COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

JAMES S. FERGUSON, et al.,	:	
Plaintiffs	:	**CASE NO. 2011 CVH 01159**
vs.	:	**Judge McBride**
THE BOARD OF TRUSTEES OF MIAMI TOWNSHIP	:	
	:	**DECISION/ENTRY**
Defendant	:	

William J. Mitchell, attorney for the plaintiffs James S. Ferguson and Janet L. Ferguson, 7809 Laurel Avenue, Suite 14, Madeira, Ohio 45243.

John C. Korfhagen, Law Director of Miami Township for the defendant Board of Trustees of Miami Township, 6346 S. Devonshire Drive, Loveland, Ohio 45140.

This cause is before the court for consideration of a motion for summary judgment filed by the plaintiffs James S. Ferguson and Janet L. Ferguson.

The court scheduled and held a hearing on the motion for summary judgment on June 1, 2012. At the conclusion of that hearing, the court took the issues raised by the motion under advisement.

Upon consideration of the motion, the record of the proceeding, the evidence presented for the court's consideration, and the oral and written arguments of counsel, the court now renders this written decision.

FACTS OF THE CASE

This case involves a dispute over the title to certain property claimed to be owned by the plaintiffs which is adjacent to a township park owned by the defendant.

The plaintiffs reside at the property located at 645 Loveland Miamiville Road, Loveland, Clermont County, Ohio.[1] James Ferguson acquired title to this property from his father Frank X. Ferguson on January 12, 1968 and has lived on this property continually since that time.[2] Frank Ferguson acquired title to the property on or about 1941 and owned that property until it was sold to James Ferguson in 1968.[3]

When Frank Ferguson acquired the property at 645 Loveland Miamiville Road in 1941, a fence was present on the property which enclosed the land believed to be owned by him. That fence was maintained by Frank Ferguson during his ownership of the property and was also maintained by James Ferguson after he assumed ownership of the property in 1968.[4] The land enclosed by the fence was used in the 1940s and 1950s to graze cattle.

[1] Affidavit of James Ferguson at ¶ 1.
[2] Id.
[3] Id. at ¶ 2.
[4] Id. at ¶¶ 3-4.

This land has been used by both Frank and James Ferguson for hunting purposes throughout their ownership of the property.[5] Off-road vehicles are currently used on this land and a small tractor is used to maintain and cut the grass on the property.[6] "No Trespassing" signs were placed on the property during the period of the ownership set forth above in order to keep individuals off the property.[7]

Recently, James Ferguson observed individuals cutting down trees and installing a sewer line on a portion of this property, which made him realize that there might be a dispute as to the ownership of the land.[8] He later discovered that Miami Township purchased the disputed property from United Venture Group on December 20, 1995.[9]

This disputed property is directly adjacent to the land owned by the plaintiff pursuant to his deed and title.[10] It is property which both James Ferguson and his father Frank Ferguson had long used in the same nature as the rest of their land and which they believed had been owned by them and which has been used exclusively by James Ferguson since 1968.[11]

The parties entered into a stipulation, filed of record in this case, which sets forth the proper legal description of the disputed property.[12]

The plaintiffs filed the present action to quiet title pursuant to the theory of adverse possession and they now move for summary judgment.

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[5] Id. at ¶ 5.
[6] Id. at ¶¶ 7 and 10.
[7] Id. at ¶ 6.
[8] Id. at ¶ 8.
[9] Id. at ¶ 9.
[10] Id. at ¶ 10.
[11] Id. at ¶¶ 10-11.
[12] Stipulation as to Legal Description, filed June 4, 2012.

WHAT IS THE STANDARD FOR REVIEW ON A MOTION FOR SUMMARY JUDGMENT?

The court must grant summary judgment, as requested by a moving party, if "(1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) the evidence demonstrates that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party opposing the motion."[13]

The court must view all of the evidence, and the reasonable inferences to be drawn therefrom, in a light most favorable to the non-moving party.[14] Furthermore, the court must not lose sight of the fact that all evidence must be construed in favor of the nonmoving party, including all inferences which can be drawn from the underlying facts contained in affidavits, depositions, etc.[15]

Determination of the materiality of facts is discussed in *Anderson v. Liberty-Lobby Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211:

> "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment."[16]

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[13] Civ. R. 56(C); *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267; *Davis v. Loopco Indus., Inc.* (1993), 66 Ohio St.3d 64, 65-66, 609 N.E.2d 144.

