[Cite as *Cline v. Rogers Farm Ents., L.L.C.*, 2017-Ohio-1379.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
PICKAWAY COUNTY

LESLIE U. CLINE, et al.,	:	
Plaintiffs-Appellees,	:	Case No. 16CA7
vs.	:	
ROGERS FARM ENTERPRISES, LLC,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

H. Ritchey Hollenbaugh, Columbus, Ohio, for appellant.

Troy A. Callicoat and Amanda Stacy Hartman, Dublin, Ohio, for appellees.

CIVIL CASE FROM COMMON PLEAS COURT
DATE JOURNALIZED: 3-30-17
ABELE, J.

{¶ 1} This is an appeal from a Pickaway County Common Pleas Court judgment that quieted title to a 3.956 acre strip of land. The trial court determined that Leslie U. and Ethel Cline, plaintiffs below and appellees herein, acquired title to the land by adverse possession.[1] Rogers Farm Enterprises, LLC, defendant below and appellant herein, assigns the following errors for review:

> FIRST ASSIGNMENT OF ERROR:
>
> "THE COURT ERRED IN TACKING MARTIN'S USE TO PLAINTIFFS' USE OF THE DISPUTED STRIP."

[1] During the pendency of this appeal, a notice of suggestion of death was filed concerning Leslie U. Cline.

SECOND ASSIGNMENT OF ERROR:

"THE COURT ERRED IN FINDING THAT MARTIN'S USE MET THE ELEMENTS OF ADVERSE POSSESSION."

{¶ 2} This case concerns a dispute regarding the ownership of a 3.956-acre strip of land that rests on the south side of State Route 316, in Pickaway County. The land adjoins appellees' approximately 141-acre property to the south (the southern property) and appellant's approximately 399-acre property to the north (the northern property). Since 1987, when appellees purchased the southern property, appellees have treated State Route 316 as the dividing line between the two properties. Appellees subsequently learned, however, that they were mistaken as to the dividing line between the two properties. A survey revealed that the southern property did not include a 3.956-acre parcel that rests to the south of State Route 316. Instead, the survey showed that the 3.956-acre parcel on the south side of State Route 316 belonged to the northern parcel. The remaining land comprising the northern parcel sits to the north of State Route 316.

{¶ 3} After attempts to resolve the dispute proved unsuccessful, appellees filed a complaint that requested a declaratory judgment and quiet title to the 3.956 parcel and alleged that they had acquired title by adverse possession. They additionally requested the court to declare them the lawful owners of the disputed parcel. Appellees alternatively asserted that they had acquired a prescriptive easement or an easement-by-necessity over the land.

{¶ 4} Appellant answered and filed a counterclaim for quiet title and declaratory judgment asserting that they are the lawful owners of the land.

{¶ 5} The parties tried the matter before a magistrate. At trial, appellees attempted to establish that they have adversely, continuously, openly, notoriously, and exclusively possessed the land between their March 1987 date of purchase and the filing of their complaint in 2013, a period in excess of twenty-one years. Mrs. Cline admitted that in 2006, she contacted appellant in an attempt to resolve the matter, but claimed that her 2006 discussion with appellant did not destroy the nature of appellees' adverse use.

{¶ 6} Additional evidence showed that before appellees purchased the southern property, Donald M. Martin lived on the property. Martin explained that he also presumed that State Route 316 was the boundary line between the southern and northern properties. Martin stated that he started renting the southern property in 1970 and continuously farmed the land, including the disputed parcel. Martin testified that in 1976, he purchased the property and continued to live on and farm the property. In 1984, however, Martin executed a deed in lieu of foreclosure to The Federal Land Bank of Louisville (FLB).

{¶ 7} Dawn Noble testified that between 1983 and 1998, she and her husband lived on the northern property. She stated that until a 1997 survey, she believed State Route 316 was the dividing line between the two properties.

{¶ 8} Appellant presented evidence that it used the disputed land since acquiring the property in 2000, and that it had implicitly permitted appellees to use the land. Carolyn Loxley, one of appellant's members, testified that when appellant purchased the property, she believed the property included the strip of land appellees claim to have acquired by adverse possession. Mrs. Loxley stated she was aware appellees used the disputed strip of land and alleged that they had appellant's implicit permission to use the land. Mrs. Loxley additionally testified that she

traversed the disputed strip of land at least a couple of times each year.

{¶ 9} After the trial, both parties submitted briefs that outlined their positions. Appellant asserted that appellees did not demonstrate that they continuously adversely possessed the property for twenty-one years. Appellant noted that Mrs. Cline testified that in 2006, she learned of the boundary line issue and contacted appellant in an attempt to resolve the matter. Appellant claimed that appellees' use after Mrs. Cline's 2006 contact with appellant was no longer adverse. Appellant additionally argued that appellees' could not tack Martin's use in order to satisfy the continuous-twenty-one-year requirement. Appellant contended that (1) Martin's deed transfer to FLB interrupted any period of adverse use, and (2) the evidence failed to show that Martin had actually used the land when FLB owned it. Appellant pointed out that appellees' son, Chad Cline, testified that when appellees purchased the property from FLB in 1987, the land was overgrown and needed substantial maintenance. Appellant argued that Chad's testimony establishes that Martin did not use the land.

{¶ 10} In their post-trial brief, appellees asserted that they could tack Martin's use in order to satisfy the continuous-twenty-one-year requirement. Appellees claimed that even though Martin deeded the property to FLB, he continued to reside on the property. They thus argued that tacking was appropriate.

{¶ 11} On August 25, 2015, the magistrate issued a decision that recommended the trial court deny appellees' adverse possession claim, deny their easement by necessity claim, grant appellees a prescriptive easement, and grant appellant quiet title to the land. In reaching her decision, the magistrate determined that appellees failed to establish that they adversely possessed the land for twenty-one years. The magistrate believed that FLB's ownership of the

land between 1984 and 1987 interrupted Martin's adverse use of the property. The magistrate found: "There was no testimony provided as to any open, notorious, adverse use of the subject strip by The Federal Land Bank or its agents during that period." The magistrate thus concluded that appellees could not tack Martin's use of the property in order to establish the twenty-one-year requirement.

