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2014 IL App (5th) 130346-U

NO. 5-13-0346

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE  
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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JOHN FINLEY and KATHLEEN FINLEY,	)	Appeal from the
	)	Circuit Court of
Plaintiffs-Appellees,	)	Madison County.
	)	
v.	)	No. 07-CH-518
	)	
JAMES MARLEN, <i>et al.</i> ,	)	Honorable
	)	Stephen A. Stobbs,
Defendants-Appellants.	)	Judge, presiding.

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JUSTICE SCHWARM delivered the judgment of the court.  
Presiding Justice Welch and Justice Goldenhersh concurred in the judgment.

**ORDER**

¶ 1 *Held:* The circuit court's judgment is affirmed, as its finding that the plaintiff established title to a strip of the defendant's property pursuant to adverse possession was not against the manifest weight of the evidence, and it properly denied the defendant's petition to substitute judge and/or change venue.

¶ 2 John and Kathleen Finley, plaintiffs, own a tract of land adjacent to a tract owned by James and JoAnn Marlen, defendants. The Finleys brought a complaint to quiet title, asserting an adverse possession claim on a strip of land located between the two properties. Prior to trial, the Marlens filed a petition to substitute all Madison County judges and/or to change venue, claiming that no associate judge in Madison County could

preside over the case without an appearance of impropriety. The circuit court denied the Marlens' petition and, after a bench trial, found that the Finleys had established title to the strip of land via adverse possession. The Marlens appeal both the denial of their petition and the verdict. For the reasons that follow, we affirm the circuit court's judgment.

¶ 3

### BACKGROUND

¶ 4 Prior to 1974, both the Finleys' tract of land and the Marlens' tract of land were owned by Edmund and Matilda Bugger. In 1974, the Buggers transferred the Marlen tract to the Marlens' predecessor in title. Within this tract of land is a 40-foot-wide strip of land containing a grape arbor. This tract of land was transferred to Pete Bostrom in 1987. In 1982, the Buggers entered into a contract for deed with the Finleys for the other parcel of land. This parcel of land abutted the grape arbor. It is undisputed that the Finleys used the grape arbor throughout the years since they acquired the property, and neither Bostrom nor any of his predecessors in title prevented the Finleys from using the grape arbor. In 2006, Bostrom executed a deed in trust transferring his parcel to the Marlens. The Marlens asserted control over the grape arbor shortly thereafter, and the Finleys ultimately sought to quiet title to the grape arbor via adverse possession.

¶ 5 At trial, the Marlens disputed whether or not the Finleys' use of the grape arbor was adverse or hostile, as is required for adverse possession. According to the Marlens, the Finleys had permission from Bostrom to enter the property and, therefore, could not have used the property in a hostile manner. Bostrom testified that, from 1987 to 2006, Clarence and Steve Mersinger, the father and brother of Kathleen Mersinger, farmed his tract of land. During that time, the Finleys assisted on the Bostrom farm, entering it to

clear the field of limbs and debris. The Finleys' children also played upon Bostrom's property, and Bostrom and Clarence Mersinger filled in a well on the tract to ensure that the children were not harmed. The Finleys also burned brush and limbs on Bostrom's tract of land, took walks across Bostrom's tract of land, and chased trespassers off Bostrom's land. John Finley testified that Bostrom had "conveyed it was okay for us to go [onto Bostrom's property]."

¶ 6 John Finley also testified that, when he viewed his tract of land in 1982 prior to purchasing it, Bugger indicated that the grape arbor was included in his tract. Since purchasing his tract in 1982, he and his wife have picked and used the grapes from the grape arbor. No one had disputed their ownership of the grape arbor prior to the Marlens' 2006 claims. Bostrom testified that he did nothing to exercise control over the grape arbor. Further, he asserted that he "never had an objection to" the Finleys walking on his land. So long as the Finleys did not gather arrowheads or run motorized vehicles on his property, he "never had it in [his] mind that there would be a problem to say, no, you can't go out there."

