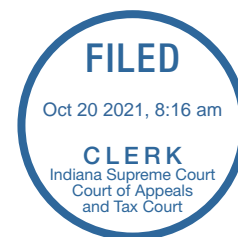


## MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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## IN THE COURT OF APPEALS OF INDIANA

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Daniel S. McCain and Joseph D.  
Derozier,  
*Appellants-Defendants,*

v.

Stephen J. Presley,  
*Appellee-Plaintiff.*

October 20, 2021

Court of Appeals Case No.  
21A-MI-567

Appeal from the Miami Superior  
Court

The Honorable J. David Grund,  
Judge

The Honorable Lisa Swaim,  
Special Judge

The Honorable Richard A.  
Maughmer, Special Judge

Trial Court Cause No.  
52D01-1705-MI-138

**Altice, Judge.**

## Case Summary

[1] This is the second appeal between neighboring landowners regarding “two tiny little strips” of land on Stephen Presley’s property, totaling approximately 120 square feet and commonly referred to in this litigation as the Dog Run and the Flower Bed. *Transcript Vol. 2* at 17. In the first appeal, Presley obtained a reversal of the trial court’s order that, based on adverse possession, quieted title to the Dog Run in Joseph DeRozier and to the Flower Bed in Daniel McCain. *Presley v. McCain*, 134 N.E.3d 464 (Ind. Ct. App. 2019) (*Presley I*). In *Presley I*, another panel of this court determined that title should be quieted in favor of Presley with regard to the land at issue and remanded with instructions to enter judgment in his favor. Following remand, the trial court issued a modified final judgment (the Final Order).

[2] In this appeal, DeRozier and McCain (collectively, the Defendants) present the following consolidated and restated issues for review:

1. In the Final Order, did the trial court exceed this court’s directives on remand in *Presley I*?
2. Did Presley’s failure to bring suit against Teresa McCain (Teresa), who was McCain’s wife at the time, prevent any binding judgment in Presley’s favor concerning the Flower Bed?

[3] We affirm.

## Facts<sup>1</sup> & Procedural History

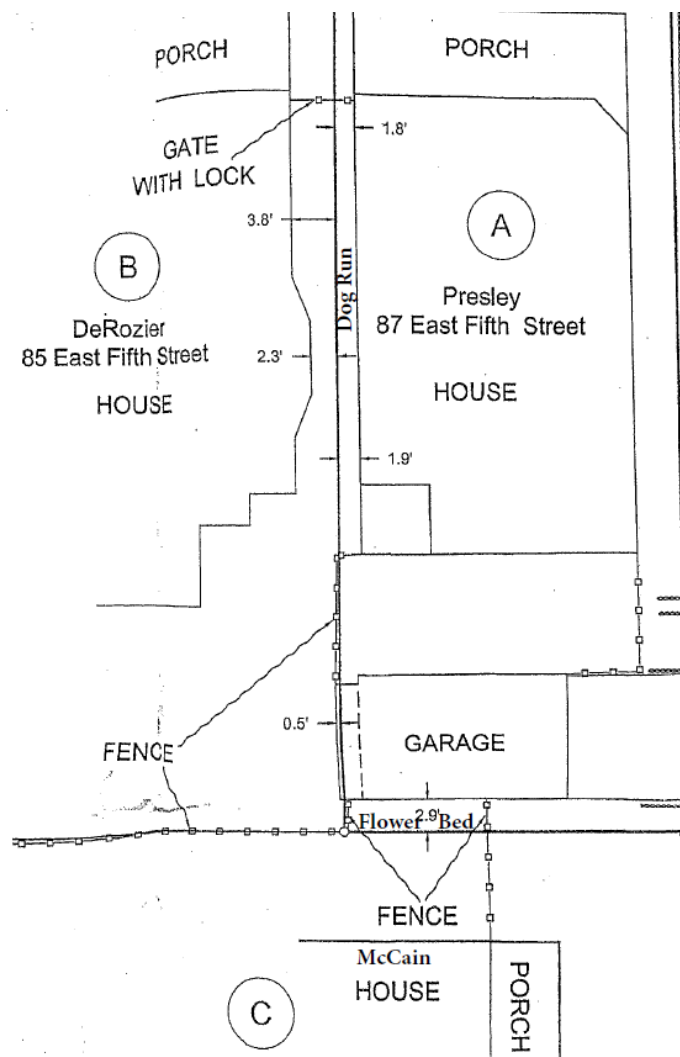
- [4] Presley, McCain, and DeRozier own three adjacent residential properties in Peru, Indiana. DeRozier owns the property at 85 East Fifth Street, which is directly west of Presley's property at 87 East Fifth Street. McCain's property lies directly south of DeRozier's and Presley's properties at 16 North Huntington Street.
- [5] As set forth above, there are two strips of land in dispute. Pursuant to the original plat, Presley legally owns both of these areas. The Dog Run is the eastern part – about two feet wide – of an alleyway that runs north and south directly between the DeRozier and Presley homes. The alleyway itself is less than six feet wide and is enclosed by a gate at the north end of the alleyway/houses. The Dog Run is entirely on Presley's property, abutting the property line to the west and his home to the east. Until DeRozier placed a lock and no trespassing sign on the gate to the alleyway in 2016, Presley exercised unrestricted access to the area that included the Dog Run.
- [6] The Flower Bed is an area just under three feet wide and no more than fifteen feet long, located on Presley's property immediately south of his detached garage and abutting McCain's property line. A fence, which encloses McCain's backyard, runs up to Presley's garage along the east and west ends of the