{¶ 12} Appellees subsequently filed both a motion to set aside[2] the magistrate's decision and objections to the magistrate's decision. They asserted that the magistrate incorrectly determined an interruption in adverse use occurred between 1984 and 1987, when FLB held title to the land. Appellees asserted that even though Martin conveyed title to the land to FLB, he continued to use the property. Appellees further claimed that the testimony shows that Martin farmed the land from 1970 to 1987. They additionally disputed the magistrate's findings that appellant gave appellees permission to use the disputed land and that appellant exerted ownership and possession of the strip of land.

{¶ 13} In response, appellant asserted that the magistrate correctly determined that FLB's ownership interrupted any adverse use between Martin and appellees. Appellant argued that appellees could not tack Martin's alleged adverse use of the strip to appellees' use when the

[2] We observe that appellees' motion to set aside the magistrate's decision was not procedurally proper. A party may file a motion to set aside a magistrate's order. Civ.R. 53(D)(2)(b). A party may also file objections to a magistrate's decision. Civ.R. 53(D)(3)(b). In the case at bar, the magistrate's decision following the trial was not an order. Civ.R. 53(D)(2)(a)(i) (noting that magistrate orders concern non-dispositive matters); Civ.R. 53(D)(3)(a)(i) and Civ.R. 53(C)(1)(b) (noting that magistrate decision required, inter alia, when court refers matter to magistrate to conduct non-jury trial). Appellees ultimately filed objections in accordance with Civ.R. 53(D), and their procedural error does not, therefore, impact our decision in this matter. Instead, we simply note that appellees' motion to set aside the magistrate's decision was procedurally improper. *See generally In re J.B.*, 8th Dist. Cuyahoga No. 104411, 2017-Ohio-293 (explaining difference between magistrate orders and magistrate decisions).

evidence failed to establish that (1) Martin farmed or otherwise used the strip during FLB's ownership, or (2) Martin was in privity with FLB. Appellant also disputed appellees' claim that Martin was FLB's tenant between 1984 and 1987 so as to permit tacking. Appellant contended that appellees failed to present any evidence of a lease between Martin and FLB so as to demonstrate privity and to permit tacking. Appellant additionally claimed that appellees failed to show that they were in privity with Martin. Appellant asserted that the mere successive possession between Martin and appellees did not establish the privity necessary to support an adverse possession claim.

{¶ 14} Appellant also countered appellees' objection to the magistrate's finding that appellant permitted appellees to use the land. Appellant claimed that both of its members, Carolyn Loxley and James Rogers, testified that in the late summer of 2004, "the Clines explicitly acknowledged that the strip did not belong to them * * * and implicitly asked for, and were granted, temporary permission to use the strip."

{¶ 15} In reply, appellees asserted that the trial testimony shows that since at least 1970, the disputed strip of land has been used as if it were part of the southern property. Appellees claimed that Martin used the land, either as tenant or owner, between 1970 and 1987. They further contended that they were not required to present evidence of a lease agreement between Martin and FLB.

{¶ 16} After reviewing the parties' objections, the trial court decided to hear additional evidence regarding Martin's use of the land between 1984 and 1987, when FLB held title to the property, because, the trial court noted, that Martin's use of the land between 1984 and 1987 could be dispositive. At the hearing, Martin testified that although he owned the property from

the mid 1970s until 1984 or 1985, he lived on and farmed the property from 1970 to 1987. Martin explained that he believed State Route 316 was the boundary line between the northern and southern parcels. Martin stated that he had several uses for the disputed land throughout his occupation of the adjoining parcel: (1) he used the corn crib;[3] (2) he stored equipment on the property; and (3) he planted crops on the strip of land. Martin testified that he did not, however, "maintain control of the brush and weeds on the embankment." Martin additionally stated that during the time that he lived on the property, no one gave him permission to use the land.

{¶ 17} Martin explained that although he lost the property in 1984, as a result of "the farm cris[i]s," he did not change the manner of his use after the transfer. Martin stated that he leased the property from FLB and continued to live on and farm the property, including the disputed strip of land. Martin testified that he continued to use the disputed land until 1987, when appellees purchased the property.

{¶ 18} On February 2, 2016, the trial court, after considering all of the evidence, found that Martin farmed and possessed the land between 1984 and 1987 and that appellees could tack Martin's use of the land in order to fulfill the twenty-one-year requirement. The court then determined that appellees and their predecessor in interest have exclusively, openly, notoriously, continuously, and adversely possessed the disputed land and that appellees acquired title by adverse possession. On February 11, 2016, the trial court entered judgment in appellees' favor regarding their adverse possession claim. This appeal followed.[4]

---

[3] The corn crib rests partially on the disputed land and partially on the southern property. The testimony does not reveal when the corn crib was built or who built the corn crib. A 2007 storm destroyed the corn crib and all that remains is a concrete slab.

[4] Although the trial court did not explicitly state whether it chose to adopt, modify, or reject the magistrate's decision pursuant to

{¶ 19} Appellant's two assignment of error challenge the propriety of the trial court's decision concluding that appellees acquired title to the disputed land by adverse possession. In its two assignments of error, appellant claims in essence that the trial court's judgment is against the manifest weight of the evidence. Because the same principles guide our consideration of both assignments of error, for ease of discussion we combine our discussion of the two assignments of error.