[14] *Engel v. Corrigan* (1983), 12 Ohio App.3d 34, 35, 465 N.E.2d 932; *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12-13, 467 N.E.2d 1378; *Welco Indus. Inc. v. Applied Cas.* (1993), 67 Ohio St.3d 344, 356, 617 N.E.2d 1129; *Willis v. Frank Hoover Supply* (1986), 26 Ohio St.3d 186, 188, 497 N.E.2d 1118; *Williams v. First United Church of Christ* (1974), 37 Ohio St.2d 150, 152, 309 N.E.2d 924.

[15] *Hannah v. Dayton Power & Light Co.* (1998), 82 Ohio St.3d 482, 485, 696 N.E.2d 1044, citing *Turner v. Turner* (1993), 67 Ohio St.3d 337, 341, 617 N.E.2d 1123.

[16] *Anderson v. Liberty-Lobby Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211.

Whether a genuine issue exists meanwhile is answered by the following inquiry: Does the evidence present "a sufficient disagreement to require submission to a jury" or is it "so one-sided that the party must prevail as a matter of law[?]"[17] "The inquiry performed is the threshold inquiry of determining whether there is the need for a trial–whether, in other words, there are any genuine factual issues that can properly be resolved only by a finder of fact because they may reasonably be resolved in favor of either party."[18]

The burden is on the moving party to show that no genuine issue exists as to any material fact, and that the moving party is entitled to judgment as a matter of law.[19] This burden requires the moving party to "specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond."[20]

A party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims.[21] The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case.[22] Rather, the moving party must be able to specifically point to some evidence of

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[17] Id. at 251-52, 106, S.Ct. at 2512, 91 L.Ed.2d at 214.
[18] Id. at 250, 106 S.Ct. at 2511, 91 L.Ed.2d at 213.
[19] *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3fd 157, 161, 553 N.E.2d 597; *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46.
[20] *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 526 N.E.2d 798, syllabus.
[21] *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264; *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429, 674 N.E.2d 1164.
[22] Id.

the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims.[23]

If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied.[24] However, if the moving party satisfies this burden, then the nonmoving party has a "reciprocal burden" to set forth specific facts, beyond the allegations and denials in his pleadings, demonstrating that a "triable issue of fact" remains in the case.[25] The duty of a party resisting a motion for summary judgment is more than that of resisting the allegations in the motion.[26] Instead, this burden requires the nonmoving party to "produce evidence on any issue for which that (the nonmoving) party bears the burden of production at trial."[27]

The nonmovant must present documentary evidence of specific facts showing that there is a genuine issue for trial and may not rely on the pleadings or unsupported allegations.[28] Opposing affidavits, as well as supporting affidavits, must be based on personal knowledge, must set forth facts as would be admissible into evidence, and must show affirmatively that the affiant is competent to testify on the matters stated therein.[29]

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[23] Id.
[24] Id.
[25] Id.
[26] *Baughn v. Reynoldsburg* (1992), 78 Ohio App.3d 561, 563, 605 N.E.2d 478.
[27] *Wing v. Anchor Media Ltd. Of Texas* (1991), 59 Ohio St.3d 108, 570 N.E.2d 1095, paragraph three of the syllabus; *Welco Indus., Inc. v. Applied Companies* (1993), 67 Ohio St.3d 344, 346, 617 N.E.2d 1129; *Gockel v. Ebel* (1994), 98 Ohio App.3d 281, 292, 648 N.E.2d 539.
[28] *Shaw v. J. Pollock & Co.* (1992), 82 Ohio App.3d 656, 659, 612 N.E.2d 1295.
[29] Civ.R.56(E); *Carlton v. Davisson* (1995), 104 Ohio App.3d 636, 646, 662 N.E.2d 1112; *Smith v. A-Best Products Co.* (Feb. 20, 1996), 4th Dist. No 94 CA 2309, unreported.

"Personal knowledge" is defined as "knowledge of the truth in regard to a particular fact or allegation, which is original and does not depend on information or hearsay."[30]

Accordingly, affidavits which merely set forth legal conclusions or opinions without stating supporting facts are insufficient to meet the requirements of Civ.R.56(E), which sets forth the types of evidence which may be considered in support of or in opposition to a summary judgment motion.[31]

Under Civ.R.56(C), the only evidence which may be considered when ruling on a motion for summary judgment are "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action." These evidentiary restrictions exist with respect to materials which are submitted both in support of and in opposition to a motion for summary judgment.

