[Cite as *Merriner v. Goddard*, 2009-Ohio-3253.]

STATE OF OHIO, MONROE COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

CHARLES T. MERRINER, et al.,	)	
	)	
PLAINTIFFS-APPELLANTS,	)	
	)	
VS.	)	CASE NO. 08-MO-2
	)	
STEPHANIE A. GODDARD, et al.,	)	OPINION
	)	
DEFENDANTS-APPELLEES.	)	

CHARACTER OF PROCEEDINGS:	Civil Appeal from Court of Common Pleas of Monroe County, Ohio Case No. 2007-241
JUDGMENT:	Affirmed
APPEARANCES: For Plaintiffs-Appellants	Attorney Mark Morrison 117 N. Main Street Woodsfield, Ohio 43793
For Defendants-Appellees	Attorney James W. Peters 107 West Court Street Woodsfield, Ohio 43793

JUDGES:

Hon. Gene Donofrio
Hon. Joseph J. Vukovich
Hon. Mary DeGenaro

Dated: June 25, 2009

[Cite as *Merriner v. Goddard*, 2009-Ohio-3253.]
DONOFRIO, J.

{¶1} Plaintiffs-appellants Charles T. Merriner, et al. appeal a decision of the Monroe County Common Pleas Court ruling in favor of defendants-appellees Stephanie M. Goddard, et al. on appellants' action to quiet title involving a claim of adverse possession, following a bench trial. On appeal, appellants raise numerous issues including the trial court's application of adverse possession law to this case, weight of the evidence, applicability of the doctrines of acquiescence and equitable estoppel, and disqualification of defense counsel.

FACTS AND PROCEDURAL HISTORY

{¶2} The subject of this adverse possession case involves a small strip of land and what constitutes the property line between the northern and southern portions of plot 47 in the Village of Sardis, Lee Township, Monroe County, Ohio. A century-old large building that has been used for various commercial and residential purposes sits on the northern portion. A residential home with a detached garage sits on the southern portion.

{¶3} Appellants are the descendants of Marvin Merriner who purchased the northern portion back in 1946. He ran a confectionery from a portion of the building and the remainder of the building was divided into apartments, one of which he resided in and the others he rented. When he bought the building, a long narrow row of dense "Rose of Sharon" bushes ran along the southern portion of the building. The bushes stood approximately 11 feet from the building. For years, many considered or thought that the bushes signified the dividing line between the two subplots.

{¶4} Upon his father's death in 1964, Charles Merriner took ownership of the northern portion. He, his wife, and other family members used the property as a summer vacation home until moving there permanently in 1977. In 1998, Charles Merriner died and the property passed to his heirs, appellants herein. Appellants renovated the building and, in 2002, opened part of the building as a restaurant called Marv's Place.

{¶5} When Marvin Merriner purchased the northern portion of lot 47 in 1946, Eileen Maienknecht lived in the house with her mother on the southern portion. When

Eileen Maienknecht was 21 years old, she and her mother moved and Oma Stalder took up residence in the house on the southern portion for the next 30 years. Oma Stalder's niece, Clara Klay and her husband, then took ownership of the property. Clara Klay and her husband sold the property to Dan Straub in 1995. Straub in turn sold it to appellee Stephanie Goddard and her husband, Mike Goddard, in 2001. Two marriages later, Stephanie Goddard became the sole owner of the property in 2005. Later, appellee Gary Thompson began living with Stephanie Goddard and the two became joint owners and have since married.

{¶6} Wanting to improve their southern side of the lot, appellees had a survey completed for the property on March 1, 2007. The survey indicated that the northern boundary line of the southern portion of lot 47 was just 5.27 feet from the southern edge of the large building sitting on the northern portion of the lot. In other words, the distance between appellants' building (Marv's Place) and the boundary line to appellees' property was only 5.27 feet. This meant that the dividing line extended 6 feet north beyond the "Rose of Sharon" bushes which actually sat completely on the southern portion of the lot and were not the true boundary line between the northern and southern portions of the lot.

{¶7} A week later, appellees removed the "Rose of Sharon" bushes and subsequently began construction of a fence between the northern and southern portions of lot 47. Appellants kept a garbage dumpster next to their building on a concrete pad which extended more than 5.27 feet beyond the building. Thus, the concrete pad had to be cut and the dumpster moved onto the sidewalk in order to complete construction of the fence. Appellees also had a detached garage and driveway constructed in addition to landscaping at a total cost of approximately $40,000.00.

{¶8} On August 20, 2007, appellants sued appellees to quiet title to the disputed strip of property claiming adverse possession. They also sought injunctive relief to prevent appellees from completing their construction improvements. The case eventually proceeded to a two day bench trial occurring on January 4th and

14th, 2008. Each side presented extensive testimonial evidence as well as copies of deeds, the new survey commissioned by appellees, and photographs taken of the area over the years.