A

STANDARD OF REVIEW

{¶ 20} Generally, appellate courts will uphold a trial court's judgment so long as the manifest weight of the evidence supports it. *State v. Arnold*, 147 Ohio St.3d 138, 2016-Ohio-1595, 62 N.E.3d 153, ¶63, quoting *Seasons Coal Co. v. Cleveland,* 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), quoting *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), syllabus ("'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.'"). When an appellate court reviews whether a trial court's decision is against the manifest weight of the evidence, the court "'"weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the [fact-finder] clearly lost its way and created such a

---

Civ.R. 53(D)(4)(b), the court's ultimate judgment reflects that it rejected the magistrate's decision. Moreover, we point out that the trial court did not expressly rule on the parties' objections to the magistrate's decision. Again, however, its ultimate judgment indicates that the court implicitly ruled on the objections. *See generally Chatfield & Woods Sack Co., Inc. v. Nusekabel*, 1st Dist. Hamilton No. C 980315, 1999 WL 960782, *1 (observing that trial court "implicitly overruled" objections to the magistrate's decision when it entered summary judgment in the non-objecting party's favor).

manifest miscarriage of justice that the [judgment] must be reversed * * *.'"" *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012–Ohio–2179, 972 N.E.2d 517, ¶20 (clarifying that the same manifest-weight standard applies in civil and criminal cases), quoting *Tewarson v. Simon*, 141 Ohio App.3d 103, 115, 750 N.E.2d 176 (9th Dist.2001); *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). A reviewing court may find a trial court's decision against the manifest weight of the evidence only in the "'exceptional case in which the evidence weighs heavily against the [decision].'" *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541, quoting *Martin*, 20 Ohio App.3d at 175; *accord State v. Lindsey*, 87 Ohio St.3d 479, 483, 721 N.E.2d 995 (2000). Moreover, when reviewing evidence under the manifest weight of the evidence standard, an appellate court generally must defer to the fact-finder's credibility determinations. *Eastley* at ¶21. As the *Eastley* court explained:

> "'[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment must be made in favor of the judgment and the finding of facts. * * *
>
> If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment.'"

Id., quoting *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), fn. 3, quoting 5 Ohio Jurisprudence 3d, Appellate Review, Section 60, at 191–192 (1978).

{¶ 21} Consequently, "we should not reverse a judgment merely because the record contains evidence that could reasonably support a different conclusion." *Bugg v. Fancher*, 4th Dist. Highland No. 06CA12, 2007-Ohio-2019, 2007 WL 1225734, ¶9. Instead, as we explained in *Bugg*:

> It is the trier of fact's role to determine what evidence is the most credible and convincing. The fact finder is charged with the duty of choosing between two

> competing versions of events, both of which are plausible and have some factual support. Our role is simply to insure the decision is based upon reason and fact. We do not second guess a decision that has some basis in these two factors, even if we might see matters differently. Rather, we must defer to the trier of fact in that situation.

Id. at ¶9.

{¶ 22} Although an appellate court will ordinarily afford great deference to a trial court's factual findings, the court will not afford any deference to a trial court's application of the law. Instead, the appellate court will independently review whether the trial court properly applied the law. *Powell v. Vanlandingham*, 4th Dist. Washington No. 10CA24, 2011-Ohio-3208, 2011 WL 2571018, ¶28, citing *Lovett v. Carlisle*, 179 Ohio App.3d 182, 2008–Ohio–5852, 901 N.E.2d 255 (4th Dist.), ¶16; *Pottmeyer v. Douglas*, 4th Dist. Washington No. 10CA7, 2010–Ohio–5293, ¶21.

{¶ 23} Thus, in the case sub judice, to the extent that appellant's assignments of error challenge factual findings, we apply a manifest-weight-of-the-evidence standard of review. To the extent that appellant challenges the trial court's application of the law, we apply a de novo standard of review.

B

FAILURE TO REQUEST FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶ 24} Before we review the merits of appellant's assignments of error, we first note that it appears that appellant did not request findings of fact and conclusions of law. See Civ.R. 52. The rule states:

> When questions of fact are tried by a court without a jury, judgment may be general for the prevailing party unless one of the parties in writing requests otherwise * * * in which case, the court shall state in writing the conclusions of fact found separately from the conclusions of law.

{¶ 25} The purpose of Civ.R. 52 findings of fact and conclusions of law is "'to aid the appellate court in reviewing the record and determining the validity of the basis of the trial court's judgment.'" *In re Adoption of Gibson,* 23 Ohio St.3d 170, 172, 492 N.E.2d 146 (1986), quoting *Werden v. Crawford,* 70 Ohio St.2d 122, 124, 435 N.E.2d 424 (1982). Thus, a party may file a Civ.R. 52 request in order "to ensure the fullest possible review." *Cherry v. Cherry*, 66 Ohio St.3d 348, 356, 421 N.E.2d 1293 (1981).

{¶ 26} In the absence of findings of fact and conclusions of law, an appellate court will presume that the trial court applied the law correctly and will affirm its judgment if evidence in the record supports the judgment. *Bugg v. Fancher,* 4th Dist. Highland No. 06CA12, 2007–Ohio–2019, ¶10, citing *Allstate Fin. Corp. v. Westfield Serv. Mgt. Co.,* 62 Ohio App.3d 657, 577 N.E.2d 383 (12th Dist.1989). As the court explained in *Pettet v. Pettet,* 55 Ohio App.3d 128, 130, 562 N.E.2d 929 (5th Dist.1988):

> [W]hen separate facts are not requested by counsel and/or supplied by the court the challenger is not entitled to be elevated to a position superior to that he would have enjoyed had he made his request. Thus, if from an examination of the record as a whole in the trial court there is some evidence from which the court could have reached the ultimate conclusions of fact which are consistent with [its] judgment the appellate court is bound to affirm on the weight and sufficiency of the evidence.
>
> The message should be clear: If a party wishes to challenge the * * * judgment as being against the manifest weight of the evidence he had best secure separate findings of fact and conclusions of law. Otherwise his already "uphill" burden of demonstrating error becomes an almost insurmountable "mountain."