Where the copy of a document falls outside the rule, the correct method for introducing such items is to incorporate them by reference into a properly framed affidavit.[32] Thus, Civil Rule 56(E) also states that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith."

Because summary judgment is a procedural device designed to terminate litigation where there is nothing to try, it must be awarded with caution, and doubts must

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[30] *Carlton v. Davisson*, 104 Ohio App.3d at 646, 662 N.E.2d at 1119; *Brannon v. Rinzler* (1991), 77 Ohio App.3d 749, 756, 603 N.E.2d 1049.
[31] *Stamper v. Middletown Hosp. Assn.* (1989), 65 Ohio App.3d 65, 69, 582 N.E.2d 1040.
[32] *Martin v. Central Ohio Transit Auth.* (1990), 70 Ohio App.3d 83, 89, 590 N.E.2d 411; *Biskupich v. Westbay Manor Nursing Home* (1986), 33 Ohio App.3d 220, 222, 515 N.E.2d 632.

be resolved in favor of the nonmoving party.[33] Summary judgment is not appropriate where the facts are subject to reasonable dispute when viewed in a light favorable to the nonmoving party.[34]

However, the summary judgment procedure is appropriate where a nonmoving party fails to respond with evidence supporting his claim(s). While a summary judgment must be awarded with caution, and while a court in reviewing a summary judgment motion may not substitute its own judgment for the trier of fact in weighing the value of evidence, a claim to survive a summary judgment motion must be more than merely colorable.[35]

In deciding a summary judgment motion, the court may, even if summary judgment is not appropriate upon the whole case, or for all the relief demanded, and a trial is necessary, grant a partial summary judgment, such that a trial will remain necessary as to the remaining controverted facts.[36]

LEGAL ANALYSIS

"To acquire title by adverse possession, a party must prove, by clear and convincing evidence, exclusive possession and open, notorious, continuous, and adverse use for a period of twenty-one years."[37] "The burden of establishing the

[33] *Davis v. Loopco Indus., Inc.*, 66 Ohio St.3d at 66, 609 N.E.2d at 145.
[34] *Mers v. Dispatch Printing Co.* (1985), 19 Ohio St.3d 100, 105-06, 483 N.E.2d 150.
[35] *Wing v. Anchor Media Ltd. Of Texas*, 59 Ohio St.3d at 111, 570 N.E.2d at 1099.
[36] Civ.R.56(D); *Holeski v. Lawrence* (1993), 85 Ohio App.3d 824, 834, 621 N.E.2d 802.
[37] *Grace v. Koch* (1998), 81 Ohio St.3d 577, 692 N.E.2d 1009, syllabus.

elements necessary to acquire title by adverse possession rests heavily upon the person claiming such ownership."[38]

" 'The possession necessary is that * * * shown by overt acts of an unequivocal character which clearly indicate an assertion of ownership of the premises to the exclusion of the rights of the real owner.' "[39] " 'Actions of the claimant referable to the ownership claimed are required in order to prove the essential element of actual possession in such cases, such as building on the premises or fencing them to define the limits of the claim and to warn the true owner of the necessity for him to take protective measures.' "[40]

"Periods of adverse possession by successive owners of property in privity may be added together to total the 21–year period required to secure ownership of real property by adverse possession."[41]

In *Huber v. Cardiff*, 186 Ohio App.3d 384, 928 N.E.2d 742, 2009-Ohio-3433 (Ohio App. 2nd Dist., 2009), the Second District Court of Appeals stated:

> "It has been held that 'when a party erects a fence and treats the land on one side of the fence as his own, there is generally little question that possession is exclusive and use of the land is open, notorious and adverse to the interests of the record owner.' *Glaser v. Bayliff* (Jan. 29, 1999), Miami App. No. 98CA34, 1999 WL 34709, *3, citing *Rader v. Brock* (Oct. 13, 1997), Preble App. No. CA 97–03–007, 1997 WL 632843, at 3.
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> In *Evanich v. Bridge,* 119 Ohio St.3d 260, 2008-Ohio-3820, 893 N.E.2d 481, the Ohio Supreme Court held that title may be acquired through adverse possession irrespective of any

