**[Cite as *Briggs v. Turner*, 2010-Ohio-5695.]**

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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| SANDRA BRIGGS | : | JUDGES: |
| | : | Hon. W. Scott Gwin, P.J. |
| Plaintiff-Appellee | : | Hon. Sheila G. Farmer, J. |
| | : | Hon. Patricia A. Delaney, J. |
| -vs- | : | |
| | : | |
| DENVER TURNER | : | Case No. 10AP030010 |
| | : | |
| Defendant-Appellant | : | O P I N I O N |

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| CHARACTER OF PROCEEDING: | Appeal from the Tuscarawas County Court of Common Pleas, Case No. 2008CV040326 |
| JUDGMENT: | AFFIRMED |
| DATE OF JUDGMENT ENTRY: | November 18, 2010 |

APPEARANCES:

| For Plaintiff-Appellee | For Defendant-Appellant |
|---|---|
| PAUL HERVEY<br>P. O. Box 1014<br>New Philadelphia, OH 44663 | JOSEPH I. TRIPODI<br>114 East High Avenue<br>New Philadelphia, OH 44663 |

*Delaney, J.*

{¶1} Defendant-Appellant Denver Turner appeals the October 9, 2009 and February 19, 2010 judgment entries of the Tuscarawas County Court of Common Pleas.

**STATEMENT OF THE FACTS AND CASE**

{¶1} In 1983, Plaintiff-Appellee, Sandra Briggs purchased residential property located at 657 Maple Ave, N.W., Strasburg, Ohio. At the time Appellee purchased her property, the neighboring property located at 670 Wooster Avenue N. was owned by Ethel E. Bixler. No survey of the property was completed when Appellee purchased her residence.

{¶2} The north line of Appellee's property abuts 670 Wooster Avenue N. Appellee's home is located on a steep hill. The boundary line between Appellee's property and that of 670 Wooster Avenue N. is elevated approximately 20 feet up a cliff from the house and backyard. Because of the terrain of the property, Appellee never spoke with her neighbors, the Bixlers.

{¶3} When Appellee purchased the property, it had a driveway leading to the garage made of limestone gravel and bordered by railroad ties. During the course of her ownership of the property, Appellee installed a basketball hoop near the driveway and she had the gravel portion of the driveway asphalted. In 2005, Appellee rebuilt the garage, reoriented the driveway, and added cement to the driveway. Appellee maintained the area surrounding the driveway and garage by mowing the grass, planting flowers, and removing weeds. Appellee believed the property where the driveway was located was hers and used the driveway continually from the time of

purchase. The Bixlers never told Appellee that she did not own that portion of the property.

{¶4} On August 30, 2007, Appellant purchased 670 Wooster Avenue N. through an estate auction. After closing on the property, a survey conducted by Diversified Engineering showed that Appellee's asphalt and concrete driveway and basketball hoop encroached on Appellant's property.

{¶5} Appellant, through his attorney, notified Appellee of the encroachment. It was then that Appellee first became aware of her property boundaries.

{¶6} On April 22, 2008, Appellee filed a Complaint for Injunction, Declaratory Relief, and a Quiet Title action in the Tuscarawas County Court of Common Pleas. Within her Complaint, Appellant argued adverse possession or prescriptive easement over a twelve foot by one hundred and sixty foot strip of property that included the driveway and basketball hoop.

{¶7} Appellant filed an Answer to the Complaint and brought Counterclaims for ejectment, request for declaratory judgment, injunctive relief, and trespass.

{¶8} Prior to trial, both parties filed motions for summary judgment. The trial court denied both motions on July 13, 2009, and set the matter for a jury trial.

{¶9} On October 8 and 9, 2009, the case was tried before a jury. Appellant made a motion for directed verdict and renewed his motion for summary judgment at the close of all the evidence. The trial court denied his motions. Appellee dismissed her claim for prescriptive easement.