¶ 7 Prior to trial, on January 4, 2012, Circuit Judge Barbara Crowder recused herself from this case because the Finleys' attorney, Lawrence O. Taliana, is her husband. Within a day, the Marlens filed a "Petition for Substitution and Change of Venue (Transfer to Another County)." The Marlens in their petition asserted that "the finder of fact in this case will be an associate judge, who is appointed by the circuit judges, and given that Plaintiffs' attorney's wife is a circuit judge, the potential bias for an associate judge to be concerned with reappointment when potentially ruling against Plaintiffs'

counsel creates the potential for bias requiring disqualification." Though the Marlens did not (and do not now) allege that any actual bias or prejudice exists with any Madison County judge, they argued that "the prospect for an associate judge to consider the possible consequences (of not being reappointed) when potentially ruling against Plaintiffs' attorney creates an inherent conflict of interest requiring recusal of all associate Madison County judges and transfer to another county." On February 6, 2012, the trial court held a hearing on this petition. At that hearing, Judge Stobbs denied the Marlens' motion but reminded them that they could still seek substitution as of right.

¶ 8 On March 13, 2013, the trial court entered judgment on behalf of the Finleys, finding that they had proven all of the elements of adverse possession and awarding them the grape arbor. On April 4, 2013, the Marlens filed a motion to reconsider, and on June 6, 2013, the Marlens amended this motion. On June 12, 2013, the trial court denied the Marlens' motion to reconsider.

¶ 9

#### ANALYSIS

¶ 10 On appeal, the Marlens argue that, due to Bostrom's implicit permission to use his land, the Finleys cannot show that their use of the grape arbor was hostile. Further, they argue, the trial court should have granted substitution of judge or a change of venue because the relationship between Judge Crowder and Taliana creates an inherent conflict of interest and/or an appearance of impropriety regarding all of the associate judges of Madison County. In furtherance of this second issue, they argue in their reply brief that Judge Stobbs should have moved *sua sponte* to have another judge hear this motion and

that the hardship to Taliana's practice by such a ruling is outweighed by their right to a fair trial.

¶ 11 To establish title to land under the 20-year adverse possession doctrine incorporated in section 13-101 of the Code of Civil Procedure (735 ILCS 5/13-101 (West 2006)), a party must prove that his or her possession of that land was: (1) continuous, (2) hostile or adverse, (3) actual, (4) open, notorious, and exclusive, and (5) under claim of title inconsistent with that of the true owner, for a period of 20 years. *Joiner v. Janssen*, 85 Ill. 2d 74, 81 (1981). All five of these elements must be shown to have existed concurrently for the full 20-year period before the doctrine will apply. *Id.*

¶ 12 As the doctrine of adverse possession can divest a previous titleholder of ownership, the standard for application is rigorous. All presumptions are in favor of the title owner. *Joiner*, 85 Ill. 2d at 81. In order to rebut the presumption in favor of the titleholder, the claimant must prove each element of adverse possession by clear and unequivocal evidence. *Knauf v. Ryan*, 338 Ill. App. 3d 265, 269 (2003). We will not disturb the circuit court's findings unless they are against the manifest weight of the evidence. *Id.* A finding is against the manifest weight of the evidence only when the opposite conclusion is apparent or when findings appear to be unreasonable, arbitrary, or not based on evidence. *Kunkel v. P.K. Dependable Construction, LLC*, 387 Ill. App. 3d 1153, 1157 (2009). As the trier of fact, the trial judge was in a superior position to judge the credibility of the witnesses and determine the weight to be given to their testimony. *Id.* at 1158.