[38] *Bonham v. Hamilton* (Jan. 29, 2007), 12th Dist. No. CA2006-02-030, 2007-Ohio-349, ¶ 11, citing *Vaughn v. Johnston* (March 7, 2005), 12th Dist. No. CA2004-06-009, 2005-Ohio-942, ¶ 9.
[39] *Diefenthaler v. Schuffnecker,* 190 Ohio App.3d 509, 942 N.E.2d 1137, 2010-Ohio-5380, ¶ 28 (Ohio App. 6th Dist., 2010), quoting *Suever v. Kinstle* (Nov. 29, 1989), 3d Dist. No. 1–88–24, 1989 WL 145169, *3, quoting *Clark v. Potter* (1876), 32 Ohio St. 49, 62, citing *Gill v. Fletcher* (1906), 74 Ohio St. 295, 78 N.E. 433.
[40] Id.
[41] Id. at ¶ 29, citing *Zipf v. Dalgarn* (1926), 114 Ohio St. 291, 151 N.E. 174, paragraph two of the syllabus.

> question of motive or of mistake in adversely possessing the property. The court held that it is the visible and adverse possession, with an intent to possess, that constitutes its adverse character and not the remote motives or belief of the possessor.
>
> The ultimate test for adverse possession is the exercise of dominion over land consistent with actions that a true owner would take. Evidence of *use* is admissible because it is ordinarily an indication of *possession*. It is *possession* that is the ultimate fact to be ascertained. Exclusive dominion over land is the essence of possession, and it can exist in unused land if others have been excluded therefrom. A fence is the usual means relied upon to exclude strangers and establish the dominion and control characteristic of ownership. *Wood v. Nelson* (1961), 57 Wash.2d 539, 540, 358 P.2d 312."[42]

The affidavit of plaintiff James Ferguson establishes that his father had exclusive possession of the disputed property from approximately 1941 until 1968 and that his father's use of the property was open, notorious, continuous, and adverse during that time period. The property was used originally for cattle grazing and hunting and has continued to be used for hunting and other general purposes. James Ferguson has maintained that same exclusive, open, notorious, continuous, and adverse use of the property since 1968. The fence which encloses the disputed property along with the property owned by the Fergusons via deed was maintained by Frank Ferguson during his entire ownership of the property and has been continually maintained by James Ferguson since 1968. "No trespassing" signs have also been present throughout the property throughout the ownership period.

The court finds that there is no factual dispute that the plaintiffs have demonstrated by clear and convincing evidence exclusive possession of the disputed property and open, notorious, continuous, and adverse use of the property for a period

[42] *Huber*, supra, at ¶¶ 10-12.

of seventy-one years between both Frank and James Ferguson, with the exclusive possession and open, notorious, continuous, and adverse use by plaintiff James Ferguson alone continuing for the past forty-four years.

"The general rule is that adverse possession does not apply against the state."[43] Furthermore, " '[t]he modern trend in Ohio is that adverse possession cannot be applied against the state and its political subdivisions.' "[44] "The sovereign is said to hold the property in trust for the public, which should not suffer should the sovereign's negligence or inattention expose the property to a claim of adverse possession."[45]

In *Bonham v. Hamilton* (Jan. 29, 2007), 12th Dist. No. CA2006-02-030, 2007-Ohio-349, the plaintiffs purportedly acquired the disputed tract of land in 1948 and the city of Hamilton also acquired title to the tract in 1963 via deed.[46] The plaintiffs brought an action to quiet title pursuant to adverse possession. The appellate court noted that there are only two exceptions to the general rule that adverse possession is not to apply to political subdivisions of the state: (1) erection of large and valuable structures on the disputed land and (2) an adjoining landowner fencing in a portion of a municipal roadway that has not been open for public use.[47] Due to the fact that those two situations did not apply to the facts of the case in *Bonham*, the court concluded that the plaintiff could not pursue their claim for adverse possession against the city.[48] The court noted that "* * * limiting adverse possession of sovereign lands is practical and reasonable where the sovereign cannot be expected to employ 'the same active

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[43] *Houck v. Bd. of Park Commrs. of the Huron Cty. Park Dist.* (2007), 116 Ohio St.3d 148, 876 N.E.2d 1210, 2007-Ohio-5586, ¶ 18, citing, *Haynes v. Jones* (1915), 91 Ohio State 197, 110 N.E. 469, syllabus.
[44] *Bonham*, supra, at ¶ 12.
[45] Id., citing, *Nusekabel v. Cincinnati Pub. School Emp. Credit Union*, 125 Ohio App.3d 427, 434-3, 708 N.E.2d 1015 (Ohio App. 1st Dist., 1997).
[46] Id. at ¶¶ 2-4.
[47] Id. at ¶¶ 14-16, citing *Heddelston v. Hendricks* (1895), 52 Ohio St. 460; and, R.C. 2305.05.
[48] Id. at ¶ 18.

vigilance * * * as is known to characterize that of a private person, always jealous of his rights and prompt to repel any invasion of them.' "[49]

However, an important distinction between the present case and the cases found by this court that have somewhat similar facts, including the *Bonham* case discussed above, is that the Fergusons' twenty-one year period of adverse possession was completed *prior* to the purchase of the disputed land by the municipality.