{¶ 27} Furthermore, the absence of a request for findings of fact and conclusions of law ordinarily results in a waiver of the right to challenge the trial court's lack of an explicit finding concerning an issue. *E.g., Fultz v. Fultz,* 4th Dist. Pickaway No. 13CA9, 2014–Ohio–3344, ¶51; *Pawlus v. Bartrug,* 109 Ohio App.3d 796, 801, 673 N.E.2d 188, (9th Dist.1996).

{¶ 28} Thus, in the case sub judice, we reject appellant's assertions that the trial court erred by failing to enter specific factual findings to support its decision. Instead, the absence of a request for findings of fact and conclusions of law means that the trial court was not required to enter any specific findings concerning its application of the law. *See generally Albrechtsen v. Mad River Apts.*, 2nd Dist. Montgomery No. 27060, 2017-Ohio-117, 2017 WL 132665, ¶7 (noting that trial court need not enter findings of fact when no request made); *Carey v. Down River Specialties, Inc.*, 8th Dist. Cuyahoga No. 103595, 2016-Ohio-4864, 2016 WL 3632498, ¶12 (same). Moreover, the absence of findings of fact and conclusions of law means that we will affirm the trial court's judgment so long as the evidence reasonably supports the judgment.

C

ADVERSE POSSESSION

{¶ 29} Under the doctrine of adverse possession, a plaintiff may acquire legal title to another's real property if the plaintiff proves exclusive possession that is open, notorious, continuous, and adverse for twenty-one years. *Evanich v. Bridge*, 119 Ohio St.3d 260, 2008–Ohio–3820, 893 N.E.2d 481, ¶7; *Houck v. Bd. of Park Commrs. of the Huron Cty. Park Dist.*, 116 Ohio St.3d 148, 2007–Ohio–5586, 876 N.E.2d 1210, ¶10; *Grace v. Koch*, 81 Ohio St.3d 577, 579, 692 N.E.2d 1009 (1998). "While adverse possession is a recognized common law method of obtaining title to real property, it is not favored." *Hoosier v. Hoosier*, 4th Dist. Pike No. 14CA846, 2014–Ohio–5810, 2014 WL 7466546, ¶23, citing *Grace* at 580, 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."); *accord Hardert v. Neumann*, 4th Dist.

Adams No. 13CA977, 2014–Ohio–1770, 2014 WL 1691649, ¶ 9. "'Viewed from its ultimate effect, it is the ripening of hostile possession, under proper circumstances, into title by lapse of time.'" *Hoosier* at ¶23, citing 2 Ohio Jurisprudence 3d, Adverse Possession and Prescription, Section 1.

{¶ 30} The party seeking title by adverse possession bears the burden of proving its elements by clear and convincing evidence. *E.g., Grace* at syllabus.

> Clear and convincing evidence is "that measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established."

State ex rel. Pietrangelo v. Avon Lake, — Ohio St.3d —, 2016–Ohio–5725, — N.E.3d —, 2016 WL 4895410, ¶14, quoting *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus.

{¶ 31} We note that even when the burden of proof is clear and convincing evidence, the manifest-weight-of-the-evidence standard of review "retains its focus upon the existence of 'some competent, credible evidence.'" *In re Seymour*, 4th Dist. Hocking No. 94CA3, (July 25, 1994), 1994 WL 390408, *3, quoting *State v. Schiebel*, 55 Ohio St.3d 71, 74, 564 N.E.2d 54 (1990); *accord Queen v. Hanna*, 2012-Ohio-6291, 985 N.E.2d 929, 2012 WL 6765603, ¶36 (4th Dist.). Accordingly, we must affirm the trial court's judgment if the record contains some competent and credible evidence that generates a firm belief that the appellees, or their predecessors, obtained title to the land by adverse possession.

D

TWENTY-ONE YEARS

{¶ 32} In its first assignment of error, appellant challenges the trial court's finding that appellees and their predecessor possessed the disputed land for twenty-one years. Appellant contends that the trial court improperly determined that appellees could tack Martin's possession of the land to establish the twenty-one-year requirement. Appellant claims that tacking requires privity between the successive occupants and that privity is lacking between Martin and appellees.

1

Tacking

{¶ 33} To demonstrate the twenty-one-year requirement, an adverse possession claimant may "tack" the claimant's use with a predecessor in privity with the claimant. *Zipf v. Dalgarn,* 114 Ohio St. 291, 296, 151 N.E. 174 (1926), quoting 2 Corpus Juris, p.82 ("'if there is privity between successive occupants holding adversely to the true title continuously, the successive periods of occupation may be united or tacked to each other to make up the time of adverse holding prescribed by the statute as against such title'"); *accord Patton v. Ditmyer,* 4th Dist. Athens Nos. 05CA12, 05CA21, and 05CA22, 2006–Ohio–7107, 2006 WL 3896780, ¶47 (citations omitted). Thus, "[o]ne person may start the adverse possession to land, and another in privity with him may continue it for the statutory period." *Zipf v. Dalgarn,* 114 Ohio St. 291, 296, 151 N.E. 174 (1926), quoting Thompson on Real Property, vol. 3, Section 2527.