{¶9} Since appellants' claimed title to the disputed portion by adverse possession, the central issue of the trial became how various owners of the two portions and neighbors treated the "Rose of Sharon" bushes and surrounding area over the years. Appellants presented the testimony of numerous people who, over the years, considered the "Rose of Sharon" bushes the boundary line. Charles Merriner's daughter, appellant Sharon Davis, remembered spending summers on the property. She recalled mowing up to the bushes and pruning the bushes. She also produced several photographs of family members trimming the bushes over the years from 1970 until they were removed in April 2007. She always considered the bushes the boundary line between their property and the southern portion of the lot.

{¶10} Eileen Maienknecht lived in a home with her mother on the southern portion of the lot now owned by appellees from 1946 to 1954. She testified to mowing the lawn up to the bushes with the understanding that it was the boundary line.

{¶11} After Maienknecht and her mother moved away, Oma Stalder lived in the home for the next 30 years. Her niece, Clara Klay, testified that, in 1968, Stalder asked the Merriner's for permission to plant snow ball plants amongst the "Rose of Sharon" bushes.

{¶12} Leland Jackson, a lifelong resident of Sardis and a friend of the Merriner family believed that the bushes belonged to the Merriners and constituted the property line. After Marvin Merriner died in 1946, but before Charles Merriner took up permanent residence in the building, Jackson used the basement of the building and maintained the building and the land, including mowing up to the "Rose of Sharon" bushes.

{¶13} Gary Wichterman also periodically mowed the property for the Merriners from the mid-1980's until Charles Merriner died in 1998. Charles Merriner had instructed him to mow up to the "Rose of Sharon" bushes.

{¶14} Appellees began their side of the case by calling Dan Straub and his wife, Kendra, to testify about their ownership of the southern portion from June 1995 to May 2001. He testified that he believed that the property line was a railroad tie that lay on the ground beyond the "Rose of Sharon" bushes and closer to the Merriner's building. He maintained his own yard up to the railroad tie. He erected a white corner fence post parallel to the bushes, but maintained that it had nothing to do with the boundary line.

{¶15} Another Sardis resident, Eugene Conley, testified about mowing the grass on the southern portion for Oma Stalder from 1966 to 1978. He recalled mowing around both sides of the bushes up to the Merriner's building.

{¶16} A neighbor, Joseph Conley, mowed the area from 1999 until 2005 as a neighborly gesture, noting that the Merriner building had sat vacant for some time. He testified that he mowed the area as close to the Merriner building as he could get beyond the bushes.

{¶17} Appellee Stephanie Goddard, who purchased the southern portion from the Straubs in 2001, testified that she, like the Straubs, mowed up to the railroad tie and behind the "Rose of Sharon" bushes. She never saw anyone else other than Joseph Conley mow the area. She also trimmed the bushes and thought the Merriner building was vacant and falling into disrepair.

{¶18} On March 4, 2008, the trial court entered judgment in favor of appellees, the owners of the southern portion, finding that appellants had failed to prove by clear and convincing evidence each of the elements of adverse possession and that appellants were estopped from asserting ownership by adverse possession. The court issued a detailed and thorough 11-page opinion. In reaching its conclusion, the court found that although appellants' possession of the property may have been open and obvious for over 21 years, the possession was not adverse or hostile and exclusive. (03/04/2008 J.E., p. 7, ¶¶34-39.) The court also found that appellants' possession of the land was not exclusive. (03/04/2008 J.E., p. 7, ¶¶40-42.) This appeal followed.

ADVERSE POSSESSION

{¶19} "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, 692 N.E.2d 1009, syllabus. 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, 151 N.E. 174, syllabus. 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, 120 N.E.2d 118. 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 facts had sufficient evidence before it to satisfy the requisite degree of proof. *State v. Schiebel* (1990), 55 Ohio St.3d 71, 74, 564 N.E.2d 54.

{¶20} Failure of proof on any of the elements of adverse possession results in failure to acquire title by adverse possession. *Grace,* 81 Ohio St.3d at 579, 692 N.E.2d 1009. "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, 692 N.E.2d 1009, citing 10 Thompson on Real Property (Thomas Ed.1994) 108, Section 87.05.

{¶21} It is the visible and adverse possession with an intent to possess which constitutes the adverse character of the occupancy. *Grace,* 81 Ohio St.3d at 581, 692 N.E.2d 1009, 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, 692 N.E.2d 1009, 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, 500 N.E.2d 876. 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.

Adverse Intent

{¶22} Appellants raise seven assignments of error, the first of which states:

{¶23} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY RULING THAT ADVERSE POSSESSION REQUIRES 'ADVERSITY' IN THE SENSE THAT THE PERSON CLAIMING ADVERSE POSSESSION MUST SUBJECTIVELY INTEND TO TAKE THE LAND FROM ANOTHER."

{¶24} Concerning the adversity element of adverse possession, appellants quote that portion of the trial court's decision where it stated:

{¶25} "* * * Plaintiffs believed over the years that they were the lawful owners of said property. Their continued use of the land, therefore[,] was not hostile or adverse." (03/04/2008 J.E., p. 7, ¶37.)

