**[Cite as *Welch v. Marlow*, 2009-Ohio-6145.]**

COURT OF APPEALS
MORGAN COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JEFFREY A. WELCH, et al.

Plaintiffs-Appellees

-vs-

ROBERT B. MARLOW, et al.

Defendants-Appellants

JUDGES:
Hon. W. Scott Gwin, P. J.
Hon. John W. Wise, J.
Hon. Julie A. Edwards, J.

Case No. 08 CA 8

O P I N I O N

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| CHARACTER OF PROCEEDING: | Civil Appeal from the Court of Common Pleas, Case No. CV-07-32 |
| JUDGMENT: | Affirmed |
| DATE OF JUDGMENT ENTRY: | November 19, 2009 |

APPEARANCES:

For Plaintiffs-Appellees

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*Wise, J.*

**{¶1}** Defendants-Appellants Robert Marlow and Tina Lambert appeal the November 19, 2008, decision entered in the Morgan County Common Pleas Court granting judgment in favor of Plaintiffs-Appellees Jeffrey A. Welch and Julie Welch on their adverse possession claim following a trial to the bench.

## STATEMENT OF THE FACTS AND CASE

**{¶2}** The case before us if one of adverse possession, with the relevant facts as follows:

**{¶3}** Plaintiffs-Appellees Jeffrey A. Welch and Julie L. Welch are the owners of 1.3400 acres located in Section 34, York Township, Morgan County, Ohio, which they acquired from Julie Welch's mother, Delora Mason, by Warranty Deed recorded on January 11, 2005.

**{¶4}** Delora Mason and her deceased husband, Pardon F. (Bud) Mason acquired an interest in said property by Land Contract dated January 23, 1983.

**{¶5}** Plaintiff Robert Linscott is the owner of 3.00 acres, more or less, located in Section 34, York Township, Morgan County, Ohio. The south 30 feet of this property is subject to an easement for what is known as "McCaslin Road".

**{¶6}** Defendants-Appellants Tina Lambert and Ronald Lambert, her husband, own a remainder interest, and her parents, Robert B. Marlow and Betty L. Marlow, own a life estate in the real property which is adjacent to the north line and east line of the Linscott property and for its southern boundary runs easterly to the western corner of the Jeffrey A. Welch property, where it continues in an east northeasterly direction along the north line of the Jeffrey A. Welch property to

Morgan County Road 75. This property is used for Christmas tree farming and neither the Lamberts nor the Marlows live on said property.

**{¶7}** The common root of title for all parties is found in a deed from Thomas C. McCaslin and Amanda McCaslin, husband and wife, to Frank I. Paxton dated the 18th day of May, 1907 and recorded in Morgan County, Ohio, and containing the following right-of-way:

**{¶8}** "Also the use of a certain private roadway belonging to the said Thomas C. McCaslin. Said roadway being 30 feet wide and beginning opposite Main Street in the First Addition to the Village of Scotch Heights, Perry County, Ohio, and extending east to the county road in Morgan County, Ohio, the use of said road to be as such as may be necessary for the said Frank I. Paxton as an inlet and outlet for the premises herein conveyed."

**{¶9}** The property at issue in this case is a 30 feet wide piece of property known as McCaslin Road, which runs through the property owned by Appellants.

**{¶10}** On or about December 17, 2006, Appellants erected a fence which prevented Appellees from using said roadway to gain access to their properties.

**{¶11}** On March 1, 2007, Plaintiffs Jeffrey A. Welch and Robert Linscott filed a Complaint seeking adverse possession of such 30-foot wide roadway on the real property owned by Defendants Robert B. Marlow and Tina Lambert.

**{¶12}** On March 28, 2007, Defendants filed their Answer and Counterclaim seeking damages against Plaintiff Welch for trespass, damage to real estate and punitive damages.

**{¶13}** On April 4, 2007, Plaintiffs filed their Reply to the Counterclaim.

**{¶14}** On May 9, 2007, a hearing was held before the trial court on the issue of the Preliminary Injunction. Testifying at the hearing were Wayne Knisely, the surveyor retained by Plaintiffs; Delora Mason, mother-in-law of Jeffrey Welch; Jeffrey Welch; Robert Linscott; William Marlow, son of Robert Marlow; and Robert Marlow.

**{¶15}** By a Court Order dated May 17, 2007, the trial court granted the Preliminary Injunction and ordered the fence removed.

**{¶16}** On January 28, 2008, an Amended Complaint was filed to join the spouses of the parties.

**{¶17}** Prior to the bench trial in this matter, the trial court, together with counsel and parties, viewed the real property in question.