{¶ 34} In order to tack a predecessor's use of property, an adverse possession claimant initially must establish that the claimant and the predecessor are in privity. *Hawn v. Pleasant,* 4th Dist. Scioto No. 98CA2595, 1999 WL 366584, *6. Once the claimant demonstrates privity, the successive uses may be tacked if the successive occupants exclusively, openly, notoriously,

continuously, and adversely used the property "in the same or similar manner." *Hindall v. Martinez*, 69 Ohio App.3d 580, 584, 591 N.E.2d 308, (3rd Dist.1990), citing *McNeely v. Langan* (1871), 22 Ohio St. 32, 37 (1871); *accord Hawn*.[5]

2

Privity

{¶ 35} Privity generally means "'[t]he connection or relationship between two parties, each having a legally recognized interest in the same subject matter.'" *Shoemaker v. Gindlesberger*, 118 Ohio St.3d 226, 2008-Ohio-2012, 887 N.E.2d 1167, ¶10, quoting Black's Law Dictionary (8th Ed.2004) 1237. More particularly, privity means that the parties have

> '"mutual or successive relationships to the same rights of property, and privies are distributed into several classes, according to the manner of this relationship. Thus, there are privies in estate, as donor and donee, lessor and lessee, and joint tenant; privies in blood, as heir and ancestor, and co-parceners; privies in representation, as executor and testator, administrator and intestate; privies in law,

---

[5] In *Hawn*, this court stated:

> To tack a predecessor's adverse use, the claimant must establish that (1) he and the predecessor were in privity; (2) they *equitably* and continuously used the disputed property; (3) in the same or a similar manner; and (4) the use was open, notorious, and adverse to the title holder's interest in the land.

Id. at *6 (emphasis added), citing *Hindall*.

We point out that number 2 in the *Hawn* quote above appears to misinterpret part of the *Hindall* court's statement. The *Hindall* court did not state that the claimant and the predecessor "equitably" used the disputed property. Instead, the *Hindall* court stated that the claimant and the predecessor "sequentially" used the disputed property. Therefore *Hawn* language should have inserted "sequentially" in place of "equitably."

where the law, without privity of blood or estate, casts the land upon another, as by escheat.'"

Burkhart v. H.J. Heinz Co., 140 Ohio St.3d 429, 2014-Ohio-3766, 19 N.E.3d 877, ¶22, quoting *Metro. St. Ry. Co. v. Gumby*, 99 F. 192, 198 (2d Cir.1900), quoting 19 American and English Encyclopedia of Law, Privies–Privity, at 156 (1892).

{¶ 36} "[P]rivity of estate" means "[a] mutual or successive relationship to the same right in property, as between grantor and grantee or landlord and tenant." Black's Law Dictionary 1238 (8th Ed. 2004). Furthermore, "[w]hen the term 'privity' is considered in respect to its relationship to estates in realty, it must be understood that it implies succession; that is, successive ownership or possession of the identical estate in the same property." *Bailey v. Stedronsky*, 57 Ohio App. 265, 13 N.E.2d 588 (5th Dist. 1936); *accord Ryan v. Stavros*, 348 Mass. 251, 264-265, 203 N.E.2d 85 (1964), quoting Am.Law of Property, Section 8.59 ("'To produce the necessary privity there must be some relation between the successive users of such a nature that the use by the earlier user can fairly be said to be made for the later user, or there must be such a relation between them that the later user can be fairly regarded as the successor to the earlier one.").

{¶ 37} "'"All that is generally necessary to privity between successive occupants of property is that one receive his possession from the other by some act of such other or by operation of law."'" *Bullion v. Gahm*, 164 Ohio App.3d 344, 2005-Ohio-5966, 842 N.E.2d 540, 2005 WL 3006772, ¶19 (4th Dist.), quoting *Keezer v. Deatrick* (1988), Paulding App. No. 11–87–8, 1988 WL 126760, quoting 2 Ohio Jur.3d 525, et seq., Adverse Possession, Section 27. Thus, "acquisition of title by adverse possession of successive owners [appears] dependent upon

continued occupancy and possession rather than the manner in which record title was acquired." *Pauken v. Rose*, 16 Ohio Supp. 149, 149-150, 31 O.O. 260, 1945 WL 5530 (C.P.1945), citing *McNeely*, 22 Ohio St. at 37; *accord Thornburg v. Haecker*, 243 Neb. 693, 698, 502 N.W.2d 434 (1993), quoting *Bryan v. Reifschneider*, 181 Neb. 787, 792, 150 N.W.2d 900 (1967) ("'Privity means privity of possession. It is the transfer of possession, not title, which is the essential element.'"). Therefore, "'the adverse claimant need not have a deed or other writing giving color of title or furnishing foundation for belief or claim of ownership or legal right to enter or take possession of land.'" *Montieth v. Twin Falls United Methodist Church, Inc.*, 68 Ohio App.2d 219, 222, 428 N.E.2d 870 (9th Dist.1980), quoting 5 Thompson on Real Property, Adverse Possession, Section 2550 (1979 Ed.), 643; *accord* Restatement (Third) of Property: Servitudes, Section 2.17 and cmt. i (discussing prescriptive use and stating that periods of such "use may be tacked together to make up the prescriptive period if there is a transfer between the prescriptive users of either the inchoate servitude or the estate benefitted by an inchoate servitude" and stating that "no formal transfer [of the property] is necessary to permit tacking of inchoate interests in servitudes"). Instead, "[t]he overriding concern in [an adverse possession] case * * * is possession." *Montieth* 68 Ohio App.2d at 222, (citations omitted). As the court explained in *McNeely*, 22 Ohio St. at 37:

> Possession itself is a species of title, of the lowest grade, it is true; yet it is good against all who cannot show a better, and by lapse of time may become, under the statute, perfect and indefeasible.
>
> * * * Where there is possession of the requisite character, the question, whether there is color of title or not, is wholly immaterial.
>
> * * * *
>
> The mode adopted for the transfer of the possession may give rise to questions between the parties to the transfer; but, as respects the rights of third persons against whom the possession is held adversely, it seems to us to be

> immaterial, if successive transfers of possession were in fact made, whether such transfers were effected by will, by deed, or by mere agreement either written or verbal.