¶ 13 In this case, the Marlens only dispute whether the Finleys' possession of the grape arbor was hostile. The "hostility" element of adverse possession "does not imply actual ill will, but only the assertion of ownership incompatible with that of the true owner and all others." *Joiner*, 85 Ill. 2d at 81. "[O]ccupancy to a visible and ascertained boundary for the statutory period is deemed the controlling feature in determining hostility in mistaken boundary-line cases." *Id.* at 83 (quoting 3 Am. Jur. 2d *Adverse Possession* § 39, at 125-26 (1962)). "Although evidence of the use and control over land is the typical manner by which a claimant establishes title by adverse possession, it must be clearly shown that the use of the land was adverse and not merely permissive, since permissive use of land, no matter how long, can never ripen into an adverse possessory right." *Mann v. La Salle National Bank*, 205 Ill. App. 3d 304, 309-10 (1990).

¶ 14 In essence, the Marlens argue that Bostrom, the former owner of their tract of land, gave the Finleys implicit permission to enter onto and use that tract for many of the years between 1987 and 2006. Because of this implicit permission, the Marlens claim that the Finleys' use of the grape arbor was merely permissive and cannot ripen into an adverse possessory right. The Marlens point to the walks taken by the Finleys on the tract, the Finley children playing on the land, Bostrom filling in a well so the land would be safer for the children playing, the Finleys chasing off trespassers on Bostrom's land, and Bostrom indicating that it was okay for the Finleys to enter his land in the manner that they had. To the Marlens, this implicit permission to use the rest of Bostrom's land likewise applies to the grape arbor and therefore defeats the Finleys' claim. They analogize this situation to a rental tenant of a home fencing in the house and yard and

then, 20 years later, claiming the entire property through adverse possession because of the fence. Just as the tenant's permissive use of the land would defeat that claim, the Marlens state, so does Bostrom's permission defeat the Finleys' claim.

¶ 15 However, in making this analogy, the Marlens miss the key distinguishing factor between the tenant analogy and this case: Bostrom never exercised control over the grape arbor. Bostrom testified that he did not treat the grape arbor as his own, nor did he tell the Finleys what they could or could not do with it. Bostrom may have permitted walking on his property, but he neither permitted nor controlled the Finleys' use of the grape arbor. As he stated, "it wasn't in my mind to even think about [the grape arbor] in any way, shape or form." Unlike the owner in the tenant analogy, Bostrom never tried to control the grape arbor.

¶ 16 By contrast, the Finleys believed they owned the grape arbor. Bugger's actions at the time he sold them their tract implied that the grape arbor was included. The Finleys then used the grape arbor as their own for more than 30 years. Based on this evidence, it was not against the manifest weight of the evidence for the trial court to find that the Finleys had acquired the grape arbor via adverse possession. We now must consider whether Judge Stobbs should have granted the Marlens' petition for substitution and change of venue.

¶ 17 "[A] petition seeking a change of venue in a civil case from a single judge need not specify the grounds of prejudice against that judge. However, since there is no statutory authority for a change of venue in civil cases on a general allegation of prejudice naming more than one judge, the petition may not properly do so." *Rosewood*

*Corp. v. Transamerica Insurance Co.*, 57 Ill. 2d 247, 253 (1974). Consequently, "our supreme court has held that where a petition seeks a change of venue from more than one judge, it must contain specific allegations to support the charges of prejudice against the additional judges named and may be granted only in the sound discretion of the court following a hearing." *Faris v. Faris*, 142 Ill. App. 3d 987, 996 (1986) (citing *Rosewood Corp.*, 57 Ill. 2d at 254). Further, "in cases where a petition has sought a change of venue from all judges of a circuit or county, the Illinois decisions have held that the petition must be factual and may be granted in the sound discretion of the trial court." *Id.* (citing *Chicago Park District v. Lyons*, 39 Ill. 2d 584, 591 (1968); *Gouker v. Winnebago County Board of Supervisors*, 37 Ill. 2d 473, 475 (1967); *Corbetta Construction Co. v. Lake County Public Building Comm'n*, 64 Ill. App. 3d 313, 326 (1978); *Lencioni v. Brill*, 50 Ill. App. 3d 802, 804-05 (1977); and *Keehner v. A.E. Staley Manufacturing Co.*, 50 Ill. App. 3d 258, 260-61 (1977)).

