[Cite as *Blue v. Van Ness*, 2009-Ohio-5615.]

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

Dennis R. Blue, et al.	Court of Appeals No. S-09-009
Appellants	Trial Court No. 08-CV-157
v.	
Joan D. Van Ness, et al.	**DECISION AND JUDGMENT**
Appellees	Decided: October 23, 2009

* * * * *

Christopher W. Davis, for appellants.

Erin N. Cain and James J. VanEerten, for appellees.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This accelerated appeal is before the court from the February 11, 2009 judgment of the Sandusky Court of Common Pleas which granted defendants-appellees, Joan and Dennis Van Ness' and Mary and Gary Sirmons', motion for summary judgment

in an adverse possession case. Because we find that no genuine issue of fact remains, we affirm.

{¶ 2} The facts of this case are not in dispute. In 1957, appellants Dennis Blue's and Linda Dray's parents, Regina and Maurice Blue, purchased from Don Potter a half-acre parcel of property located at 1468 Oak Harbor Drive in Sandusky County, Ohio. The Blues constructed a home on the property. In 2006, appellants took title to the property.

{¶ 3} Directly adjacent to the property is a half-acre vacant lot that was owned by Don Potter at the time the Blues purchased their lot. The property has never been improved. Appellees are the heirs (and their spouses) of Potter and jointly own the lot.

{¶ 4} On February 1, 2008, appellants commenced an action to quiet title to the lot by adverse possession. Appellants claimed that since taking ownership in 1957, their parents "continuously and adversely possessed the vacant lot by maintaining the lawn as they did their own property, removing debris, making no distinction as to any boundary between the two parcels and generally considering the vacant lot their own property."

{¶ 5} On October 10, 2008, appellees filed a motion for summary judgment. In their motion, appellees relied upon the cases captioned *Grace v. Koch*, 81 Ohio St.3d 577, 1998-Ohio-607 and *Culbert v. Marconi* (Oct. 28, 1988), 6th Dist. No. S-88-4, in arguing that appellants failed to create an issue of fact that they had exclusively possessed the lot in an open, notorious, continuous, and adverse manner for 21 years. In support of

their motion, appellees relied upon the averments in appellants' complaint and their answers to interrogatories.

{¶ 6} On November 20, 2008, appellants filed their opposition to appellees' motion and a cross-motion for summary judgment. Appellants argued that from 1957 until present, they and their predecessors in interest considered their lot and the vacant lot to be one parcel. Specifically, appellants stated that construction materials were stored on the lot while the home was built, they graded and seeded the lot, they maintained the lawn, stored firewood and automobiles, and allowed their children to play there. Appellants stated that they never asked permission from the owners to use the lot. Appellants contended that the cases relied upon by appellees are distinguishable.

{¶ 7} On February 11, 2009, the trial court, specifically relying on the cases cited by appellees, granted appellees' motion for summary judgment. This appeal followed.

{¶ 8} On appeal, appellants raise the following two assignments of error:

{¶ 9} "Assignment of Error No. 1: The trial court erred in granting defendants' motion for summary judgment and determining as a matter of law that defendants were entitled to a judgment on the facts.

{¶ 10} "Assignment of Error No. 2: The trial court erred in denying plaintiffs' motion for summary judgment on their complaint to quiet title by adverse possession."

{¶ 11} In appellants' first assignment of error, they contend that the trial court erred by granting appellees' motion for summary judgment. We first note that appellate review of a trial court's grant of summary judgment is de novo. *Grafton v. Ohio Edison*

Co., 77 Ohio St.3d 102, 105, 1996-Ohio 336. Accordingly, we review the trial court's grant of summary judgment independently and without deference to the trial court's determination. *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. Summary judgment will be granted only when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66; Civ.R. 56(C). The burden of showing that no genuine issue of material fact exists falls upon the party who moves for summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 294, 1996-Ohio-107. However, once the movant supports the motion with appropriate evidentiary materials, the nonmoving party "may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E).

{¶ 12} Adverse possession is a viable yet disfavored way to acquire title to property. *Grace v. Koch*, 81 Ohio St.3d at 580. Accordingly, in order to prove adverse possession "a party most prove, by clear and convincing evidence, exclusive possession and open, notorious, continuous, and adverse use for a period of twenty-one years." Id. at syllabus. Intent to possess is "objective rather than subjective, 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." *Evanich v. Bridge*, 119 Ohio St.3d 260, 2008-Ohio-3820, syllabus.

{¶ 13} Appellants contend that the trial court's judgment was in error because the cases it relied upon in granting summary judgment to appellees are distinguishable on several key points. The trial court first relied upon *Grace v. Koch*, supra. In *Grace*, for in excess of 21 years, the plaintiff had been using a strip of property as a side yard; the plaintiff requested and received express permission to mow the strip. Id. at 578. Determining that the plaintiff failed to establish adverse possession by clear and convincing evidence, the court noted:

{¶ 14} "There is no question that the Kochs used the strip. They mowed the grass, parked cars in the strip, and their children played in the strip. The Kochs also placed firewood, oil drums, and a swing set in the strip. While we consider the case a close one, we conclude that the record does not contain clear and convincing evidence that Grace or his parents were on notice that their dominions had been invaded in 1971. The Kochs asked for the Graces' permission before proceeding to mow the strip. Mr. Koch conceded that he knew that the strip belonged to Grace and that he never would have used it without permission. Absent clear and convincing evidence of the adversity of the Kochs' claim to the strip for the entire statutory period, adverse possession must fail." Id. at 582.

{¶ 15} Similarly, in *Culbert v. Marconi*, supra, the adjoining landowner maintained a strip of property by mowing the grass, filling in low spots, planting and pruning shrubs, and planting a lilac bush. The adjoining landowner admitted that she did

nothing to interfere with the property owner's rights and that she never asked permission to mow the strip. This court concluded that the adjoining landowner's "overt acts" were insufficient to establish adverse possession.

{¶ 16} We agree with appellants' assertion that in adverse possession claims there can be no "bright line" test; rather, each case must be examined based on the unique nature of the property and the acts of the party asserting the claim. In the present case, we find that the factual differences of *Grace* and *Culbert* are minor and do not diminish their precedential value. In fact, the nature of the property in this case is not just a strip of land between adjoining landowners as in many of the adverse possession cases; instead, it is an entire half-acre parcel. It follows that the level of activity that needed to have occurred would have been greater in order to establish by clear and convincing evidence adverse possession of the property.

{¶ 17} Accordingly, we find that the trial court did not err when it granted appellees' motion for summary judgment. Appellants' first assignment of error is not well-taken.

{¶ 18} In appellants' second assignment of error, they contend that the trial court erred when it failed to grant their motion for summary judgment. An order denying a motion for summary judgment is not final and appealable, *Tribett v. Mestek, Inc.* (Mar. 18, 1999), 7th Dist. No. 99 JE 1. Thus, even if we had found appellants' first assignment of error well-taken, we would be unable to address the second assignment of error.

{¶ 19} On consideration whereof, we find that substantial justice was done the parties complaining and the judgment of the Sandusky Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellants are ordered to pay the costs of this appeal.

JUDGMENT AFFIRMED.

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

Thomas J. Osowik, J. _____
JUDGE

James J. Sweeney, J. _____
CONCUR.
JUDGE

Judge James J. Sweeney, Eighth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.