{¶26} Appellants argue that the trial court's finding in that regard is contrary to Ohio Supreme Court's decision in *Evanich v. Bridge*, 119 Ohio St.3d 260, 2008-Ohio-3820, 893 N.E.2d 481, holding that an adverse possession claimant's bad faith intention is not required.

{¶27} In response, appellees contend that the appellants' quotation of the trial court's decision is taken out of context and contend that there was enough evidence of adversity. Specifically, appellees note that the Merriners never took any steps to prevent various people over the years from mowing behind and pruning the "Rose of Sharon" bushes.

{¶28} The portion of the trial court's decision quoted by appellants comes from ¶37. In its entirety, it states:

{¶29} "In the case before the Court, Plaintiffs offered no testimony to support that their possession of the land in question was adverse or hostile to the true land owner. In fact, Plaintiffs believed over the years that they were the lawful owners of said property. Their continued use of the land, therefore[,] was not hostile or adverse."

{¶30} Appellants' general proposition is true. Bad faith or subjective intent on the part the adverse possession claimant is not required. Similar to the property owners here, the property owners in *Evanich*, cited by appellants, were fighting over a small strip of property between adjacent sublots. After building a home on one of the unimproved lots, the owners conducted a self-survey and landscaped accordingly, unknowingly encroaching onto the adjacent unimproved sublot. Years later, the adjacent property owners surveyed their lot and discovered the small encroachment by their neighbors. Unwilling to remove their landscaping, the first owners sued for adverse possession of the small strip of land. The other owners argued that the first owner's possession of the strip could not have been adverse because they never took possession of the land with the intent to claim title to it. The trial court awarded the strip to the first property owners (the adverse possession claimants). A divided court of appeals affirmed. The dissent was persuaded that the adverse possession claimant's mistake was insufficient to meet the intent element of adverse possession.

{¶31} The Ohio Supreme Court affirmed the court of appeals and addressed the issue of intent:

{¶32} "We have never held that a claimant must establish subjective intent to acquire title to real property of another to prevail on an adverse possession claim. The adversity element has been explained this way: '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.' *Humphries v. Huffman* (1878), 33 Ohio St. 395, 402. This 'occupancy must be such as to give notice to the real owner of the extent of the adverse claim.' Id. at 404.

{¶33} “In an early case, this court addressed the precise issue of whether the element of adversity requires that a person possess the subjective intent, meaning the actual motive, to claim the property of another. *Yetzer v. Thoman* (1866), 17 Ohio St. 130. There, the court considered a jury instruction on adverse possession that stated: ‘“The plaintiff [seeking title through adverse possession] must have knowingly and designedly taken and held the land to enable him to claim the benefit of the statute. Occupancy by accident, or mistake, or ignorance of the dividing line, is not sufficient.”’ That instruction was rejected as unprecedented, erroneous, and “mischievous in its operation.” Id. at 133. Instead, the court reaffirmed what it considered the prevailing, objective intent view that ‘“[t]he possession alone, and the qualities immediately attached to it, are regarded. If [the adverse possessor] intends a wrongful disseisin, his actual possession for [the relevant time] gives him a title; or if [the adverse possessor] occupies what he believes to be his own, a similar possession gives him a title. Into 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, and not the remote views or belief of the possessor.”’ Id., quoting *French v. Pearce* (1831), 8 Conn. 439, 443. In other words, title may be acquired ‘irrespective of any question of motive or of mistake.’ Id. at 132.” Id. at ¶8-9.

{¶34} The court concluded:

{¶35} “In a claim for adverse possession, intent is objective rather than subjective in determining whether the adversity element of adverse possession has been established, and the legal requirement that possession be adverse is satisfied by clear and convincing evidence that for 21 years the claimant possessed property and treated it as the claimant's own. *Yetzer,* 17 Ohio St. 130. This has been the law in Ohio for over 140 years, and we are unwilling to alter a rule that has successfully directed the application of the doctrine of adverse possession for so long.” Id. at ¶13.

{¶36} In this case, the trial court did reference appellants’ subjective intent when it noted that appellants over the years believed that they were the lawful

owners of the disputed property. To that limited extent, the court's decision was in error in light of *Evanich*. However, that error was inconsequential. The court also applied an objective test when it stated that appellants had offered no testimony to support that their possession of the disputed land was adverse to the true owner.

{¶37} Accordingly, appellants' first assignment of error is without merit.

Exclusive Possession

{¶38} Appellants' second assignment of error states:

{¶39} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY RULING THAT ANY USE BY THE RECORD HOLDER DEFEATS ADVERSE POSSESSION."

{¶40} When addressing the exclusive possession element of adverse possession, the trial court noted, "No matter how small the use by the record owner, it is sufficient to defeat the acquisition of title by adverse possession." (03/04/2008 J.E., p. 7, ¶40.) Appellants argue that this is another incorrect conclusion of law on the part of the trial court, simply citing to and quoting *Kaufman v. Giesken Enterpises*, Ltd., 3d Dist. No. 12-02-04, 2003-Ohio-1027, without further explanation.

