997 WL 632843 (Oct. 13, 1997), at *3[2] (stating that "when a

[2] In *Rader* at *3, the court stated:

> Setting property off by a fence has been found to be sufficient to support a claim of adverse possession. *See Bentley v. Newlon* (1859), 9 Ohio St. 489, 493 ("It appears from the record that the defendant has had continuous adverse possession of the land of which recovery was sought, for more than twenty-one years previous to the commencement of the suit. His claim of possession had been indicated ever since some time in 1827, by a fence defining the boundary of the premises. The possession is therefore shown to have been actual, adverse and notorious on the part of the defendant for more than a quarter of a century"); *Hindall v. Vassari* (May 30, 1997), Hancock App. No. 5-97-05, unreported (where evidence showed that fence had been in place for more than thirty-two years, trial court did not err in finding that disputed property had been adversely possessed); *Schramm v. Boyd* (Feb. 12, 1996), Belmont App. No. 94-B-6, unreported (where landowner's neighbor used nine-foot strip of land encroached on by house and delineated by fence without permission for more than 21 years, claim of adverse possession was sustained even though fence was no longer standing at time of lawsuit); *Sustersic v. Overholser* (1992), Guernsey App. No. 91-CA-41, unreported (where fence line that ran from three feet to less than a foot off the actual property line existed approximately in its current location for more than 21 years, judgment finding adverse possession had occurred was proper); *Arndts v. McMahon* (Aug. 16, 1991), Montgomery App. No. 12401, unreported (where plaintiffs occupied a five-foot strip of land lying between the actual lot line and a wire fence for more than twenty-one years, and the use was

party erects a fence and treats the land on one side of the fence as his own, there is generally little question that * * * use of the land is open, notorious and adverse to the interests of the record owner"). Appellant did not offer any evidence to suggest that appellee or her predecessors concealed their use of the property. In fact, appellee's husband's son and the neighbor confirmed that the community viewed the disputed land as part of appellee's adjoining property.

{¶ 38} Appellant nevertheless implies that the trial court incorrectly determined that appellee's and her predecessors' use of the disputed land was open and notorious based upon the erroneous conclusion that appellee's husband built a road upon, instead of near, the disputed land. Whether appellee's husband did or did not build a road upon the premises may be helpful to determine whether appellee's and her predecessors' use of the land was open and notorious. The remaining evidence (fencing and bulldozing the disputed land), however, demonstrates open and notorious use. Therefore, even if the trial court incorrectly stated that appellee's husband built a road upon, instead of near, the disputed land, any error is harmless. *See* Civ.R. 61 (explaining that court "must disregard any error or defect in the proceeding" that does not affect a party's substantial rights).

{¶ 39} Consequently, we disagree with appellant that appellee failed to establish the absence of a genuine issue of material fact concerning whether her and her predecessors' use of the property was open and notorious.

4.

Continuous

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continuous, exclusive, open, notorious, and adverse, jury verdict quieting title in their favor was affirmed).

{¶ 40} Appellant next asserts that the trial court incorrectly determined that no genuine issues of material fact remained as to whether appellee and her predecessors continuously possessed the property. To demonstrate continuous use, an adverse claimant must show use of the property without substantial interruption. *Pottmeyer v. Douglas*, 2010-Ohio-5293, 2010 WL 4273232, ¶ 37 (4th Dist. Washington), citing *Bullion v. Gahm*, 164 Ohio App.3d 344, 2005-Ohio-5966, 842 N.E.2d 540 (4th Dist.), ¶20. The adverse claimant need not demonstrate daily or weekly use, but instead, must establish "prolonged and substantial use." *Bullion* at ¶20, quoting *Ault v. Prairie Farmers Co-Operative Co.*, Wood App. No. WD-81-21, 1981 WL 5788 (Sept. 25, 1981), *2.

{¶ 41} In the case at bar, appellee submitted evidence that the disputed land has continuously–without interruption–been fenced as part of her adjoining land. Even if the evidence does not show that appellee and her predecessors physically walked upon the land on a daily or weekly basis, the evidence does show that the disputed land has been continuously fenced and treated as part of appellee's adjoining land since at least the mid-1980s. We again note that appellant failed to submit evidence to suggest that appellee's use was not continuous.

{¶ 42} We therefore disagree with appellant that appellee failed to show the absence of a genuine issue of material fact regarding whether she and her predecessors continuously used the disputed land.

5.

Adverse

{¶ 43} Appellant further alleges that appellee failed to demonstrate the absence of a material fact regarding whether her and her predecessors' use of the disputed land was adverse.

"[T]o establish adversity, '[t]he tenant must unfurl his flag on the land, and keep it flying so that the owner may see, if he will, that an enemy has invaded his dominions and planted his standard of conquest.'" *Grace v. Koch*, 81 Ohio St.3d 577, 581, 1998–Ohio–607, 692 N.E.2d 1009, quoting *Darling v. Ennis*, 138 Vt. 311, 313, 415 A.2d 228 (1980). "'It is the visible and adverse possession with an intent to possess that constitutes [the occupancy's] adverse character, and not the remote motives or purposes of the occupant.'" *Evanich* at ¶8, quoting *Humphries v. Huffman*, 33 Ohio St. 395, 402 (1878). "Thus, * * * the intent to take the property of another is not necessary; the intent to occupy and treat property as one's own is all that is required." *Id.*

{¶ 44} In the case at bar, we do not believe that the trial court incorrectly determined that no genuine issues of material fact remained regarding the element of adverse possession. Again, appellee presented evidence that the disputed land was a fenced part of her and her predecessors' adjoining land since at least the mid-1980s. Fencing property ordinarily is a clear sign that the occupant has "unfurl[ed] his flag on the land" with intent to occupy and treat the land as one's own. *See Huber, supra*.

{¶ 45} Appellant nonetheless claims that appellee's use was not adverse. He alleges that he gave appellee's husband permission to use the land. Appellant did not, however, present any evidence–by affidavit or otherwise–to show that he gave the husband permission to use the land. Instead, he points to the allegations of his pleading. However, a party may not defeat a properly-supported summary judgment motion simply by relying upon allegations in the pleadings, but instead, must produce evidence to show that genuine issues of material fact remain for trial. Civ.R. 56 ("an adverse party may not rest upon the mere allegations or denials of the party's pleadings"); *Dohme v. Eurand Am., Inc.*, 130 Ohio St.3d 168, 2011-Ohio-4609, 956 N.E.2d 825,

¶21 (explaining that "nonmovant * * * must show that the issue to be tried is genuine and may not rely merely upon the pleadings or upon unsupported allegations"); *Todd Dev. Co. v. Morgan*, 116 Ohio St.3d 461, 2008-Ohio-87, 880 N.E.2d 88, ¶11 ("the nonmoving party may not rest upon the mere allegations or denials of the pleadings"). Because appellant did not do so, the trial court properly entered summary judgment in appellee's favor.

{¶ 46} Accordingly, based upon the foregoing reasons, we overrule appellant's sole assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Highland County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Harsha, J. & McFarland, J.: Concur in Judgment & Opinion

For the Court

BY:_____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

Topics and Issues