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<sup>1</sup> We draw from *Presley I* for the bulk of the facts relevant to this appeal, as no new evidence was admitted on remand. While McCain indicates that Teresa is now his ex-wife and owns the property, the facts relevant to the Final Order and this appeal come from the evidentiary hearing held prior to the apparent dissolution of the McCains' marriage.

Flower Bed. On the east end of the Flower Bed the fence juts south about three feet and then continues westward along the property line between the DeRozier and McCain properties. In 2016, McCain built a planter box out of railroad ties around the Flower Bed.

[7] The properties in question are pictured below.



[8] In May 2017, Presley filed a pro se complaint for ejectment and damages against the Defendants, arguing that he owned the Dog Run and the Flower Bed and that the Defendants had wrongfully interfered with his use of this land. Presley eventually retained counsel and, on January 22, 2018, filed an amended complaint to quiet title and for the “ejectment of the Defendants encroaching on said Real Estate entirely.” *Appellee’s Appendix Vol. 2* at 3. Specifically, Presley requested in the amended complaint for the trial court to determine him to be the “true and lawful owner” of the Dog Run and the Flower Bed *and* to “eject the Defendants from Plaintiff’s Real Estate or in the alternative order the Defendants to remove their encroachments on the Real Estate.” *Id.* at 5.

[9] In their answer to the amended complaint, the Defendants claimed ownership to the respective disputed tracts and, in the alternative, asserted several affirmative defenses including adverse possession. They also filed a counterclaim to quiet title to the Dog Run in DeRozier through adverse possession, the Flower Bed in McCain through adverse possession, and an even smaller six-inch strip of property at which Presley’s garage encroached on DeRozier’s land (the Third Tract).

[10] The trial court held a bench trial on October 31, 2018, on the competing claims to quiet title. The trial court issued a final judgment on November 2, 2018, which was later modified after the parties filed motions to correct error. The modified final judgment (the Original Order) provided that DeRozier and McCain had acquired ownership of the Dog Run and the Flower Bed, respectively, through adverse possession, and that Presley had acquired the

Third Tract through adverse possession. The Original Order also provided: “The parties shall retain a licensed surveyor to create a legal description consistent with this order of their respective ownership interests should they desire the same.” *Id.* at 15.

[11] Presley appealed from the Original Order and argued that the trial court erred when it determined that DeRozier and McCain had acquired ownership of the Dog Run and the Flower Bed, respectively, through adverse possession. In response, the Defendants argued that they had presented sufficient evidence to support the trial court’s adverse possession determinations in their favor. Alternatively, they presented two cross-appeal issues.<sup>2</sup> The first related to the denial of one of their motions for summary judgment, and the second was that Presley’s failure to bring suit against McCain’s wife, Teresa, prevented any binding judgment in Presley’s favor concerning the Flower Bed.