" 'In the case of adverse possession, property is not taken. Rather, once the statutory period enunciated in R.C. 2305.04 has expired, the former titleholder has lost his claim of ownership and the adverse possessor is thereafter maintaining its possession, not taking property.'"[50] Put another way, "[w]hen adverse possession is continued for a period of greater than 21 years, the rights of the record property owner are cut off, and those rights are vested in the adverse possessor. * * * When this occurs, the title of the record property owner is destroyed, and title is vested in the adverse possessor, as a perfect and indefeasible fee."[51]

Even if this court were only to consider the use of the land by James Ferguson and not "tack on" the years of use by his father, title of the subject property vested in James Ferguson prior to the township's purchase of the property. James Ferguson's exclusive possession and open, notorious, continuous, and adverse use of the property began in 1968. Therefore, title to this property vested in him in 1989.[52] The township did not purchase the property from United Venture Group until 1995.

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[49] Id., quoting *Heddelston* at 465.
[50] *Rader v. Brock* (Oct. 13, 1997), 12th Dist. No. CA97-03-007, 1997 WL 632843, *2, quoting *State ex rel. A.A.A. Inv. v. City of Columbus* (1985), 17 Ohio St.3d 151, 152, 478 N.E.2d 773.
[51] *Judd v. Jackson* (Dec. 1, 2003), 12th Dist. No. CA2002-11-291, 2003-Ohio-6383, ¶ 13, citing 2 Ohio Jurisprudence 3d (1998) 535, Adverse Possession, Section 113.
[52] See, *Judd* at ¶ 14.

Unlike most of the other cases examining the issue of adverse possession of municipal property, this case does not involve an attempted taking by a citizen of property owned by the municipality. Instead, the plaintiff is merely asserting his vested title in the property, which he acquired prior to the property being owned by the township. The general philosophy that "the sovereign cannot be expected to employ the same active vigilance as is known to characterize that of a private person" in protection against encroachments on its property is not applicable here. The adverse possession of the disputed property was exclusive, open and continuous by James Ferguson since 1968 and was apparent when the township purchased the property in 1995 by way of the fence surrounding the subject property. While the sovereign cannot be expected to employ the same vigilance in patrolling its land for encroachments, it can be expected to employ the same vigilance in executing a purchase of property that would be associated with any other purchaser.

In the recent case of *Rising v. Litchfield Board of Township Trustees* (May 21, 2012), 9th Dist. No. 11CA0079-M, 2012-Ohio-2239, the Ninth District Court of Appeals examined an issue similar to that in the case at bar. In *Rising*, the court found that an issue of fact existed because the plaintiff could establish that the prescriptive easement in the subject driveway vested prior to the township's purchase of the property if he could establish all the elements required to "tack on" adverse uses.[53] While the township argued that it was entitled to summary judgment because a prescriptive easement cannot vest against land owned by a municipality, the appellate court noted that "[t]his argument would only be relevant if Rising's prescriptive easement vested

[53] *Rising* at ¶ 6.

some time after [the township] purchased the property in 1999."[54] The court concluded that "if Rising's prescriptive easement vested prior to 1999, [the township] would have taken title subject to such easement."[55]

Here, title to the subject property vested in James Ferguson in 1989, six years prior to the township's purchase of the property. Therefore, the court finds that the plaintiff's claim of adverse possession under the particular facts of this case is not contrary to Ohio law. The court finds that there are no genuine issues of material fact and that the plaintiffs are entitled to judgment as a matter of law.

CONCLUSION

The plaintiffs' motion for summary judgment is well-taken and is hereby granted in its entirety.

IT IS SO ORDERED.

DATED:_____ _____
Judge Jerry R. McBride

[54] Id. at ¶ 9.
[55] Id.

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile/E-Mail/Regular U.S. Mail this 22nd day of June 2012 to all counsel of record and unrepresented parties.

_____
Administrative Assistant to Judge McBride