{¶41} Appellees argue that there was no exclusive possession since appellants or their predecessors in title never stated that the disputed property was their own and never precluded others from entering into the area and exercising control over it.

{¶42} As the trial court explained, various people did enter into the disputed area and exercised control over it. Dan Straub, who owned the southern portion prior to appellees, testified about mowing and trimming the grass in the disputed area. Joseph Conley and appellee Stephanie Goddard also mowed and trimmed the grass in the disputed area. None of the people asked permission to maintain the area and no one ever approached or confronted them about it.

{¶43} Accordingly, appellants' second assignment of error is without merit.

Weight of the Evidence

{¶44} Appellants' third assignment of error states:

{¶45} "THE EVIDENCE OF ADVERSE POSSESSION IS SO OVERWHELMING THAT THIS COURT SHOULD HOLD THAT PLAINTIFFS HAVE TITLE AT LEAST BY ADVERSE POSSESSION."

{¶46} The thrust of appellants' argument under this assignment of error is essentially one of manifest weight of the evidence. "Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 8 O.O.3d 261, 376 N.E.2d 578, syllabus. See, also, *Gerijo, Inc. v. Fairfield* (1994), 70 Ohio St.3d 223, 226, 638 N.E.2d 533. The court "must indulge every reasonable presumption in favor of the lower court's judgment and finding of facts." *Gerijo*, 70 Ohio St.3d at 226, 638 N.E.2d 533 (citing *Seasons Coal Co., Inc. v. Cleveland* [1984], 10 Ohio St.3d 77, 10 OBR 408, 461 N.E.2d 1273). "In the event the evidence is susceptible to more than one interpretation, [the court] must construe it consistently with the lower court's judgment." Id. "The underlying rationale of giving deference to the findings of the trial court rests with the knowledge that the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Seasons Coal Co.*, 10 Ohio St.3d at 80, 10 OBR 408, 461 N.E.2d 1273.

{¶47} Appellants argue that the trial court's reliance on the non-exclusivity testimony of Dan Straub, Stephanie Goddard, and Frank Conley was misplaced because none of them had any connection to the property until after the 21-year period for adverse possession had already occurred.

{¶48} Instead, appellants attempt to focus attention on persons who testified about the property from 1946 to 1967 (the alleged period of adverse possession). Specifically, appellants rely principally on the testimony of Eileen Maienknecht and Clara Klay.

{¶49} Eileen Maienknecht testified that she lived with her mother in the home that sat on the southern portion of the lot from 1946 to 1954. (Tr. 83.) She also

testified that they understood the property line between the northern and southern of the portions of the lot to be the Rose of Sharon bushes. (Tr. 84.) She explained that they mowed up to the bushes, but no further. (Tr. 84.)

{¶50} Clara Klay testified about her aunt, Oma Stalder, who lived in the home on the southern portion. Apparently Stalder moved in after Eileen Maienknecht and her mother moved in 1954 and resided there for the next 30 years. (Tr. 91.) Klay related that she visited Stalder often and recalled that Stalder, after asking permission from the Merriners, planted summer snowball plants along the boundary line in 1968. (Tr. 92, 96.) She also testified that Stalder or someone at her direction mowed only up to those plants. (Tr. 95.)

{¶51} Maienknecht's and Klay's testimony is some evidence that appellants and their predecessors in title (the Merriners) held the disputed portion by adverse possession. However, it does not appear to rise to the level of clear and convincing evidence. Their testimony dealt only with how two different people who lived in the home on the southern portion treated the "Rose of Sharon" bushes. Neither Maienknecht nor Klay testified about any of the Merriners exercising control or authority over the disputed area. For example, Maienknecht could not remember who took care of the grass on the other side of the bushes, just assuming that it was the Merriners. (Tr. 84.) Also, Klay twice testified that she could not specifically recall the "Rose of Sharon" bushes, but assumed they were there. (Tr. 93, 97.) Although Maienknecht and Stalder themselves may have understood the "Rose of Sharon" bushes to be the property line, as indicated earlier the Ohio Supreme Court has had held that it is the *objective intent on the part of the adverse possession claimant* that is paramount. *Evanich*, supra. Maienknecht's and Klay's testimony offered nothing in regard to how the Merriners treated the disputed area over the years.

{¶52} Accordingly, appellants' third assignment of error is without merit.

DOCTRINE OF ACQUIESCENCE

{¶53} Appellants' fourth assignment of error states:

{¶54} "THE EVIDENCE OF ACQUIESCENCE IS SO OVERWHELMING THAT THIS COURT SHOULD HOLD THAT PLAINTIFFS HAVE TITLE AT LEAST BY THE DOCTRINE OF ACQUIESCENCE."