[12] In *Presley I*, this court found a “dearth of evidence proving that DeRozier and McCain acquired ownership of [the] Dog Run and the Flower Bed, respectively, through adverse possession.” 134 N.E.3d at 468. Thus, the court held as follows:

[T]he trial court erred when it quieted title to two parcels in DeRozier and McCain. In evaluating all the evidence in a light most favorable to the judgment, we find that title should be

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<sup>2</sup> DeRozier did not challenge the trial court’s ruling regarding the Third Tract.

quieted in favor of Presley, as the rightful and legal owner of the two parcels.

The judgment of the trial court is reversed and remanded with instructions to enter judgment in favor of Presley.

*Id.* at 469. The Defendants filed a petition for rehearing, which was denied on December 12, 2019. As they did not seek transfer, *Presley I* was certified on January 31, 2020.

[13] Over a year later, on February 12, 2021, Presley filed a motion for order in the trial court. The Defendants objected on multiple grounds. Thereafter, on March 1, 2021, the trial court entered the Final Order, which provides in relevant part as follows:

7. Based on the evidence presented and the statutory requirements:

- a. Presley has acquired title to the real estate identified as the [Third Tract], to wit: the area approximately six (6) inches wide wherein the Garage on the Presley Property extends over the property line onto the DeRozier Property;
- b. DeRozier, or anyone claiming through or under him, has not acquired title to the real estate identified as the Dog Run through adverse possession, and title to the Dog Run is quieted in favor of Presley and he is entitled to exclusive possession and ownership; and
- c. McCain, or anyone claiming through or under him, has not acquired title to the real estate identified as the Flower

Bed through adverse possession, and title to the Flower Bed is quieted in favor of Presley and he is entitled to exclusive possession and ownership.

8. Presley may retain a licensed surveyor to create new legal descriptions of the Presley Property and DeRozier Property to reflect Presley acquiring title to the [Third Tract] consistent with this Judgment, and the same may be recorded in the Office of the Recorder of Miami County, Indiana.

9. Presley is entitled to eject DeRozier, including the removal of any structures or improvements, from the Dog Run.

10. Presley is entitled to eject McCain, including the removal of any structures or improvements, from the Flower Bed.

*Appellants' Appendix Vol. II* at 17. The Defendants now appeal. Additional information will be presented below as needed.

## **Discussion & Decision**

### ***1. Did the Final Order exceed this court's directives on remand?***

[14] The Defendants argue that the trial court was simply directed by this court to quiet title to the Dog Run and the Flower Bed in Presley and that the trial court erred in granting additional relief on remand. Specifically, the Defendants challenge the provision of the Final Order allowing Presley to retain a licensed surveyor to create a new legal description of his and DeRozier's properties to reflect Presley's acquisition of the Third Tract. The Defendants also claim that the trial court could not permit Presley to eject them (that is, remove any



structures or improvements) from the Dog Run and the Flower Bed. We will address these in turn.

[15] With respect to the new survey, the Defendants complain, “The trial court erred in delegating the ultimate issue of the property description to some unknown surveyor based on some new unknown future survey conducted at some future unknown time.” *Appellants’ Brief* at 12. What the Defendants ignore, however, is that an analogous provision was included in the Original Order. That is, with respect to the Third Tract, the only land still changing hands, the Original Order allowed Presley to “retain a licensed surveyor to create a legal description consistent with [the] order” reflecting his newly adjudicated ownership interest. *Appellee’s Appendix* at 15. The Defendants did not appeal that portion of the Original Order and, thus, cannot now be heard to complain.

