[Cite as *Kiesel v. Hovis*, 2013-Ohio-3469.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY

Alvin J. Kiesel, et al.	Court of Appeals No. S-12-043
Appellees	Trial Court No. 10 CV 1085
v.	
Ronald J. Hovis	**DECISION AND JUDGMENT**
Appellant	Decided: August 9, 2013

* * * * *

James S. Nordholt, Jr. and Martin D. Koop, for appellees.

Thomas M. Bowlus, for appellant.

* * * * *

SINGER, P.J.

{¶ 1} Appellant appeals the order of the Sandusky County Court of Common Pleas granting a judgment notwithstanding the verdict in a quiet title action. Because we conclude that the jury's verdict was one upon which reasonable minds could differ, we reverse.

{¶ 2} Appellees, Alvin J. and Jane I. Kiesel, and appellant, Ronald J. Hovis, are owners of adjacent parcels of farmland in Scott Township, Sandusky County, Ohio. At issue is the boundary line between these parcels. In contest is a strip of land 126 feet wide and 2,660 feet long, containing approximately seven acres of land.

{¶ 3} Both parties derive their claim from late nineteenth and early twentieth century sale of the land by Henry Nye. On April 11, 1898, Nye sold Samuel Roberts land in Scott Township described as:

> Fifteen (15) rods off from the west side of the East half (1/2) of the North east quarter (1/4) of Section Fifteen (15) Township four (4) Range Thirteen (13) East *Embracing all land on the west side from the center of the located Ditch* on said West half Section Containing Fifteen (15) acres of land. (Emphasis added.)

{¶ 4} This west parcel would eventually come into the hands of appellant.

{¶ 5} On April 1, 1902, Nye sold Henry Hughes the east parcel that would eventually come to appellees. The deed description of this property was:

> The East half (1/2) of the North East quarter (1/4) of Section Fifteen (15) Township four (4) North Range thirteen (13) East.
> Also, the east half (1/2) of the West half (1/2) of the north east quarter (1/4) of section fifteen (15) Township four (4) North, Range thirteen (13) East *except fifteen (15) acres off of the west part sold to Samuel Roberts, a ditch*

running north and south to be the dividing line, containing in all one hundred and five (105) acres of land. (Emphasis added.)

{¶ 6} These property descriptions continued unchanged in the chain of title of both parties. The same language contained in the Hughes deed appears in the deed when appellees purchased the east parcel from Robert Garn in 1994. The Roberts deed language was in the deed to appellant's father when he bought the west parcel in 1966.

{¶ 7} In 2007, when appellant recorded a transfer on death deed, he was advised by a representative of the county auditor that no further transfer would be permitted until the property description was updated. Appellant hired surveyor Gregory Drown to update the description.

{¶ 8} Measuring 15 rods from the west side of the east half of the northeast quarter, Drown set the dividing line between the parcels 126 feet east of the course of the north-south ditch on the property. Drown later testified that this measurement produced a parcel consistent with the 15 acre transfer in the 1898 deed.

{¶ 9} When appellant recorded Drown's survey, appellees brought the quiet title action that underlies this appeal. Appellees claimed that the centerline of the ditch was the true boundary between these parcels and that the survey appellant filed constitutes an encroachment on their property. The seven acre strip on the east side of the ditch is theirs by deed and/or by adverse possession, appellees maintained. Appellees also accused appellant of slander of title. Appellant answered, denying appellees' claim on the

disputed strip and counterclaiming for prior revenues appellees derived from the land through a Soil and Water Conservation Services program.

{¶ 10} The matter proceeded to trial before a jury. At trial, appellees called a property lawyer and their own surveyor who testified to their opinion of the deeds at issue, supporting appellee's assertion that the centerline of the ditch was the historical property line between the parcels. Appellees also called farmers Lyle Blausey and David Richter.

{¶ 11} Blausey testified that he had farmed the east parcel for Robert Garn from 1975 until 1992, including the contested strip. Blausey shared the revenue from the land equally with Garn. Blausey testified that he farmed to within five feet of the ditch because that was where it had been farmed before. Richter farmed the east section in 1993 for cash rent. He too followed the area that had been planted before, although he testified that he did not believe all of the land belonged to Garn.