{¶55} Appellants argue that the doctrine of acquiescence applies to give them title to the disputed strip of property because the owners of the southern portion acquiesced regarding ownership resting with the northern side. Appellees argue that the doctrine is inapplicable because there was evidence presented that they and their predecessors in title to the southern portion mowed behind the "Rose of Sharon" bushes and up to the railroad tie which rested closer to the Merriner building.

{¶56} A lesser known construct of the doctrine of adverse possession is the doctrine of acquiescence. The doctrine has been explained this way:

{¶57} "The doctrine of acquiescence is applied in instances when adjoining land owners occupy their respective properties up to a certain line and mutually recognize and treat that line as if it is the boundary that separates their properties. See *Robinson v. Armstrong,* Guernsey App. No. 03CA12, 2004-Ohio-1463, at ¶35; *McConachie v. Meeks* (Sep. 21, 1999), Richland App. No. 98CA90; *Turpen v. O'Dell* (Oct. 14, 1998), Washington App. No. 97CA2300. Acquiescence rests on the practical reality that oftentimes, the true boundary line location is uncertain and neighbors may themselves establish boundaries. *Richardson v. Winegardner* (Nov. 2, 1999), Allen App. No. 1-99-56. To apply this doctrine: (1) adjoining landowners must treat a specific line as the boundary; and (2) the line must be so treated for a period of years, usually the period required for adverse possession. *Robinson,* supra at ¶35; *Matheson v. Morog* (Feb. 2, 2001), Erie App. No. E-00-17; *McGregor v. Hanson* (Jun. 16, 2000), Geauga App. No. 99-G-2228." *Burkitt v. Shepherd*, 4th Dist. No. 05-CA-744, 2006-Ohio-3673, at ¶15.

{¶58} Applying the doctrine to the facts of this case, evidence is lacking on both elements. For the period Marvin Merriner owned the northern portion from 1946 until his death in 1964, there was no evidence presented that he treated the bushes as the dividing line. Likewise, there was no evidence presented that when Charles

Merriner took ownership of the building from his father in 1964 that he treated the bushes as the dividing line until he died in 1998. In fact, following Marvin Merriner's death in 1964 the building's windows were boarded up, the building was not used commercially until 1998. For long periods of time from 1964 to 1977, the building sat vacant and was used only for storage. While appellant Sharon Davis testified that she and her family always maintained the bushes and considered them to be the dividing line, she and the other appellants did not take ownership of the building until 1998, well within the 21 year time period for adverse possession.

{¶59} Accordingly, appellants' fourth assignment of error is without merit.

MOTION TO DISQUALIFY

{¶60} Appellants' fifth assignment of error states:

{¶61} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY DENYING PLAINTIFFS' MOTION TO DISQUALIFY DEFENSE COUNSEL."

{¶62} Shortly after appellants filed suit, they filed a motion to disqualify appellees' defense counsel, Attorney James W. Peters. Appellants alleged that Atty. Peters let appellant Sharon Davis inform him of numerous matters concerning the property line dispute while trying to get him to represent her against appellees. In support of the motion, appellants attached an affidavit from Sharon Davis detailing the conversation she had with Atty. Peters:

{¶63} "1) I called Attorney James W. Peters when I was trying to find a lawyer to handle our adverse possession case against Stephanie Goddard. His secretary answered and I asked to speak with Attorney Peters concerning a legal matter. He came on the phone. I introduced myself and reminded him that I had gone to see him a few years before on another matter. I then began to tell Attorney Peters about the happenings concerning the land behind our building in Sardis. At no time prior to hearing my explanation did he make any attempt to ascertain whether he had a conflict of interest.

{¶64} "2) I started at the beginning when Stephanie Goddard and Gary Thompson had the land surveyed and Thompson came to me and told me part of our

dumpster pad was now on their land. I replied to him, “I find it hard to believe my dad was always wrong about the property line.

{¶65} “3) I told Attorney Peters they tore out the bushes, and later put in a fence. I explained how my son, Joel Davis, tried to stop him from putting up the fence but to no avail. I was at home in Fremont at the time the (sic) called to talk to Thompson. He told me the same thing he told Joel – he would move the fence in from the line so we could keep the dumpster pad and we could put our ladders over his fence if we still did not have enough room to set a ladder behind the building.

{¶66} “4) Attorney Peters was advised that Thompson had been blocking in Marv’s customers when they park in front of Stephanie’s house. I included how I talked to Thompson and Stephanie about this – how it was public parking and anyone could park there. I told him how upset they became with me.

{¶67} “5) I then mentioned how just a few days later Thompson (without notice to me) sawed off about 6 inches of the dumpster pad and left the dumpster in the middle of the sidewalk. When I asked him why he did that he (sic) reply was “you shouldn’t have come over and run your mouth the other day.

{¶68} “6) I asked Attorney Peters if he would consider taking our Adverse Possession case. He said “Thompson…..Thompson? No, I can’t. He called me a month or so ago to see what he could do to stop people from parking in front of his house. That would make it a conflict of interest. My son could not either for we are in the same law firm. I thanked him and hung up.”