**{¶18}** On April 21, 2008, the trial commenced in this matter, during which the trial court heard testimony from surveyors Wayne Knisely and Dana Snouffer; Morgan County Engineer Jeffrey McInturf; Plaintiffs-Appellees Jeffrey Welch and Julie Welch; Tammy Searles, a neighbor; Ralph Allen, owner of Crooksville Coal; Joseph Yonis, owner of Yonis Logging; and James Marlow, Robert Marlow, Jr. and William Marlow, sons of Defendant-Appellant Robert Marlow;

**{¶19}** The trial resumed on June 26, 2008, wherein the trial court heard additional testimony from Tina and Ron Lambert, daughter and son-in-law of Defendant-Appellant Robert Marlow; Defendant-Appellant Robert Marlow; Beverly Gibbs, a previous neighbor and sister-in-law of Bud Mason, previous owner of the property now owned by Jeffrey and Julie Welch; and Plaintiff Robert Linscott.

**{¶20}** Findings of Fact and Conclusions of Law were filed by Appellants on July 28, 2008, and by Appellees on August 19, 2008.

**{¶21}** On November 19, 2008, the trial court filed its Findings of Fact and Conclusions of Law and Orders finding in favor of Plaintiffs on part of their adverse possession claim. The trial court did not grant damages on either the complaint or the counter-claim, finding that the parties had failed to prove same.

**{¶22}** Defendants-Appellants Robert Marlow and Tina Lambert now appeal from this decision, raising the following assignment of error:

## ASSIGNMENT OF ERROR

**{¶23}** "I. PLAINTIFFS/APPELLEES FAILED TO MEET THE REQUISITE BURDEN OF PROOF TO ESTABLISH THAT THEY ADVERSELY POSSESSED ANY PORTION OF 'MCCASLIN ROAD' FROM TATMANS ROAD. "

### I.

**{¶24}** In their sole assignment of error, Appellants argue that Appellees Jeffrey Welch and Julie Welch failed to meet their burden of proof on their adverse possession claim. We disagree.

**{¶25}** "To acquire title by adverse possession, a party must prove, by clear and convincing evidence, 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, syllabus.

**{¶26}** In order for possession to be considered open, "the use of the disputed property must be without attempted concealment. * * * To be notorious, a use must be known to some who might reasonably be expected to communicate their knowledge to

the owner * * * [or] so patent that the true owner of the property could not be deceived as to the property's use." *Kaufman v. Geisken Enterprises, Ltd.,* 3rd Dist. No. 12-02-04, 2003-Ohio-1027, at ¶ 31.

**{¶27}** In order for possession to be considered "hostile", the Ohio Supreme Court has stated that any use of the land inconsistent with the rights of the titleholder is adverse or hostile. *Kimball v. Anderson* (1932), 125 Ohio St. 241, 244.

**{¶28}** In order for use to be considered continuous and exclusive, "[u]se of the property does not have to be exclusive of all individuals. Rather, it must be exclusive of the true owner entering onto the land and asserting his right to possession. It must also be exclusive of third persons entering the land under their own claim of title, or claiming to have permission to be on the premises from the true title holder. If the title holder enters onto the land without asserting, by word or act, any right of ownership or possession, his presence on the land does not amount to an actual possession, and the possession may properly be attributed to the party who is on the land exercising or claiming exclusive control thereof. It is not necessary that all persons be excluded from entering upon and using the premises." *Kaufman,* supra, at ¶ 39, quoting *Walls v. Billingsley* (April 28, 1993), 3rd Dist. No. 1-92-11, citing 4 Tiffany, Real Property (1975) 736, Section 1141.

**{¶29}** In order to establish the necessary twenty-one year period, a party may add to their own term of adverse use any period of adverse use by prior succeeding owners in privity with one another. *Zipf v. Dalgarn* (1926), 114 Ohio St. 291, syllabus.

**{¶30}** 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. Where a party must prove a claim by clear and convincing evidence, a reviewing court must examine the record to determine whether the trier of fact had sufficient evidence before it to satisfy the requisite degree of proof. *State v. Schiebel* (1990), 55 Ohio St .3d 71, 74.

**{¶31}** Failure of proof on any of the elements of adverse possession results in failure to acquire title by adverse possession. *Grace,* supra at 579. "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." *Id.,* at 580, citing 10 Thompson on Real Property (Thomas Ed.1994) 108, Section 87.05.

**{¶32}** It is the visible and adverse possession with intent to possess which constitutes the adverse character of the occupancy. *Grace,* 81 Ohio St.3d at 581, citing *Humphries v. Huffman* (1878), 33 Ohio St. 395, 402. In other words, " '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. Courts do not require the title owner of the property to receive actual notice of adverse possession as long as that owner is charged with knowledge of adverse use when one enters into open and notorious possession of the land under a claim of right. *Vanasdal v. Brinker* (1985), 27 Ohio App.3d 298, 299. The adverse occupancy of the land must be sufficient to notify the real owner of the extent of the adverse claim. *Humphries,* 33 Ohio St. at 404.

**{¶33}** Each case of adverse possession rests on its own peculiar facts. *Bullion v. Gahm*, 164 Ohio App.3d 344, 349, 2005-Ohio-5966, citing *Oeltjen v. Akron Associated Invest. Co.* (1958), 106 Ohio App. 128, 130.