(Citations omitted); accord *Kainea v. Kreuger*, 31 Haw. 108, 115-116 (1929), quoting *Rich v. Naffziger*, 255 Ill. 98, 105, 99 N.E. 341 (1912) ("'Doubtless the possession must be connected and continuous so that the possession of the true owner shall not constructively intervene between them; but such continuity and connection may be effected by any conveyance, agreement and understanding which has for its object a transfer of the rights of the possessor or of his possession and is accompanied by a transfer of the possession in fact.'"). Moreover, "'[s]uccessive possessions may be tacked although the land, title to which is claimed by adverse possession, is not included in the description in the deed of adjoining land to the party in possession.'" *Keezer v. Deatrick* (1988), Paulding App. No. 11–87–8, 1988 WL 126760, *4, quoting 2 Ohio Jur.3d 525, et seq., Adverse Possession, Section 28.

{¶ 38} As the foregoing cases indicate, privity, for adverse possession purposes, does not require a contractual relationship, i.e., that the successive occupants directly transferred title or possession of the land by written instrument. Furthermore, an adverse claimant need not prove an unbroken chain of title in order to show privity for adverse possession purposes. Instead, the pertinent inquiries when evaluating privity in the adverse possession context are whether the adverse claimant and the predecessor(s) successively–and without interruption–occupied the property and whether a transfer of possession by any means, in fact, occurred. *McNeely*, 22 Ohio St. at 37 (noting that mode of transfer immaterial in adverse possession when successive transfers in fact made).

{¶ 39} Our decision in *Spurlock v. Pemberton*, 4th Dist. Lawrence No. 13CA1,

2013-Ohio-4002, 2013 WL 5230725, illustrates the foregoing principle. In *Spurlock*, we determined that the adverse possession claimants could tack the prior title holders' use of a disputed piece of land, even though contractual privity was lacking. In *Spurlock*, the occupants took possession of the land under a purported written land contract that was never produced. Thus, the claimants' title to the land was questionable. We determined that although the claimants did not produce written evidence that they held title to the property, the claimants could tack the prior titled owners' adverse use of the property in order to satisfy the twenty-one-year requirement. *Id.* at ¶21. We explained that "whether [the claimants] engaged in these acts as a land contract vendee or a tenant is beside the point." *Id.* at ¶19. Instead, we concluded that the claimants' possession of the land was more significant than proof that the claimants actually held title to the land. *Id.* In *Spurlock*, we therefore rejected the contention that contractual privity must exist in order to tack a prior adverse use. Rather, we permitted the claimants to demonstrate privity by unbroken periods of successive occupation.

{¶ 40} The flip-side of this analysis applies in the case sub judice. Martin, the previous occupant, did not hold title to the land immediately before appellees purchased the land and began using the disputed strip of land. Nevertheless, the facts show that Martin lived on the land and used the disputed property from 1970 until appellees obtained possession of the property. Martin and appellees used the disputed land in a similar manner and their uses were not interrupted. Although Martin may not have transferred the property to appellees by a legal document, his possession and the appellees' possession occurred in immediate succession. Although Martin and the appellees may not share contractual privity, they share privity in the sense that they successively and uninterruptedly occupied the same piece of land. Consequently,

we do not agree with appellant that privity is lacking between Martin and the appellees. Whether Martin used the land as a tenant, owner, or otherwise is immaterial to the question of privity. Instead, the pertinent factor is Martin's and the appellees' successive uses of the property and the successive transfer of possession.

{¶ 41} Furthermore, even if privity is lacking between Martin and the appellees, the appellees share contractual privity with FLB. Martin's adverse use of the property as FLB's tenant inured to FLB. "Possession of a tenant is regarded as the possession of the landlord, [and] hence there may be tacking to establish the landlord's title, although the land is occupied by tenants." *Ferguson v. Zimmerman*, 2nd Dist. Montgomery No. 9426, 1986 WL 878, *9, citing *Powers v. Malavazos*, 25 Ohio App. 450, 158 N.E. 654 (4th Dist. 1927); *USA Cartage Leasing, LLC v. Baer*, 202 Md.App. 138, 204, 32 A.3d 88 (Md.App.2011), quoting 2 C.J.S. Adverse Possession, Section 47 (1941) (stating that "tenant may adversely possess land 'on behalf of' landlord"); *Steinichen v. Stancil*, 284 Ga. 580, 582, 669 S.E.2d 109 (2008) (determining that tenants' use inured to landlord and subsequent owner could tack tenants' use in order to satisfy continuous possession for statutory period); *see generally Eddyville Corp. v. Relyea*, 35 A.D.3d 1063, 1066-1067, 827 N.Y.S.2d 315 (2006); *Ebenhoh v. Hodgman*, 642 N.W.2d 104, 109 (Minn.App.2002). FLB, therefore, is deemed to have adversely possessed the disputed property.[6] FLB deeded the property to appellees. FLB and appellees most certainly

[6] Although not raised by either party, we note that assuming, arguendo, FLB is a governmental entity, nothing appears to preclude a governmental entity from acquiring adverse possession of property. *See State ex rel. A.A.A. Investments v. Columbus*, 17 Ohio St.3d 151, 152, 478 N.E.2d 773 (1985) (stating that "governmental entities may acquire title to land by adverse possession"); *accord Wood v. Kipton*, 160 Ohio App.3d 591, 2005-Ohio-1816, 828 N.E.2d 173 (9th Dist.). We note, however, that this rule is not without criticism. *See* Andrew Dick, Making Sense Out of Nonsense: A Response to Adverse Possession by Governmental Entities, 7 Nev. L.J. 348 (2007).

are in privity. Tracing Martin's use through FLB shows adverse use of the property since 1984. Tacking Martin's use between 1970 and 1984 (which appellant has not claimed is improper) illustrates adverse use of the property from at least 1970 through 2000, the year appellant purchased the adjoining property. This is a period of thirty years, which is more than the twenty-one years necessary to establish adverse possession.

{¶ 42} Appellant nevertheless asserts that appellees failed to demonstrate the existence of a landlord-tenant relationship between Martin and FLB. Appellant contends that the statute of frauds requires leases in excess of one year to be in writing, and that the absence of a written lease means that appellees cannot show that a lease existed.