{¶ 12} David Kiesel testified that his father bought the land from Garn at auction in 1993. He farmed the land to within "one to two feet" from the ditch. He continued to do so until his father put the disputed area into the Conservation Enhancement Reserve Program as a filter strip through the United States Department of Agriculture "seven or eight years ago." Appellee Alvin Kiesel testified that he put the strip in the program in 2003 and received annual payments from the program, generally in excess of $2,000 yearly for 18 acres, including the seven acre strip.

{¶ 13} Appellant called surveyor Drown who testified that the phrase "embracing * * * the located ditch" had little meaning in drawing lines. "Embracing" is not a term of art. Moreover, the surveyor testified, he had consulted auditor's tax maps that showed the boundary to the east of the north-south ditch. He also consulted United States Geographical Survey maps recorded shortly after the sales from Nye. A 1901 USGS map shows no north-south ditch at all on section 15. Indeed, according to Drown, no ditch appears in that section on any USGS map until 1959. Finally, the surveyor testified, by ignoring reference to the ditch in the property description and simply measuring 15 rods from west side of the east quarter of the section, the result sets the border at 126 feet east of the ditch and creates a parcel consistent with the 15 acres sold in the 1898 Nye to Roberts deed.

{¶ 14} Appellant also called Scott Kieffer, a county auditor's employee in charge of the county's geographic information system. Kieffer testified that the computerization of the county tax maps dictated that ambiguous legal descriptions be resolved. This was why the office demanded that appellant have his land surveyed before another transfer could be recorded. Kieffer identified tax maps showing the border between the parties' parcels to be east of the north-south ditch and testified that surveyor Drown's calculations resulted in a property area computation for appellant's parcel matching that on the auditor's list "through four points past the decimal."

{¶ 15} Appellant testified that he was familiar with the property since his father purchased it in 1966. According to appellant, both he and his father before him had paid

taxes on the full amount of the property, including the area in the east strip. Appellant testified that his father and Garn were friends, but he did not know if the two men had an agreement for Garn's use of the land east of the ditch. As far as his own acquiesce to Garn's and later appellees' use of the strip, appellant testified he never said anything, but consented by his inaction.

{¶ 16} At the conclusion of the trial, all parties moved for a directed verdict on all issues. The court did not expressly rule on these motions, but in chambers advised counsel that, in the court's view, appellees had not made their case on the deed or the slander of title claims. The court suggested, and counsel agreed, that the matter be submitted to the jury on the adverse possession claim only. That was the matter submitted to the jury. On deliberation, the jury returned a unanimous verdict in favor of appellant.

{¶ 17} The trial court accepted the verdict. The court, however, granted appellees' subsequent motion for a judgment notwithstanding the verdict, concluding that the jury had "lost its way." From this judgment, appellant brings this appeal, setting forth four assignments of error:

> I. The trial court erred in granting plaintiff-appellee's [sic] motion for judgment notwithstanding the verdict, because evidence and testimony was introduced refuting some or all of the elements of adverse possession.
>
> II. The trial court erred in granting plaintiff-appellee's [sic] motion for judgment notwithstanding the verdict, because reasonable minds could

have reached more than one conclusion on the question of adverse possession based upon the evidence and testimony presented at trial.

III. The trial court erred in granting plaintiff-appellee's [sic] motion for judgment notwithstanding the verdict, because the judge applied the wrong test when reaching his judgment.

IV. The trial court erred in granting plaintiff-appellee's [sic] motion for judgment notwithstanding the verdict, because this ruling in inconsistent with the charge given to the jury and invades the province of the jury.

{¶ 18} We shall discuss appellant's assignments of error together.

I. Judgment Notwithstanding The Verdict

The standard for granting a judgment notwithstanding the verdict * * * pursuant to Civ.R. 50(B) is the same as that for granting a directed verdict pursuant to Civ.R. 50(A). *Texler v. D.O. Summer's Cleaners* (1998), 81 Ohio St.3d 677, 679, 693 N.E.2d 271. If, after construing the evidence most strongly in favor of the party against whom the motion is directed, the court finds that upon any determinative issue reasonable minds could come to only one conclusion on the evidence submitted and that conclusion is adverse to the nonmoving party, then the court must sustain the motion. *Id.*, citing Civ.R. 50(A)(4). If there is substantial competent evidence in favor of the nonmoving party upon which reasonable minds might reach different conclusions, the [motion] should be rejected. Id.,

citing *Kellerman v. J.S. Durig Co*. (1964), 176 Ohio St. 320, 199 N.E.2d 562. A party who bears the burden of proof can seldom complain when a trier of fact finds that the burden has not been met. *Jawarski v. Perz* (June 13, 1997), 6th Dist. Lucas No. L-96-334; *In re Scott*, 111 Ohio App.3d 273, 274, 675 N.E.2d 1350 (6th Dist.1996). *Staerker v. CSX Transp., Inc.*, 6th Dist. Lucas No. L-05-1416, 2006-Ohio-4803, ¶ 22.