{¶10} On October 9, 2009, the jury returned a verdict in favor of Appellee that stated she proved by clear and convincing evidence that Appellee owned by adverse

possession twelve feet by one hundred and ten feet of property along the common boundary line between the parties. The jury completed Interrogatories No. 1 and No. 2, consistent with determinations of the jury. The trial court journalized the verdict on October 9, 2009.

{¶11} The parties filed post-verdict motions. Relevant to this appeal, Appellant renewed his motion for summary judgment; renewed his motion for directed verdict under Civ.R. 50(A); requested a judgment notwithstanding the verdict pursuant to Civ.R. 50(B); and moved for a new trial under Civ.R. 59(A)(1), (2), (5), (6), and (7). On February 19, 2010, the trial court denied all of Appellant's requests.

{¶12} On February 26, 2010, the trial court entered judgment that the portion of property in question was quieted against Appellant pursuant to the October 9, 2009 verdict.

{¶13} It is from these decisions Appellant now appeals.

**ASSIGNMENTS OF ERROR**

{¶14} Appellant raises six Assignments of Error:

{¶15} "I. THE TRIAL COURT COMMITTED ERROR WHEN IT DENIED APPELLANT'S RENEWED MOTION FOR SUMMARY JUDGMENT, BECAUSE, ACCORDING TO THE TRIAL COURT, THE MOTION FOR SUMMARY JUDGMENT WAS A MOTION FOR RECONSIDERATION, AND THEREFORE UNTIMELY, AS A FINAL JUDGMENT HAD BEEN RENDERED.

{¶16} "II. THE TRIAL COURT COMMITTED ERROR WHEN IT DENIED APPELLANT'S MOTION FOR DIRECTED VERDICT BECAUSE, ACCORDING TO

THE TRIAL COURT, THIS MOTION FOR DIRECTED VERDICT IS REALLY A MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

{¶17} "III. THE TRIAL COURT COMMITTED ERROR WHEN IT DENIED APPELLANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, BECAUSE, ACCORDING TO THE TRIAL COURT, REASONABLE MINDS COULD REACH DIFFERENT CONCLUSIONS ON THE DETERMINATIVE ISSUES PRESENTED BY PLAINTIFF'S CLAIM FOR ADVERSE POSSESSION.

{¶18} "IV. THE TRIAL COURT COMMITTED ERROR WHEN IT DENIED APPELLANT'S CIVIL RULE 59(A)(1), (2), (5), (6) & (7) [SIC].

{¶19} "V. THE TRIAL COURT COMMITTED ERROR WHEN IT RENDERED A JUDGMENT IN FAVOR OF THE PLAINTIFF ON THE CLAIM FOR OWNERSHIP BY ADVERSE POSSESSION OF A STRIP OF LAND 12-FEET DEEP BY 110-FEET.

{¶20} "VI. THE TRIAL COURT COMMITTED ERROR WHEN IT ORDERED, ADJUDGED, AND DECREED THAT THE TITLE AND POSSESSION OF 0.0303 ACRE TRACT OF LAND IS QUIETED AGAINST THE APPELLANT."

**I.**

{¶21} Appellant argues in his first Assignment of Error that the trial court erred in denying his renewed motion for summary judgment. We disagree.

{¶22} As stated above, Appellant renewed his motion for summary judgment at the close of his case, which was denied. On October 21, 2009, he also filed a renewed motion for summary judgment as part of his post-verdict motions. In trying to resolve Appellant's purpose in renewing his motion for summary judgment motion after a jury verdict had been rendered in favor of Appellee, the trial court stylized Appellant's

renewal as a motion for reconsideration of the trial court's denial of Appellant's original motion for summary judgment. The trial court denied the motion on February 19, 2010 because a final judgment had been rendered.

{¶23} Appellant argues it was error for the trial court to consider the renewed motion for summary judgment to be a motion for reconsideration because it is well settled that the Ohio Rules of Civil Procedure do not allow for motions for reconsideration after a final judgment. *Pitts v. Ohio Dept. of Transportation* (1981), 67 Ohio St.2d 378, 423 N.E.2d 1105, paragraph one of the syllabus. He states that he was asking the trial court to reconsider the motion for summary judgment at the close of his case but before the jury rendered its verdict; therefore, there was no final judgment.