[16] Turning to ejectment, we observe that Presley consistently made clear below that he wanted to quiet the title to the Dog Run and the Flower Bed and eject the Defendants therefrom. *See, e.g., Transcript Vol. 2* at 16 (Presley’s counsel indicating in his opening statement that in addition to quieting title against the Defendants’ claims of adverse possession, Presley “would ask that they be ejected from that property”), 132 (Presley’s counsel’s closing statement: “we simply want to eject them from the property.”), 140 (Defendants’ counsel’s closing statement: “Presley is seeking to eject my clients from land that Presley has never had possession of and has been fenced by my clients and their predecessors of interest and claimed for over three decades.”). Indeed, in the prior appeal, the Defendants indicated that Presley sought through his lawsuit

to “eject his neighbors from two narrow strips of land” which have been “fenced by his neighbors’ backyard fences for decades.” *Appellees’ Brief* (the Defendants’ brief from the first appeal) at 12 (summary of argument) and 28 (conclusion). The parties, the trial court, and this court have always been on notice that Presley sought to eject the Defendants from encroaching on his land. Thus, we cannot agree with the Defendants that our instructions on remand to “enter judgment in favor of Presley” did not include granting the relief plainly sought by him throughout.

[17] As an alternative argument, the Defendant make the curious assertion that, adverse possession aside, the fences on Presley’s property may not be removed because “the property code’s statute of limitations governing improvements to land” has passed. *Appellants’ Brief* at 16. They rather baldly claim that this case is governed by a ten-year statute of limitations contained in Ind. Code § 32-30-1-5, which provides:

(a) As used in this section, “designer” means a person who:

(1) designs, plans, supervises, or observes the construction of an improvement to real property; or

(2) constructs an improvement to real property.

(b) As used in this section, “possessor” means a person having ownership, possession, or control of real property at the time an alleged deficiency in an improvement to the real property causes injury or wrongful death.

(c) As used in this section, “deficiency” does not mean a failure by a possessor to use reasonable care to maintain an

improvement to real property following a substantial completion of an improvement.

(d) *An action to recover damages*, whether based upon contract, tort, nuisance, or another legal remedy, for:

(1) a deficiency or an alleged deficiency in the design, planning, supervision, construction, or observation of construction of an improvement to real property;

(2) an injury to real or personal property arising out of a deficiency; or

(3) an injury or wrongful death of a person arising out of a deficiency;

may not be brought against a designer or possessor unless the action is commenced within the earlier of ten (10) years after the date of substantial completion of the improvement....

(Emphasis supplied). As we have explained, this “statute of repose was created to protect engineers, architects, contractors, and others involved in the design and construction of improvements to real property from stale claims and to eliminate open-ended liability for defects in workmanship.” *Perdue v. Greater Lafayette Health Servs., Inc.*, 951 N.E.2d 235, 239-40 (Ind. Ct. App. 2011), *trans. denied*; *see also Gill v. Evansville Sheet Metal Works, Inc.*, 970 N.E.2d 633, 638 (Ind. 2012) (setting out the four criteria under the statute, with the second being that “the claimant must be seeking damages for a deficiency in the design, planning, supervision, construction, or observation of construction of such improvement or an injury arising therefrom”).

[18] The Defendants are neither designers nor possessors, as defined in the statute, and Presley's action against them was not an action to recover damages at all, let alone for the reasons outlined in subsection (d). The statute, therefore, is wholly inapplicable here.

***2. Did Presley's failure to bring suit against Teresa prevent any binding judgment concerning the Flower Bed?***

[19] The Defendants presented the very same issue in *Presley I* on cross-appeal, as an alternative to their adverse possession claim, and reiterated the issue in its petition for rehearing, which was denied. Although this court did not directly address the issue in *Presley I*, the court necessarily rejected it when reversing and remanding with instructions to enter judgment in favor of Presley. The Defendants did not seek transfer, and they are bound by *Presley I*. Moreover, to the extent that McCain claims that he no longer has an interest in the property and the current owner, Teresa, is not a party to the action, we fail to see how he can assert arguments at this juncture on her behalf.

[20] In sum, the Defendants' respective claims of adverse possession have been defeated, exclusive possession and ownership by Presley of the Dog Run and the Flower Bed has been judicially recognized, and Presley has the right to remove structures and improvements from these strips of land for the full enjoyment of his property if he so wishes. Further, Presley is permitted to retain a licensed surveyor to create new legal descriptions, consistent with the Final Order, of his and DeRozier's properties to reflect Presley's ownership of the Third Tract.

[21] Judgment affirmed.

Bradford, C.J. and Robb, J., concur.