{¶69} The trial court subsequently denied the motion “based on representations made by Attorney Peters that he did not previously discuss this matter with either Defendant.” (10/11/2007 J.E.)

{¶70} Appellants’ contention that the trial court erred in denying the motion is two pronged – procedural and substantive. Procedurally, appellants take issue with how the motion was handled contending that the record contains no inquiry of Atty. Peters or the opportunity for appellants to cross-examine him.

{¶71} Substantively, appellants argue that a conflict of interest was created when Atty. Peters let Davis give him information about the dispute. In addition to creating an impermissible appearance of impropriety, appellants maintain that the conversation provided Atty. Peters with key information such as appellants' intention to file a lawsuit over the dispute and how quickly appellees should proceed with the construction they had commenced in improving their side of the lot. Appellants believe Atty. Peter's knowledge of this key information directly influenced the outcome of this case evidenced by the trial court's ruling that equitable estoppel precluded appellants from asserting ownership. In reaching that decision, the court explained, "Plaintiffs claim they were having discussions with legal counselors concerning their situation and they may have [been] doing so, but the Defendants were not made aware of the same." (03/04/2008 J.E., p. 10, ¶51.) Appellants suggest that the court may have reached that conclusion based on Atty. Peter's unsworn, improperly obtained, and uncross-examined "representations * * * that he did not previously discuss this matter with either Defendant." (10/11/2007 J.E.)

{¶72} In response, appellees argue that appellants, as the appealing parties, failed in their duty to provide this court with transcripts relating to any proceedings on the motion to disqualify. Absent transcripts, appellees maintain that this court is left with no other option than to presume the regularity of the proceedings below on that issue.

{¶73} Appellate review of a trial court's decision to disqualify a party's counsel is for an abuse of discretion. *155 N. High v. Cincinnati Ins. Co.* (1995), 72 Ohio St.3d 423, 426, 650 N.E.2d 869. "'Abuse of discretion' means unreasonable, arbitrary, or unconscionable." *State ex rel. Cranford v. Cleveland*, 103 Ohio St.3d 196, 2004-Ohio-4884, 814 N.E.2d 1218, ¶24.

{¶74} "Disqualification of an attorney is a drastic measure which should not be imposed unless it is absolutely necessary." *City of Youngstown v. Joenub, Inc.* (Sept. 28, 2001), 7th Dist. No. 01-CA-01, citing *Spivey v. Bender* (1991), 77 Ohio App.3d 17, 22. Ohio has adopted the three-part test for disqualification of counsel due to a

conflict of interest set forth in *Dana Corp. v. Blue Cross & Blue Shield Mut. Of N. Ohio* (C.A.6, 1990), 900 F.2d 882. See *Morgan v. North Coast Cable Co.* (1992) 63 Ohio St.3d 156, 586 N.E.2d 88; *Hollis v. Hollis* (1997), 124 Ohio App.3d 481, 485; *Kitts v. U.S. Health Corp. of S. Ohio* (1994), 97 Ohio App.3d 271, 275. The test is as follows: 1) a past attorney-client relationship must have existed between the party seeking disqualification and the attorney he or she wishes to disqualify; 2) the subject matter of the past relationship must have been substantially related to the present case; and 3) the attorney must have acquired confidential information from the party seeking disqualification. *Dana* at 889; *Morgan* at 159, n. 1. If a party moving to disqualify an attorney cannot meet the first prong of the *Dana* test, that party lacks standing to seek the disqualification. *Morgan* at syllabus.

{¶75} Appellants' procedural argument fails for three reasons. First, they have not cited any case law for the proposition that a hearing is required on a motion for disqualification of a party's counsel. In fact, it has been held that a trial court is not required to hold a hearing on every motion to disqualify counsel on the basis of a conflict of interest. *Holmer v. Holmer*, 3d Dist. No. 13-07-28, 2008-Ohio-3228, ¶25; *Shawnee Assoc., L.P. v. Shawnee Hills,* 5th Dist. No. 07CAE050022, 2008-Ohio-461, ¶34; *Harsh v. Kwait* (Oct. 5, 2000), 8th Dist. No. 76683; *Luce v. Alcox,* 10th Dist. No. 04AP-1250, 2005-Ohio-3373, ¶6.

{¶76} Second, appellant Sharon Davis' affidavit which appellants attached in support of their motion for disqualification constituted a sufficient evidentiary basis upon which the trial court could make its decision.

{¶77} Third and most importantly, appellants' have failed to provide record support for their contention. When the trial court issued its ruling denying appellees' motion for summary judgment it contemporaneously denied appellants' motion to disqualify counsel. In denying the motion to disqualify, the court noted that it was doing so "based upon representations made by Attorney Peters that he did not previously discuss this matter with either Defendant." (10/11/2007 J.E.) Prior to appellants' filing their motion to disqualify, the trial court had set the summary

judgment matter for non-oral hearing on October 1, 2007. It is unclear from the court's October 11, 2007 ruling if those "representations" were drawn from the contents of appellant Sharon Davis' affidavit or from the non-oral hearing. The only other occasion for those "representations" to have occurred would have been through improper ex parte communications between the trial court and Atty. Peters, which appellants' do not specifically allege.