{¶24} Upon consideration Appellant's presentation of his renewed motion for summary judgment as part of Appellant's post-verdict motions, we can find no error in the trial court's determination of the matter. There can be no reconsideration of a matter after a final judgment. The proper forum for Appellant's argument, as noted by the trial court during the November 2, 2009 motion hearing, was before this Court on appeal. Upon review of Appellant's arguments on appeal, we note however, that Appellant has not raised as an Assignment of Error the trial court's denial of its summary judgment motion on July 13, 2009.

{¶25} Appellant's first Assignment of Error is overruled.

**II.**

{¶26} Appellant contends in his second Assignment of Error that the trial court erred in considering Appellant's renewed motion for directed verdict raised in

Appellant's post-verdict motion as a motion for judgment notwithstanding the verdict. We disagree.

{¶27} In "Branch Two" of Appellant's post-verdict motion filed on October 21, 2009, Appellant renewed his motion for directed verdict originally made at trial at the close of all the evidence. The trial court denied Appellant's renewed motion for directed verdict because it found that a motion for directed verdict cannot be made after a verdict has been rendered. It considered Appellant's arguments for directed verdict raised in his post-verdict motion as pertaining to his motion for judgment notwithstanding the verdict. As stated more fully below, the trial court applies the same test when ruling on a motion for judgment notwithstanding the verdict as in reviewing a motion for directed verdict.

{¶28} Civ.R. 50 states: "When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue."

{¶29} Civ.R. 50(A)(1) provides that a motion for a directed verdict may be made on the opening statement of the opponent, at the close of the opponent's evidence, or at the close of all the evidence. Such motion made at any other stage of the proceedings is not a "properly made" motion as required by Civ.R. 50(A)(4), and therefore may neither be entertained nor granted by the trial court. *Stephens v. Vick Express, Inc*.,

Butler App. Nos. CA2002-03-066, CA2002-03-074, 2003-Ohio-1611, ¶12 citing *Sherwin v. Cabana Club Apartments* (1980), 70 Ohio App.2d 11, 15, 433 N.E.2d 932.

{¶30} As in Appellant's first Assignment of Error, the proper avenue for raising the trial court's denial of properly raised Civ.R. 50 motion for directed verdict is on appeal. This Court has reviewed Appellant's second Assignment of Error and the arguments supporting his Assignment of Error and finds that Appellant does not argue the trial court erred in denying Appellant's motion for directed verdict *at trial*. Appellant argues only that the trial court erred in denying Appellant's post-verdict motion for directed verdict.

{¶31} As such, we find the trial court did not err and we overrule Appellant's second Assignment of Error.

**III.**

{¶32} Appellant argues in his third Assignment of Error that the trial court erred in denying Appellant's motion for judgment notwithstanding the verdict. We disagree.

{¶33} Civ. R. 50(B) governs motions for judgment notwithstanding the verdict. It provides:

{¶34} "Whether or not a motion to direct a verdict has been made or overruled and not later than fourteen days after entry of judgment, a party may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion; or if a verdict was not returned such party, within fourteen days after the jury has been discharged, may move for judgment in accordance with his motion. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned, the court may allow the judgment

to stand or may reopen the judgment. If the judgment is reopened, the court shall either order a new trial or direct the entry of judgment, but no judgment shall be rendered by the court on the ground that the verdict is against the weight of the evidence. If no verdict was returned the court may direct the entry of judgment or may order a new trial."