{¶ 19} The trier of fact is the sole judge of the weight of the evidence and the credibility of witnesses and "may believe or disbelieve any witness or accept part of what a witness says and reject the rest." *State v. Antill*, 176 Ohio St. 61, 67, 197 N.E.2d 548 (1964).

II. Adverse Possession

{¶ 20} A party who wishes to acquire title to real property by adverse possession must show exclusive possession and open, notorious, continuous and adverse use of such property for a period of twenty-one years. *Grace v. Koch*, 81 Ohio St.3d 577, 579, 692 N.E.2d 1009 (1988). The burden of proof is on the party attempting to establish title by adverse possession. *Id.* If the claimant fails to prove any required element by clear and convincing evidence, the claim must fail. *Id.* at 580. Ordinarily, the determination of whether these elements have been proven rests with the trier of fact. *Thomas v. Wise*, 6th Dist. Sandusky No. S-06-043, 2007-Ohio-3467, ¶ 13.

{¶ 21} In establishing the 21 year period necessary for title by adverse possession, a party may "tack" his or her period of adverse use with any period of adverse use by

antecedent owners in privity. *Franck v. Young's Suburban Estates, Inc.*, 6th Dist. Ottawa No. OT-02-040, 2004-Ohio-1650, ¶ 23, citing *Zipf v. Dalgarn*, 114 Ohio St. 291, 297-298, 151 N.E.2d 174 (1926). Possession is never adverse or hostile if it is by permission of the owner. *Van Buren v. Worley*, 6th Dist. Lucas No. L-95-049, 1995 WL 704096 (Dec. 1, 1995), citing *Hinman v. Barnes*, 146 Ohio St. 497, 66 N.E.2d 911 (1946). Permission for the use of land may be implied from the facts and circumstances of each case. *Id.* Use of premises which begins as permissive can become hostile and adverse only with the most unequivocal conduct of the user. *Hinman* at paragraph two of the syllabus.

III. Analysis

{¶ 22} In its entry granting a judgment notwithstanding the verdict, the court stated that it believed the jury has "lost its way." This is patently the wrong standard for assessing whether or not to grant a J.N.O.V. It is a manifest weight standard. *See Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 17, *State v. Thompkins*,78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). Whether the trial court actually applied this standard to appellant's prejudice or was merely imprecise in its language is another question which we need not reach.

{¶ 23} Appellees bore the burden of proving, by clear and convincing evidence, each element necessary to establish adverse possession. Since, from the testimony it is clear that appellees made no use of the disputed strip prior to their purchase of the

adjacent property in 1994, they cannot, by themselves, establish 21 years of adverse use. They must tack their use to that of their predecessor in interest, Robert Garn.

{¶ 24} They attempted to do this with testimony from farmers Blausey and Richter who farmed Garn's land as a rental or for a percentage of the crops. Neither farmer testified to any express discussion with Garn concerning the disputed strip. Both said they simply farmed the land that had been farmed before them. No inquiry was made of either farmer of the relationship between Garn and the elder Mr. Hovis. Appellant testified that his father and Garn and his father were friends. He also testified that, although he had not communicated his permission to appellees, he was content to let the adjoining property holder use the land because it was difficult to get his own equipment across the ditch.

{¶ 25} The jury could have wholly disbelieved the testimony of Blausey and/or Richter. It could have concluded that Blausey and Richter had no knowledge of any permissive arrangement between the elder Hovis and Garn and, considering the testimony of appellant about the friendship between these predecessors to the present parties, inferred that a permissive prior use was more likely than not. We cannot say that any of these findings are such that reasonable minds could not differ. Since any of these findings would negate a proof by appellees of an essential element of adverse possession, the trial court erred in granting them a judgment notwithstanding the verdict. Accordingly, appellant's second assignment of error is found well-taken. The remaining assignments of error are moot.

{¶ 26} On consideration whereof, the judgment of the Sandusky County Court of Common Pleas is reversed. This matter is remanded to said court to reinstate the verdict of the jury. It is ordered that appellees pay the court costs of this appeal pursuant to App.R. 24.

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J.
CONCUR. _____
JUDGE