{¶78} Appellants' substantive argument likewise fails. The first part of the *Dana* test is met in that appellant Sharon Davis and Atty. Peters previously had an attorney-client relationship. However, the second part is not met as Davis' affidavit does not indicate that the subject matter of the past relationship was substantially related to the present case. Nor, was the third part met – that Atty. Peters acquired confidential information concerning the present case. All of what Davis related to Atty. Peters dealt with non-confidential events that gave rise to the present dispute. Upon reviewing the affidavit, Davis never indicates that she told Atty. Peters any information which substantiated her claim for adverse possession. Also, of the information Davis did provide to Atty. Peters, none of it became pivotal or disputed at trial.

{¶79} Accordingly, appellants' fifth assignment of error is without merit.

EQUITABLE ESTOPPEL

{¶80} Appellants' sixth assignment of error states:

{¶81} "BECAUSE THE DEFENSE OF EQUITABLE ESTOPPEL IS INAPPLICABLE TO PLAINTIFFS' LAWSUIT, THE TRIAL COURT SHOULD NOT HAVE FOUND PLAINTIFFS EQUITABLY ESTOPPED FROM HOLDING TITLE."

{¶82} Appellees had the survey completed of the property on March 1, 2007. While the surveyor was placing the last pin, appellee Gary Thompson went next door and told appellant Sharon Davis about the survey and showed her the survey pins. Her only response was that it looked like they were going to have to cut some concrete where their dumpster sat. (Tr. 202.) Thereafter, appellees began improvements to their property. On March 8th, appellees removed the "Rose of

Sharon" bushes. (Tr. 203.) On April 28th, appellees began constructing a fence between their property and the appellants'. (Tr. 204.) On July 7th, the encroaching part of the concrete pad where the dumpster sat was cut and the dumpster moved, and the last part of the fence was installed. (Tr. 205.) Appellees also poured a driveway, built a detached garage, and installed landscaping. (Tr. 207-208.) On August 20th, appellants filed suit to quiet title and for injunctive relief (particularly concerning the construction of the fence).

{¶83} In its decision, the trial court took note of the steps appellees took to construct the fence and make other improvements, and appellants' awareness of the survey pins and the construction. The court also noted the lapse of time between the commencement of construction and appellants' legal response to it:

{¶84} "In all, nearly six months passed: March, April, May, June, July, and August, 2007, and the Plaintiffs did nothing to either notify Defendants of their claim or to stop Defendants.

{¶85} "Plaintiffs claim they were having discussion with legal counselors concerning their situation and they may have [been] doing so, but the Defendants were not made aware of the same.

{¶86} "Equitable estoppel precludes a party from asserting certain facts when the party, by his conduct, has induced another to change his position in good faith reliance upon that conduct. *Helman vs. EPL Prolong, Inc.,* 139 Ohio App.3d 231, 743 N.E. 2d 484 (2000 Seventh District).

{¶87} "In this case, the Plaintiffs are estopped from asserting ownership by adverse possession when the Defendants relying in good faith upon the result of a new survey, made substantial improvements to the property without any objection by the Plaintiffs. Plaintiffs did nothing to stop the construction process which went on for almost six months before filing their Complaint alleging ownership of the premises." (03/04/2008 J.E., p. 7, ¶¶50-53.)

{¶88} Appellants point out that they sued merely for an ownership determination, not damages, thus rendering equitable estoppel inapplicable and

irrelevant to this case. Citing *Sexton v. City of Mason*, 117 Ohio St.3d 275, 2008-Ohio-858, 883 N.E.2d 1013. Appellees argue that equitable estoppel is applicable because appellants sat silent while they continued with the improvements to their side of the property.

{¶89} *Sexton* involved homeowners who sued a neighboring city, developer of an upstream subdivision, and stormwater drainage system subcontractor for flooding problems on their property following the subdivision development. In that case, the Ohio Supreme Court ruled that the trespass was permanent, not continuing, to which the four-year statute of limitations applied to bar the homeowners' claim. The case did not involve and the court had no occasion to address equitable estoppel. Consequently, appellants' reliance on the case is misplaced. They have cited to no cases which support their general proposition that equitable estoppel applies only to cases in which damages are sought.

{¶90} Accordingly, appellants' sixth assignment of error is without merit.

{¶91} Appellants' seventh assignment of error states:

{¶92} "EVEN IF EQUITABLE ESTOPPEL HAD BEEN PERTINENT TO THE LAWSUIT, BECAUSE DEFENDANTS FAILED TO PROVE THAT PARTICULAR DEFENSE, PLAINTIFFS, AS A MATTER OF LAW, ARE NOT EQUITABLY ESTOPPED FROM HOLDING TITLE."