{¶35} When ruling on a motion for judgment notwithstanding the verdict, a trial court applies the same test as in reviewing a motion for a directed verdict. *Ronske v. Heil Co.,* Stark App. No. 2006-CA-00168, See also, *Pariseau v. Wedge Products, Inc.* (1988), 36 Ohio St.3d 124, 127, 522 N.E.2d 511. "A motion for judgment notwithstanding the verdict is used to determine only one issue i.e., whether the evidence is totally insufficient to support the verdict." *Krauss v. Streamo,* Stark App. No.2001 CA00341, 2002-Ohio-4715, paragraph 14; see also, *McLeod v. Mt. Sinai Medical Center* (2006), 166 Ohio App.3d 647, 853 N.E.2d 1235, reversed on other grounds, 116 Ohio St.3d 139, 876 N.E.2d 1201. Neither the weight of the evidence nor the credibility of the witnesses is a proper consideration for the court. *Posin v. A.B.C. Motor Court Hotel, Inc.* (1976), 45 Ohio St.2d 271, 275, 344 N.E.2d 334. See, also, Civ.R. 50(B); and *Osler v. Lorain* (1986), 28 Ohio St.3d 345, 347, 504 N.E.2d 19. In other words, if there is evidence to support the nonmoving party's side so that reasonable minds could reach different conclusions, the court may not usurp the jury's function and the motion must be denied. *Osler,* supra.

{¶36} Appellate review of a ruling on a motion for judgment notwithstanding the verdict is de novo. *Midwest Energy Consultants, L.L.C. v. Utility Pipeline, Ltd.,* 5th Dist. App. No. 2006CA00048, 2006-Ohio-6232; *Ronske v. Heil,* supra.

{¶37} Appellant argues that the evidence in this case was insufficient to establish adverse possession because Appellee failed to establish by clear and convincing evidence that she met all the necessary elements of adverse possession. In *Franklin v. Massillon Homes II, LLC*, 184 Ohio App.3d 455, 2009-Ohio-5487, 921 N.E.2d 314, this Court had the opportunity to review the elements of adverse possession. "In order to succeed on a claim of acquiring title by adverse possession, the claimant 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 ¶ 7, citing *Grace v. Koch* (1998), 81 Ohio St.3d 577, 579, 692 N.E.2d 1009, citing *Pennsylvania RR. Co. v. Donovan* (1924), 111 Ohio St. 341, 349-350, 145 N.E. 479. '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.' *Evanich* at ¶ 8, quoting *Humphries* at 404. '[T]he intent to occupy and treat property as one's own is all that is required.' Id. at ¶ 12." Id. at ¶24.

{¶38} Appellant argues that Appellee failed to establish by clear and convincing evidence that she possessed the property in question for 21 years. He states that evidence showed that Appellee installed the asphalt and cement driveway less than 21 years ago.

{¶39} While we agree with Appellant that the evidence shows that Appellee installed the asphalt and cement less than 21 years ago, Appellee testified that she installed the asphalt and cement over the limestone gravel driveway that had been in

existence since Appellee purchased the property in 1983 and Appellee had possessed and used the driveway since her purchase. The limestone gravel driveway encroached on Appellant's property.

{¶40} As to the size of the driveway, Appellee testified that the asphalt and cement paving were approximately the same size as the gravel driveway. Appellee requested adverse possession for a twelve foot by one hundred and sixty foot strip of land. The jury determined that Appellee demonstrated adverse possession over a twelve foot by one hundred and ten foot strip of land. We find that there was evidence to support Appellee's claim, so that reasonable minds could reach different conclusions.

{¶41} Appellant's third Assignment of Error is overruled.

**IV.**

{¶42} Appellant contends in his fourth Assignment of Error that the trial court abused its discretion when it denied his motion for new trial brought pursuant to Civ.R. 59(A)(1), (2), (5), (6), and (7).

{¶43} Civ.R. 59 states in pertinent part:

{¶44} "(A) A new trial may be granted to all or any of the parties and on all or part of the issues upon any of the following grounds:

{¶45} "(1) Irregularity in the proceedings of the court, jury, magistrate, or prevailing party, or any order of the court or magistrate, or abuse of discretion, by which an aggrieved party was prevented from having a fair trial;

{¶46} "(2) Misconduct of the jury or prevailing party;

{¶47} "* * *;

{¶48} "(5) Error in the amount of recovery, whether too large or too small, when the action is upon a contract or for the injury or detention of property;

{¶49} "(6) The judgment is not sustained by the weight of the evidence; however, only one new trial may be granted on the weight of the evidence in the same case;

{¶50} "(7) The judgment is contrary to law;

{¶51} "* * *.

