NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
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April 21, 2022

LETTER OPINION

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Re: *David Willems, et al. v. James Batcheller, et al.*
Case No. CL-2020-6575

Dear Counsel:

This case is before the Court on the parties' dueling Motions to Reconsider this Court's Letter Opinion of March 6, 2022, and Final Order of March 9, 2022, wherein the Court ruled that the boundary line between their properties is determined to be the

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location of the Defendants' fence separating their land from that of Plaintiffs.[1] This second Letter Opinion addresses the matters of apparent first impression why no follow-on court proceeding is necessary to establish anew the factual finding of the new boundary, and what degree of interference with the fencing of land is required in order to defeat the exclusivity requisite to establish adverse possession.

The Court holds that the Plaintiffs' shed roof eave, to the extent that it overhangs any part of Defendants' fence where such fence extends over onto Plaintiffs' land, does not interrupt the exclusivity or continuity of the fence that Defendants maintained over 15 years so as to break the establishment of adverse possession. When a person is deemed to be in actual possession of the land of another through fencing that shuts out the rightful owner, like is the case by Defendants, action must be taken by such rightful owner against such adverse possessor in a manner that interferes with how the land would be used by an average owner exercising dominion over such terrain in order to disrupt adverse possession. Plaintiffs' shed eave roof, by its height and location, did not disturb or restrict Defendants' normal and average use of the disputed ground.

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[1] This Court's other previous rulings ordering Defendants to take permanent measures to control the bamboo in the area where it is currently planted proximate to Plaintiffs' shed in such a manner that it does not grow under or over ground past the boundary of Defendants' property nor contact the roof of Plaintiffs' shed, even in times of wind, ice or snow, and permanently enjoining Defendants from positioning the spotlight complained of so as to allow it to shine towards Plaintiffs' bedroom windows, and finding that Defendants' Christmas lights affixed to the fence between the properties are not deemed to be a nuisance, have been sufficiently addressed in this Court's Letter Opinion of March 6, 2022, and are therefore not addressed further herein. Of future note to the parties should either continue to maintain bamboo that spreads from their land onto that of another is that on March 22, 2022, the Fairfax County Board of Supervisors enacted an ordinance which will regulate the spread of "running bamboo" between properties beginning January 1, 2023, reference to which may be found here: https://www.fairfaxcounty.gov/boardofsupervisors/sites/boardofsupervisors/files/assets/meeting-materials/2022/board/mar22-revised-board-package.pdf

Consequently, for the reasons as delineated in this and its March 6, 2022, Letter Opinions, the Court's Final Order entered March 9, 2022, is reaffirmed.

BACKGROUND

In 2002, Defendants purchased their home located at 6805 Valley Brook Drive in Fairfax County, Virginia. In 2003, Defendants installed a split rail fence surrounding the Defendants' back and side yards. At that time, the property located on the other side of the fence adjoining Defendants' property, 3503 Thomas Court (currently owned by the Plaintiffs, the Willems), was owned by Mr. and Mrs. Erbenghi. The Defendants had the fence installed where they believe the property boundary existed. The fence is contiguous around the rear yard, with no gaps or open spaces. No portion of the fence has been moved since installation. The base of the Plaintiffs' shed is less than two feet from the fence.

In 2015, Plaintiffs purchased the lot formerly owned by the Erbenghis and bordering that of the Defendants. The Plaintiffs proceeded to repair the roof of a shed on their property within less than 15 years after Defendants installed their fence. The shed eave was extended a number of inches from the original footprint so that in places it overhangs the posts of the Defendants' fence running parallel to the shed roof line.

In 2020, Plaintiffs filed suit to enjoin the growth of the Defendants' bamboo into their property, to alter the directionality of the spotlight pointing in the direction of their bedroom windows, and to remove the fence Defendants installed on Plaintiffs' property and with it the Christmas lights affixed thereto. Defendants responded that Plaintiffs' claims were barred either by the statute of limitations or laches, and also because the

fence is no longer trespassory as the area of its installation had been acquired by adverse possession.

The Court issued its first Letter Opinion on March 6, 2022, largely resolving most of the claims at issue. The Court determined that the Defendants' fence separating the two properties, measured at its base, constituted the new boundary between the parties' lands as established by adverse possession. In the area of the shed, the fence is either directly on the property line or slightly over into Plaintiffs' land. Plaintiffs aver in their Motion to Reconsider that the shed roof eave overhang breaks exclusivity of Defendants' adverse possession established by the fence, and also assert that the Court cannot establish a new property line based on adverse possession being pled as a mere affirmative defense. Defendants maintain that the shed roof eave and fence meet at the property line, and that the Court should not disturb its finding that the entire length of the fence establishes the new boundary between the parties' lands.

