[Cite as *Blankenship v. Vance*, 2010-Ohio-4209.]

COURT OF APPEALS
KNOX COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
DONALD BLANKENSHIP, ET AL	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J.
Plaintiffs-Appellants	:	Hon. Sheila G. Farmer, J.
	:	
-vs-	:	
	:	Case No. 2010-CA-000009
BELYNDA (BUNNY) VANCE, ET AL	:	
	:	
Defendants-Appellees	:	O P I N I O N

CHARACTER OF PROCEEDING:	Civil appeal from the Knox County Court of Common Pleas, Case No. 09OT12-0767
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	September 3, 2010

APPEARANCES:

For Plaintiffs-Appellants

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For Defendant-Appellee

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Gwin, P.J.

{¶1} Plaintiffs Donald and Alyce Corena Blankenship appeal a judgment of the Court of Common Pleas of Knox County, Ohio, entered in favor of defendants-appellees Belynda and Sam Vance and the Ohio Heritage Bank of Mount Vernon. Appellants assign two errors to the trial court:

{¶2} "I. THE TRIAL DID ERR BY FINDING IN FAVOR OF THE DEFENDANTS-APPELLEES AT THE TRIAL IN THIS ABOVE MATTER.

{¶3} "THE TRIAL COURT DID ERR BY NOT SUSTAINING THE OBJECTION TO THE INTRODUCTION OF MEMORANDUM WHICH WAS CONTRARY TO EVIDENTIARY RULE 408."

{¶4} The record indicates Robert Corcoran and his wife purchased the property known as 518 Coshocton Avenue in Mount Vernon, Knox County, Ohio, on November 18, 1988. They acquired it as an investment property and never lived there. At the time Corcoran purchased the property, there was a privacy fence between 518 Coshocton Avenue and 520 Coshocton Avenue. Corcoran believed the neighbors had erected the fence, and also believed the fence was on the property line. Corcoran sold the property to appellees approximately two years later. When Corcoran sold the property to appellees, the fence was in the state it had been when he first purchased the property.

{¶5} The parties introduced a building permit issued August 3, 1982, for constructing a wooden privacy fence between the two properties.

{¶6} Appellants acquired their property at 520 Coshocton Avenue in 1989.

{¶7} On or about August 27, 2009, appellees demolished the privacy fence. The trial court conducted a bench trial, and directed a verdict on behalf of the appellees,

finding appellants had not proven 21 years of continuous possession of the disputed property.

I.

{¶8} In their first assignment of error, appellants argue the trial court erred in finding in favor of appellees. We disagree.

{¶9} In Ohio, a party seeking to acquire title by adverse possession must show exclusive possession that is open, notorious, continuous, and adverse for 21 years. *Evanich v. Bridge,* 119 Ohio St. 3d 260, 2008-Ohio-3820, 893 N.E. 2d 481, at paragraph 7, citations deleted. The evidentiary standard is clear and convincing evidence. Id. at paragraph 13. Clear and convincing evidence is more than the mere preponderance of the evidence, and must produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established. *Cross v. Ledford* (1954), 161 Ohio St. 469, 120 N.E. 2d 118, syllabus, paragraph 3, by the court.

{¶10} Our standard of reviewing a claim a trial court's decision is against the manifest weight of the evidence is to determine whether the decision is supported by some competent and credible evidence. *C.E. Morris Company v. Foley Construction Company* (1978), 54 Ohio St. 2d 279. In applying the standard of review, we must defer to the findings of the trial court, because the trial court is best able to view the witnesses and observe their demeanor, gestures, and voice inflections, and to use its observation to weigh the credibility of the proffered testimony. *Seasons Coal Company v. City of Cleveland* (1984), 10 Ohio St. 3d 77, 461 N.E. 2d 1273.

{¶11} The trial court found appellants could only prove 20 years of continuous adverse, open, and notorious possession. Appellants argue Corcoran's testimony

shows the fence was in place in 1988, and the building permit demonstrates the fence was erected in 1982. Appellants conceded they never had the property surveyed and did not know exactly where the property line actually ran.