{¶93} Under this assignment of error, appellants argue that, even if applicable, appellees failed to prove equitable estoppel. Appellants point to evidence surrounding the actions appellant Sharon Davis took after being shown the surveyor's pin that constituted constructive notice to appellees sufficient to overcome any equitable estoppel defense. Approximately a couple of weeks after being shown the pin, Davis contacted Attorney Dick Yoss about the disputed strip of land. Although he had represented her before, Atty. Yoss informed her that he could not represent her because he was representing appellees. In addition to revealing the true boundary line between appellants' and appellees' adjacent lots on lot 47, the survey also revealed that appellees' house protruded onto a public alley by

approximately one to two feet. Apparently, appellees retained Atty. Yoss to represent them to resolve that issue. According to Davis, Atty. Yoss nonetheless assured her that he would speak with appellee Stephanie Goddard in an attempt to resolve their boundary dispute without resorting to legal redress. Another two weeks later and upon appellees commencement of construction on the fence, Davis called Atty. Yoss again and he advised her to seek counsel to represent her in the matter. That is when Davis contacted Atty. Peters who also said he could not represent her because he was representing appellee Goddard.

{¶94} In addition to constructive notice to appellees, appellants also argue that the equitable estoppel defense fails because they had no duty of disclosure and did not conceal any fact material to the transaction at hand.

{¶95} Appellants argue that appellees concealed the facts that they were claiming ownership of the disputed strip of land by adverse possession. Appellees contend there was no evidence presented at trial to suggest that they had any notice that appellants would be advancing a claim of adverse possession.

{¶96} When discussing equitable estoppel, the trial court cited *Helman vs. EPL Prolong, Inc.* (2000), 139 Ohio App.3d 231, 743 N.E. 2d 484. Although factually dissimilar to the case at hand, in *Helman* this court set forth the law on equitable estoppel as follows:

{¶97} "'A prima facie case for equitable estoppel requires a plaintiff to prove four elements: (1) that the defendant made a factual misrepresentation; (2) that it is misleading; (3) [that it induced] actual reliance which is reasonable and in good faith; and (4) [that the reliance caused] detriment to the relying party.'" Id. at 246, 743 N.E. 2d 484, quoting *Doe v. Blue Cross/Blue Shield of Ohio* (1992), 79 Ohio App.3d 369, 379, 607 N.E.2d 492.

{¶98} Obviously, in *Helman* equitable estoppel was used offensively. In this case, however, equitable estoppel was employed as a defense to appellants' claim of adverse possession. The party raising the defense of equitable estoppel bears the burden of demonstrating its applicability. *MatchMaker Internatl., Inc. v. Long* (1995),

100 Ohio App.3d 406, 408. In terms of applying equitable estoppel to a defense in this case, though, it is better explained in the related concept of waiver by estoppel.

{¶99} Waiver by estoppel "'exists when the acts and conduct of a party are inconsistent with an intent to claim a right, and have been such as to mislead the other party to his prejudice and thereby estop the party having the right from insisting upon it.'" *National City Bank v. Rini,* 162 Ohio App.3d 662, 2005-Ohio-4041, 834 N.E.2d 836, at ¶24, citing *Mark-It Place Foods, Inc. v. New Plan Excel Realty Trust, Inc.,* 156 Ohio App.3d 65, 2004-Ohio-411, 804 N.E.2d 979, at ¶57. "Waiver by estoppel allows a party's inconsistent conduct, rather than a party's intent, to establish a waiver of rights." Id.

{¶100} The trial court concluded that appellants made no objection or otherwise tried to stop appellees while they undertook substantial improvements to the property relying in "good faith" upon the results of the new survey. While equitable estoppel or waiver by estoppel could conceivably serve as a defense to appellants' claim of adverse possession in this case, it is not a very strong defense. The only evidence to suggest that appellants were not going to pursue an adverse possession claim was appellant Sharon Davis's response to appellee Gary Thompson showing her the surveyor pin, "It looks like we're going to have to cut some concrete." Davis disputed that at trial, testifying that she told Thompson she did not know how her dad could have been wrong all those years. As appellants rightly point out, they certainly had no duty to put appellees on notice that they would be pursuing legal redress by way of an adverse possession claim. Also, it does not seem that appellees relied on anything appellants may or may not have said or done. Rather, emboldened by and relying on the survey, appellees would have likely continued with their plans despite any protestations from appellants. Notably, appellees did not commence construction until after completion of that survey. In addition, appellees never discussed removing the "Rose of Sharon" bushes with appellants and acted unilaterally in their completion of the improvements to their property.

{¶101} But, in the end, regardless of the weakness of equitable estoppel as a defense, the trial court's traverse down that path was unnecessary since it had already determined that appellants' adverse possession failed on its merits. Thus, even if the court's application of the doctrine was in error, it amounted to nothing more than harmless error.

{¶102} Accordingly, appellants' seventh assignment of error is without merit.

{¶103} The judgment of the trial court is hereby affirmed.

Vukovich, P.J., concurs.

DeGenaro, J., concurs in judgment only.