¶ 18 "Every application for substitution of judge for cause shall be made by petition, setting forth the specific cause for substitution and praying a substitution of judge. The petition shall be verified by the affidavit of the applicant. \*\*\* Upon the filing of a petition for substitution of judge for cause, a hearing to determine whether the cause exists shall be conducted as soon as possible by a judge other than the judge named in the petition." 735 ILCS 5/2-1001(a)(3)(ii), (iii) (West 2012). "Every application for a change of venue by a party or his or her attorney shall be by petition, verified by the affidavit of the applicant. The petition shall set forth the facts upon which the petitioner bases his or her belief of prejudice of the inhabitants of the county or the undue influence

of the adverse party over their minds, and must be supported by the affidavits of at least 2 other reputable persons residing in the county." 735 ILCS 5/2-1001.5(b) (West 2012).

¶ 19 The Marlens argue that, because the Finleys' attorney is married to Judge Crowder, and Judge Crowder casts a ballot in appointing Madison County associate judges, the potential for prejudice and appearance of impropriety requires that all associate judges be disqualified and/or the case be transferred to another venue. While the Marlens allege no actual bias, they claim that the mere risk of such bias is sufficient to justify disqualification and/or transfer. The Marlens rely upon *Faris v. Faris* in reaching this conclusion. In that case, an attorney husband who had recently been appointed as an associate judge in the eighteenth judicial circuit sought to modify support payments under a divorce decree. *Faris v. Faris*, 142 Ill. App. 3d 987, 990 (1986). His wife sought a change of venue from all the judges of the eighteenth judicial circuit because "the judges of the circuit would be prejudiced because of husband's professional and personal acquaintances with the judges as a practicing lawyer and because of husband's recent appointment as an associate judge of the circuit." *Id.* at 991. The appellate court affirmed the trial court's denial of this request, noting that "[t]he associate judges of the circuit \*\*\* do not vote on the appointment of an associate judge." *Id.* at 997. The Marlens understand this statement to indicate that if the judges had been able to vote on the husband's appointment, the court would have granted the wife's petition. They argue that because Judge Crowder votes on the associate judges' appointments, the trial court should have granted the Marlens' petition.

¶ 20 In making this statement, the Marlens overlook that this passage is but one of many facts considered by the *Faris* court in determining whether or not to grant the wife's petition. The *Faris* court noted that, beyond the wife's general prejudice claims, "[n]o more specific allegations of prejudice were alleged." *Faris*, 142 Ill. App. 3d at 997. Further, "[t]he mere fact that husband was an attorney who practiced before the judges \*\*\* and who, based on general allegations, had a personal and professional relationship with the judges of the circuit, is insufficient to establish prejudice. *More specific facts* showing the alleged relationship with the judges is required before we can find the trial judge abused his discretion in denying the motion." (Emphasis added.) *Id.* In this case, the Marlens did not allege more specific facts showing prejudice in Judge Stobbs or any other associate judge. In fact, the Marlens have specifically stated they "did not allege that any actual bias or prejudice exists with any Madison County associate judge." *Faris* makes clear that a litigant *must* allege specific bias or prejudice in order to seek a transfer of venue or disqualification of all associate judges for a circuit. The Marlens have simply failed to show a specific bias.

¶ 21 In their reply brief, the Marlens also state that Judge Stobbs had an independent obligation to ensure that he did not preside over the Marlens' petition because Judge Stobbs had a potential conflict of interest. Therefore, Judge Stobbs should have assigned the case to a judge without such potential conflict *sua sponte*. "While it is generally true that points not argued in the initial brief are deemed waived, it is our prerogative to consider points made for the first time in reply briefs." *Joyce v. Explosives Technologies International, Inc.*, 253 Ill. App. 3d 613, 616 (1993).