{¶12} In *Nixon v. Parker*, Licking App. No. 04 CA 84, 2005-Ohio-2375, this court reviewed a claim of adverse possession over a narrow strip of land between the surveyed boundary of land and a chain link fence. In 2002 defendants acquired the property and hired a surveyor, who determined the fence was several feet over the actual property line and completely on defendant's property. The plaintiff owned the property on the other side of the fence. At trial, a neighbor testified that the prior owner of plaintiff's land had erected the fence in 1979 or 1980. None of the neighbors recalled anyone but plaintiff or her predecessor in interest using the strip of land. Defendant called the prior owner of her property, who testified he never wondered where the property line was, although he believed there was a law against putting a fence right on the line. He testified he and plaintiff never had any problems over the ownership of the lots. This court found adverse possession may lie in a case of mutual mistake of boundary, and does not require knowledge or wrongful intent. *Nixon* at paragraph 20, citations deleted. However, where the parties are unaware of the precise property line, but mutually tacitly agree to some other boundary, it is difficult to find possession which is hostile and adverse. Id at paragraph 21, citations deleted.

{¶13} In order to establish the necessary 21 year period, a party may add his own term of adverse use to any period of adverse use by a prior succeeding owner in privity with the current owner. *Wetzler v. Eagleson's, Inc.,* Guernsey App. No. 01CA14, 2002-Ohio-1838 at page 2, citing *Zipf v. Dalgarn* (1926), 114 Ohio St. 291, 151 N.E.

174. The chain of adverse use by succeeding owners is known as tacking, and the chain may not be broken. Id.

{¶14} Appellees argued to the trial court appellants had failed to put on any evidence about tacking, and we agree. Corcoran's evidence dealt with appellee's property, and there was no evidence regarding whether the prior owner of appellants' property acted in a manner consistent with adverse possession, or, to the contrary, had express or tacit approval to erect the fence. Appellants testified they planted a tree and bushes, and placed a concrete bench on the disputed strip of property after they acquired the property, but presented no evidence of anything the prior owner may have done which could have been tacked to appellants' use.

{¶15} The first assignment of error is overruled.

II.

{¶16} In their second assignment of error, appellants argue the trial court should not have admitted Exhibit "B", a letter appellants sent to appellees regarding settlement negotiations. Appellants argue negotiation letters are inadmissible under Evid. R. 408 to prove liability for the claim. *Cannell v. Rhodes* (1986), 31 Ohio App. 3d 183, 509 N.E. 2d 963.

{¶17} A trial court is presumed to know and follow the law unless the record demonstrates otherwise. In a bench trial, we presume a trial court relies only on relevant material and competent evidence in arriving at its judgment. *Hothem v. Hothem,* Coshocton App. No. 09-CA-20, 2010-Ohio-2400, at paragraph 10, citations deleted.

{¶18} Civ. R. 61 states: "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

{¶19} Appellees assert any error arising from admission of the letter was irrelevant to the determinative issue in the case. We agree.

{¶20} The second assignment of error is overruled.

{¶21} For the foregoing reasons, the judgment of the Court of Common Pleas of Knox County, Ohio, is affirmed.

By Gwin, P.J.,

Hoffman, J., and

Farmer, J., concur

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HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN

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HON. SHEILA G. FARMER

WSG:clw 0817

[Cite as *Blankenship v. Vance*, 2010-Ohio-4209.]

IN THE COURT OF APPEALS FOR KNOX COUNTY, OHIO

FIFTH APPELLATE DISTRICT

DONALD BLANKENSHIP, ET AL	:	
Plaintiffs-Appellants	:	
-vs-	:	JUDGMENT ENTRY
BELYNDA (BUNNY) VANCE, ET AL	:	
Defendants-Appellees	:	CASE NO. 2010-CA-000009

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

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HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN

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HON. SHEILA G. FARMER