{¶52} "In addition to the above grounds, a new trial may also be granted in the sound discretion of the court for good cause shown. * * * "

{¶53} In reviewing a trial court's decision regarding a motion for new trial, we use the abuse of discretion standard. *Sharp v. Norfolk & Western Railway Company,* 72 Ohio St.3d 307, 1995-Ohio-224, 649 N.E.2d 1219. This court may not disturb a trial court's decision unless we find the decision was unreasonable, unconscionable, or arbitrary. Id*.,* citing *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶54} Appellant reiterates his argument that Appellee failed to show by clear and convincing evidence that Appellee had met the 21-year element of adverse possession. Appellant goes further to argue that the jury committed misconduct and prevented Appellant from having a fair trial because the jury disregarded the jury instructions as to the clear and convincing evidence standard of proof requirement for the 21-year element of adverse possession.

{¶55} Upon review of the record, we find no irregularities in the court proceedings or misconduct on the part of the jury as alleged by Appellant. "A

presumption always exists that the jury has followed the instructions given to it by the trial court." *Pang v. Minch* (1990), 53 Ohio St.3d 186, 187, 559 N.E.2d 1313, paragraph four of the syllabus. The jury instructions in the present case stated, "[t]o establish this claim of ownership by adverse possession the plaintiff must prove by clear and convincing evidence that the plaintiff has been in actual, open, notorious, continuous, hostile, and exclusive possession of the land for at least 21 years." In Interrogatory No. 1, the jury was asked whether they found Appellee had proved by clear and convincing evidence all the essential elements of adverse possession.

{¶56} We further find that the judgment was not against the weight of the evidence or contrary to law. A trial court's judgment is not against the manifest weight of the evidence when it is supported by competent, credible evidence. *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. Since the trier of fact is best able to view the witnesses and observe their demeanor when weighing the credibility of the offered testimony, there is a presumption that the findings of the trier of fact are correct. Id.

{¶57} We find there was competent, credible evidence to support the verdict of the jury that Appellee had demonstrated by clear and convincing evidence that she adversely possessed the property in question for at least 21 years. As stated above, when Appellee purchased the property in 1983, there was a limestone gravel driveway on the property which was utilized as such by Appelee. Appellee subsequently paved the limestone gravel driveway with asphalt and cement. Appellee estimated that the paved driveway was approximately the same size as the gravel driveway. The jury in

this case chose to believe Appellee that she had adversely possessed a twelve foot by a one hundred and ten foot piece of land for at least 21 years.

{¶58} Appellant's fourth Assignment of Error is overruled.

**V.**

{¶59} Appellant's fifth Assignment of Error reiterates Appellant's arguments in his third and fourth Assignments of Error. We overrule Appellant's fifth Assignment of Error based upon our rulings on the third and fourth Assignments of Error.

**VI.**

{¶60} On February 26, 2010, the trial court filed a judgment entry enforcing the jury verdict and quieting title of the tract of land in question against Appellant. Appellant states that this judgment entry was in error based upon his earlier Assignments of Error.

{¶61} Based on our above determinations of the status of the evidence, the jury verdict, and the trial court's post-verdict motions, we find Appellant's sixth Assignment of Error to be without merit and we overrule the same.

{¶62} The judgment of the Tuscarawas County Court of Common Pleas is affirmed.

By Delaney, J.

Gwin, P.J. and

Farmer, J. concur.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. SHEILA G. FARMER

IN THE COURT OF APPEALS FOR TUSCARAWAS COUNTY, OHIO

FIFTH APPELLATE DISTRICT

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| SANDRA BRIGGS | : | |
| | : | |
| Plaintiff-Appellee | : | |
| | : | |
| -vs- | : | JUDGMENT ENTRY |
| | : | |
| DENVER TURNER | : | |
| | : | |
| Defendant-Appellant | : | Case No. 10AP030010 |

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Tuscarawas County Court of Common Pleas is affirmed. Costs assessed to Appellant.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. SHEILA G. FARMER