¶ 22 The Marlens never requested that a judge other than Judge Stobbs hear their petition for substitution and change of venue even though Judge Stobbs explicitly told them that they could still use their substitution of judge as of right. Had the Marlens sought to use their substitution as of right immediately after Judge Stobbs denied their petition for substitution and change of venue, Judge Stobbs would have been required to grant it. However, because they requested a different judge for cause, Judge Stobbs was under no obligation to grant their request. In *In re Estate of Wilson*, the Supreme Court of Illinois held that "a party's right to have a petition for substitution heard by another judge is not automatic. [Citations.] Principles of liberal construction do not excuse the obligation of parties to express statutory requirements." *In re Estate of Wilson*, 238 Ill. 2d 519, 553 (2010). Rather, "[t]rial courts are required to refer a petition to another judge for a hearing on whether cause for substitution exists only if the party seeking that relief is able to bring himself or herself within the provisions of the law." *Id.* Section 2-1001(a)(3) of the Code of Civil Procedure (735 ILCS 5/2-1001(a)(3) (West 2012)) gives three requirements for the right to have another judge determine if substitution for cause is warranted: "the request must be made by petition, the petition must set forth the specific cause for substitution, and the petition must be verified by affidavit." *In re Estate of Wilson*, 238 Ill. 2d at 553. Similarly, section 2-1001.5(b) of the Code of Civil Procedure, governing change of venue, states that "[e]very application for a change of venue by a party or his or her attorney shall be by petition, verified by the affidavit of the applicant" which also "must be supported by the affidavits of at least 2 other reputable persons residing in the county." 735 ILCS 5/2-1001.5(b) (West 2012). Given the

similarity of the requirements between section 2-1001 and 2-1001.5, it seems clear that, in order to receive either, the Marlens must have followed the procedural requirements as stated in the Code of Civil Procedure.

¶ 23 The Marlens have met the first requirement of both by filing a petition, as their request came in their "Petition for Substitution and Change of Venue (Transfer to Another County)." However, they have failed to provide any required affidavit. The Marlens have not attached their own affidavit verifying their petition, as required by sections 2-1001 and 2-1001.5. Moreover, they have not attached the affidavits of at least two other reputable persons living in Madison County to support their change of venue request. Given that the Marlens have failed to follow proper procedure for their request, they cannot now insist that a different judge should have ruled upon their petition.

¶ 24 Even if the Marlens had attached affidavits verifying his petition, they would not be entitled to have their petition heard by another judge because their allegations are insufficient on their face to show the requisite bias needed for a substitution for cause or a change of venue. "To meet the statute's threshold requirements, a petition for substitution must allege grounds that, if true, would justify granting substitution for cause." *In re Estate of Wilson*, 238 Ill. 2d at 554. In this case, the Marlens allege that the mere appearance of impropriety is sufficient to prevent any associate judge in Madison County from presiding over this case. However, the Supreme Court of Illinois expressly rejected the appearance of impropriety standard for judicial substitution for cause in favor of an actual prejudice standard. *In re Marriage of O'Brien*, 2011 IL 109039, ¶¶ 31, 43. Without a showing of actual prejudice, the Marlens cannot seek a substitution for cause.

The Marlens have stated repeatedly that they "did not allege that any actual bias or prejudice exists with any Madison County associate judge." The Marlens, by their own admission, cannot make the showing of bias necessary for substitution for cause.

¶ 25 In response to the plaintiffs' assertion that barring Taliana from practicing before any Madison County judge would be highly prejudicial to his practice, the Marlens allege that this hardship "is substantially outweighed by Defendants' right to a fair and impartial trial by a trier of fact free of inherent and/or structural conflicts of interest." If the Marlens were able to show actual prejudice, this allegation would certainly be true. However, the Marlens have not alleged or shown actual prejudice. Given that no bias has been shown, this court will not allow such a result. As such, the trial court properly denied the Marlens' petition.

¶ 26

#### CONCLUSION

¶ 27 For the reasons stated, we affirm the judgment of the circuit court of Madison County.

¶ 28 Affirmed.