{¶ 43} We disagree and find our reasoning in *Martin v. Jones*, 2015-Ohio-3168, 41 N.E.3d 123, 2015 WL 4709438, ¶¶47-49 (4th Dist.), applicable. In *Martin*, we determined that the doctrine of part performance may remove an oral lease from the statute of frauds. We explained:

> "In Ohio, the Statute of Frauds is embodied in R.C. Chapter 1335." *Ed Schory & Sons, Inc. v. Soc. Natl. Bank*, 75 Ohio St.3d 433, 438, 662 N.E.2d 1074 (1996). R.C. 1335.04 provides that "[n]o lease * * * shall be assigned or granted except by deed, or note in writing, signed by the party assigning or granting it, or his agent thereunto lawfully authorized, by writing * * *." R.C. 1335.05 provides that "[n]o action shall be brought * * * upon a contract or sale of lands * * * or interest in or concerning them * * * unless the agreement upon which such action is brought * * * is in writing and signed by the party to be charged therewith * * *." It is uncontroverted here that the parties' lease was not in writing.
>
> Nevertheless, part performance can remove an oral contract concerning real property from the operation of the statute of frauds. *See OBLH, L.L.C. v. O'Brien*, 11th Dist. Trumbull No. 2013–T–0111, 2015-Ohio-1208, 2015 WL 1443226, ¶20; *Bumgarner v. Bumgarner*, 4th Dist. Highland No. 09CA22, 2010-Ohio-1894, 2010 WL 1730018, ¶27; Kuehnle and Levey, *Baldwin's Ohio Real Estate Law*, Section 39.23 (2014); *Hughes v. Oberholtzer*, 162 Ohio St. 330, 337, 123 N.E.2d 393 (1954) ("Early in the history of the statute of frauds, courts of equity, to prevent the statute [from] being used as a shield by a wrongdoer,

> evolved the doctrine of part performance to remove a contract from the statute"). "Part performance to be sufficient to remove an agreement from the operation of the statute of [frauds] must consist of unequivocal acts by the party relying upon the agreement, which are exclusively referable to the agreement and which have changed his position to his detriment and make it impossible or impractical to place the parties *in statu quo.*" *Delfino v. Paul Davies Chevrolet, Inc.*, 2 Ohio St.2d 282, 209 N.E.2d 194 (1965), paragraph four of the syllabus; *OBLH* at ¶21.
>
> Thus "[t]he doctrine of part performance which will take a case out of the operation of the statute of frauds is based upon the acts of the parties which are such that it is clearly evident that such acts would not have been done in the absence of a contract and that there is no other explanation for the performance of such acts except a contract containing the provisions contended for by the plaintiff." *Hughes* at 337–338, 123 N.E.2d 393; *Kiser v. Williams,* 9th Dist. No. 24968, 2010-Ohio-3390, 2010 WL 2837198, ¶15; *King v. King,* 4th Dist. Adams No. 99 CA 680, 2000 WL 326131, *5 (Mar. 20, 2000).

Id.; *see Greer v. Bruce*, 1st Dist. Hamilton No. C-140121, 2014-Ohio-4901, 2014 WL 5817889, ¶14 (determining that trial court's finding that oral lease existed not against the manifest weight of the evidence when purported lessee testified that he had an oral lease and evidence showed that purported lessee had access to the property and openly used it).

{¶ 44} In the case at bar, assuming, arguendo, that the statute of frauds required a written lease agreement between Martin and FLB, we believe that the doctrine of part performance applies. Martin lived on the property for three years during FLB's ownership. It seems highly unlikely that FLB was unaware of Martin's three-year occupation of the property. It seems more likely that the parties had reached an agreement concerning Martin's occupation and use of the property. In other words: The "acts of the parties * * * are such that it is clearly evident that such acts would not have been done in the absence of a [lease] and * * * there is no other explanation for the performance of such acts except a [lease]." *Hughes v. Oberholtzer*, 162 Ohio St. at 338. We therefore do not believe that the lack of documentary evidence to prove the existence of a lease means that a lease did not exist.

{¶ 45} Additionally, we believe that the record contains some competent and credible evidence that Martin leased the land from FLB. Martin directly testified that after he deeded the land to FLB, he leased the property from FLB, continued to live on the property, and used the disputed strip of land. Consequently, we disagree with appellant that the trial court incorrectly applied the law regarding privity, or that its decision to tack Martin's use of the property with appellees' use, is against the manifest weight of the evidence.

3

Pleading Requirement

{¶ 46} Appellant also asserts that appellees failed to plead privity and, thus, the trial court could not consider privity for purposes of tacking. "'All that the civil rules require is a short, plain statement of the claim that will give the defendant fair notice of the plaintiff's claim and the grounds upon which it is based.'" *Patrick v. Wertman*, 113 Ohio App.3d 713, 716, 681 N.E.2d 1385 (3rd Dist. 1996), quoting *Kelley v. E. Cleveland*, 8th Dist. No. 44448 (Oct. 28, 1982); *accord Wells Fargo Bank, N.A. v. Horn*, 142 Ohio St.3d 416, 2015-Ohio-1484, 31 N.E.3d 637, ¶13; Civ.R. 8(A)(1). The rules do not require a party to "plead the legal theory of recovery." *Illinois Controls, Inc. v. Langham*, 70 Ohio St.3d 512, 526, 639 N.E.2d 771 (1994).