**{¶34}** As stated above, the trial court judge in this case viewed both the western and eastern ends of the roadway in question prior to the commencement of the trial. The trial court "observed old automobiles and automobile parts located on [Appellees] Welch property which could only have been placed there using McCaslin Road because of the topography of the land." (11/19/2008 JE, ¶20). The trial court then heard testimony from numerous witnesses, including the parties, surveyors, neighbors, family members and others who were familiar with the location and use of the subject property.

**{¶35}** Jeffrey Welch testified that he and his wife began living at this location with her parents in 1985. (T. at 53). He stated that he and his wife initially lived with his in-laws in the house located on the property but that in 1986 they moved into a mobile home on the property. (T. at 54). He testified that a shed exists on the property, which he believed his father-in-law built in the early 1990's. He further testified that in September, 2006, a pole building was constructed on the property and that in November, 2006, gravel was placed in the driveway from County Road 75 east to the pole building. (T. at 55-57). He testified that he continuously uses/drives on what is known as McCaslin Road and that he had also observed his father-in-law use said road. (T. at 55-56, 69). He stated that prior to the erection of the fence by Appellant Marlow in 2006, he had continuous, uninterrupted use of the roadway. He further testified that there is no access road to his mobile home or the pole building other than the McCaslin Road access. (T. at 60-61).

**{¶36}** In addition to his testimony, Jeffrey Welch presented photographs of trucks and automobiles owned by him, restored by him or delivering something to him taken in 1986 and 1988 depicting his use of McCaslin Road. (T. at 67-69).

**{¶37}** Julie Welch also testified that she, her parents and her husband had used McCaslin Road since 1986-1987. (T. at 77). She also testified that in 2006 they graveled that portion of McCaslin Road from County Road 75 (Tatman's Road) up to their pole building. (T. at 85-87).

**{¶38}** Beverly Gibbs, sister of Delora Mason, testified she lived on County Road 75, near the Masons, since 1975 and that she observed Jeff and Julie Welch use McCaslin to drive up to their mobile home since 1987-1988. (T. II. at 79-80, 86). She stated that she witnessed Jeff and Julie Welch and Bud Mason drive on McCaslin Road and that she herself used the road. (T. II. at 81).

**{¶39}** Zeke Justus, nephew of Appellant, testified in his deposition that between 1986 and 1991 he observed junk and odds and ends placed in or over McCaslin Road by Bud Mason. (Depo. at 8, 9, 18).

**{¶40}** While Appellant's sons James Marlow and Robert Marlow, Jr. testified that their family used their property for Christmas tree harvesting, they stated that their father retired from such tree harvesting around 1987, and that while two of the sons continued with the business, they only did so until 2004 when their father transferred the land to their sister Tina. (T. at 144). Since 2000, someone only went out the property maybe once a year. (T. at 144, 146). However, Robert Marlow testified that when they went out to the property for purposes of the Christmas tree business, they used an

access road which is located north of McCaslin Road instead of McCaslin Road. (T. at 148).

**{¶41}** James Marlow testified that in December, 1989, he spoke with Bud Mason about "some old building materials stacked up over on the easement". (T. at 119). He further stated that at that time he told Mr. Mason to "stay over on your side of the line and we won't have to put the fence up." Id. He also testified that he observed vehicles parked in or on McCaslin Road in 2000, 2001, 2002. (T. at 122, 124).

**{¶42}** It was testified to that in the late 1980's their father began to erect a fence along the property line on McCaslin Road but that such fence was not completed at that time. (T. at 134).

**{¶43}** Tina Lambert testified that since the property was transferred to her, she had only been out to the property "probably three or four times total." (T. II. at 16).

**{¶44}** Appellant testified that while he used to visit his property very frequently in the early years, he did not use McCaslin Road to access the property. (T.II. at 41, 43). He stated that back in 1989 he knew that Bud Mason was using McCaslin Road and that he was informed to "stay off the property." (T.II. at 44).

**{¶45}** Based on the testimony of the parties, we find that the trial court had before it clear and convincing evidence that the Welches, along with the Masons before them, had openly, notoriously, hostilely and adversely possessed that portion of McCaslin Road, which is the subject of the action, without substantial interruption for a period of twenty-one (21) years.

**{¶46}** Appellants' sole assignment of error is overruled.

**{¶47}** For the foregoing reasons, the judgment of the Court of Common Pleas, Morgan County, Ohio, is affirmed.

By: Wise, J.

Gwin, P. J., and

Edwards, J., concur.

/S/ JOHN W. WISE

/S/ W. SCOTT GWIN

/S/ JULIE A. EDWARDS

JUDGES

JWW/d 10/30

IN THE COURT OF APPEALS FOR MORGAN COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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| JEFFREY A. WELCH, et al. | : | |
| Plaintiffs-Appellees | : | |
| -vs- | : | JUDGMENT ENTRY |
| ROBERT B. MARLOW, et al. | : | |
| Defendants-Appellants | : | Case No. 08 CA 8 |

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Morgan County, Ohio, is affirmed.

Costs assessed to Appellants.

/S/ JOHN W. WISE_____

/S/ W. SCOTT GWIN_____

/S/ JULIE A. EDWARDS_____

JUDGES