{¶ 47} In the case sub judice, appellant did not argue, during the trial court proceedings, that appellees failed to plead privity and, thus, could not rely upon privity to tack Martin's use of the property. It is a rule of appellate procedure that "an appellate court will not consider any error which could have been brought to the trial court's attention, and hence avoided or otherwise corrected." *Schade v. Carnegie Body Co.*, 70 Ohio St.2d 207, 210, 436 N.E.2d 1001 (1982); *accord State v. Quarterman*, 140 Ohio St.3d 464, 19 N.E.3d 900, 2014–Ohio–4034, 19 N.E.3d

900, ¶15. Thus, a party forfeits, and may not raise on appeal, any error that arises during trial court proceedings if that party fails to bring the error to the court's attention, by objection or otherwise, at a time when the trial court could avoid or correct the error. *Goldfuss v. Davidson,* 79 Ohio St.3d 116, 121, 679 N.E.2d 1099 (1997); *Stores Realty Co. v. City of Cleveland Bd. of Bldg. Standards and Bldg. Appeals,* 41 Ohio St.2d 41, 43, 322 N.E.2d 629 (1975). Therefore, appellant should not be able to raise on appeal a challenge to the sufficiency of appellees' pleading. Additionally, we observe that appellant does not cite any authority that requires an adverse possession claimant to explicitly plead privity in the complaint.

{¶ 48} Moreover, under Civ.R. 15(B),[7] the parties may implicitly consent to try issues not raised in the pleadings. Here, appellant questioned Martin regarding his connection with FLB and appellees. Appellant also raised the privity issue in its post-trial filings. Therefore, appellant implicitly consented to try the privity issue.

{¶ 49} For all of the foregoing reasons, we reject appellant's argument that appellees' alleged failure to plead privity with Martin necessitates a reversal of the trial court's decision.

{¶ 50} Accordingly, based upon the foregoing reasons, we overrule appellant's first assignment of error.

D

CONTINUOUS AND ADVERSE USE

{¶ 51} In its second assignment of error, appellant contends that the trial court's determination that Martin's use of the property was continuous and adverse is against the

[7] Civ.R. 15(B) states in relevant part: "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."

manifest weight of the evidence.[8] Appellant argues that Martin's use was not continuous because he testified that during the farm crisis, he was simply "struggling to survive" and "quit raising crops." Appellant further points to Chad Cline's testimony concerning the condition of the property when appellees (his parents) purchased it in 1987. Chad stated that the disputed land "was fairly overgrown," with "a lot of heavy thick brush." Appellant claims that Chad's testimony illustrates that Martin did not continuously maintain or use the disputed land, but instead, allowed it to become overgrown.

{¶ 52} Appellant additionally argues that the evidence does not support a finding that Martin adversely possessed the property. Appellant asserts that the evidence fails to show that Martin manifested an intention to claim title and that Martin actually "expressly disclaimed any interest" in the disputed land when he deeded the property to FLB. Appellant points to Martin's testimony that he believed he deeded the entire parcel of land, including the disputed strip, to FLB, and to his testimony that he "relinquish[ed] any claim that [he] had to that parcel of property."

{¶ 53} To demonstrate continuous use, an adverse claimant must show use of the property without substantial interruption. *Pottmeyer v. Douglas*, 4th Dist. Washington No. 10CA7, 2010–Ohio–5293, 2010 WL 4273232, ¶37, citing *Bullion v. Gahm*, 164 Ohio App.3d 344, 2005–Ohio–5966, 842 N.E.2d 540 (4th Dist.), ¶20. The adverse claimant need not demonstrate daily or weekly use, but instead, must establish "'prolonged and substantial use.'"

[8] We observe that appellant did not specifically argue whether the evidence supports the trial court's findings regarding the exclusive, open, and notorious elements. Appellant cites legal principles regarding notorious use, but does not delineate why appellant believes the evidence fails to illustrate notorious use. We therefore do not address these elements in any detail. We simply note that the record contains some evidence regarding each of these foregoing elements so as to support the trial court's judgment.

Bullion at ¶20, quoting *Ault v. Prairie Farmers Co–Operative Co.,* Wood App. No. WD–81–21, 1981 WL 5788 (Sept. 25, 1981), *2.

{¶ 54} "[T]o establish adversity, '[t]he tenant must unfurl his flag on the land, and keep it flying so that the owner may see, if he will, that an enemy has invaded his dominions and planted his standard of conquest.'" *Grace v. Koch,* 81 Ohio St.3d 577, 581, 1998–Ohio–607, 692 N.E.2d 1009, quoting *Darling v. Ennis,* 138 Vt. 311, 313, 415 A.2d 228 (1980). "'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.'" *Evanich* at ¶8, quoting *Humphries v. Huffman,* 33 Ohio St. 395, 402 (1878). "Thus, * * * the intent to take the property of another is not necessary; the intent to occupy and treat property as one's own is all that is required." *Id.* "[T]he intent to possess another's property 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* at syllabus.

{¶ 55} In the case at bar, we believe that some competent, credible evidence supports a finding that Martin continuously used the disputed strip of land between 1984 and 1987. First, Martin explicitly testified that he continuously used the disputed strip of land between 1970 and 1987. Appellees' counsel asked Martin whether he continued farming the property between 1984 and 1987 (when FLB held title to the land), and Martin responded affirmatively. Martin stated that during 1984 and 1987, he was "struggling to survive" and "quit raising crops." He further explained, however, that he continued to farm the property "as [he] saw fit." Martin testified that between 1984 and 1987 (1) he rotated between raising crops and keeping hogs on

the property, (2) he used the corn crib to store corn, and (3) he stored equipment on the property. Martin specifically refuted Chad Cline's testimony that the disputed strip of land was overgrown. Martin indicated that the "only place that was overgrown with brush was from the fence to the road on the bank." Moreover, some competent, credible evidence supports a finding that Martin adversely possessed the property. Even though Martin indicated that he relinquished title to the property, he did not discontinue occupying the property and using the disputed strip of land. While he may have subjectively believed that he relinquished all interest in the property, his objective actions indicate that he possessed the land and continued to treat it as if it were his own. Consequently, we disagree with appellant that the trial court's decision is against the manifest weight of the evidence.

{¶ 56} Accordingly, based upon the foregoing reasons, we overrule appellant's second assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Pickaway County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

McFarland, J. & Hoover, J.: Concur in Judgment & Opinion

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.