ANALYSIS

I. Defendants' Affirmative Defense of Adverse Possession Establishes the New Property Line Between the Parties' Lands Without Need for an Additional Adjudicative Proceeding to Establish Such Fact

For the reasons as stated in this Court's Letter Opinion of March 6, 2022, the Court reiterates that the Supreme Court of Virginia guides that adverse possession can be properly asserted as an affirmative defense by Defendants to Plaintiffs' claim of trespass as to Defendants' fence. *Sutherland v. Gent*, 121 Va. 643, 645 (1917); s*ee Howard v. Ball*, 289 Va. 470, 474 (2015); *see also Smith v. Woodlawn Construction Co.,* 235 Va. 424, 430 (1988). Plaintiffs nevertheless refer the Court to *Ted Lansing Supply v. Royal Alum.,* 221 Va. 1139 (1981), which states "[i]t is firmly established that no court can base

its judgment or decree upon *facts* not alleged or upon a *right* which has not been pleaded and claimed." *Id.* at 1141 (citing *Potts v. Mathieson Alkali Works,* 165 Va. 196, 207 (1935) (emphasis added). Plaintiffs' contention is that Defendants could not establish a new property line via their defense, and had instead to do so by separate claim or counterclaim. In other words, Plaintiffs would at most have this Court apply adverse possession to defeat their trespass claim but not in binding establishment of the boundary between the parties' lands. The focus of the rule as to pleadings addressed in *Ted Lansing Supply* and *Potts* is on the requirement that a claimant in litigation must address sufficient facts and the right claimed with specificity rather than foreclosing claims addressed defensively. In the instant case, Defendants pleaded and claimed their right to land they fenced in their Answer to the Complaint. This is, however, an odd circumstance, where the defense of adverse possession does not merely defeat Plaintiffs' claim that Defendants' fence is trespassory, but necessarily does so by first establishing that the fenced land is no longer the property of Plaintiffs. Such a finding is therefore neither fleeting nor transitory, and also prospective as a matter of litigation procedure.

While the Court recognizes that the Defendants did not seek declaratory relief nor file a counterclaim seeking to establish adverse possession, the precedent and dicta as cited in this Court's Letter Opinion of March 6, 2022, establishes that the Supreme Court of Virginia has not foreclosed the assertion of adverse possession through the alternate vehicle of an affirmative defense. Once adverse possession is established in this case, the holding is binding on the same litigants and those with whom they are in privity in the future.

> Claim preclusion bars successive litigation where (1) there has been a final judgment on the merits, (2) the parties or privies are the same, and (3) the later lawsuit arises from the same conduct, transaction, or occurrence as the earlier lawsuit. *Lee*, 290 Va. at 245-48; *see also* Rule 1:6(a). Simply put, "[t]he law should afford one full, fair hearing relating to a particular problem — but not two." *Funny Guy, LLC v. Lecego, LLC*, 293 Va. 135, 143 (2017) (citation and internal quotation marks omitted).

Alexander v. Cobb, 298 Va. 380, 388 (2020).

The Court's holding as to adverse possession is a judgment determining the new boundary line, not just an idle declaration to be revisited in the future. It would be in derogation of guidance from the Supreme Court of Virginia for the Court to hold that, although the adverse possession claim is established defensively, a secondary suit would nevertheless be requisite again to establish the fact the fence constitutes the property line separating the parties' lands.

II. Plaintiffs Failed to Disrupt the Period Necessary for Defendants to Establish Adverse Possession Product of Fencing Because They Did Not Take Such Action Against the Fenced Property During the Statutory Period That Would Interfere With Defendants' Normal and Average Use of the Disputed Land

The issue of whether the shed roof eave overhanging Defendants' fence disrupts the Defendant's claim of adverse possession is a question without apparent direct applicable Virginia precedent. Adverse possession requires proof by clear and convincing evidence that the possession is actual, hostile or adverse, exclusive, visible or open and notorious, continuous for 15 years, and under a claim of right. *Quatannens v. Tyrell*, 268 Va. 360, 371 (2004).

> No *precise* rule of general application can be laid down . . . acts of dominion over the land must, to be effective as against the true owner, be so open, notorious, and hostile as to put an ordinarily prudent person on notice of the fact that his lands are in the adverse possession of another.

LaDue v. Currell, 201 Va. 200, 207 (1959) (emphasis in original). At a minimum, it is clear from the installation of the fence that the Plaintiffs were on notice that the Defendants exercised continuous dominion over the land on their side of the fence. Both parties filed separate Motions to Reconsider regarding the adversity, continuousness, and the exclusivity of Defendants' fence on Plaintiffs' land, recognizing that Plaintiffs built a shed roof partly overhanging the Defendants fence.

A. Defendants' Construction of a Fence on a Mistaken Boundary Line Was Adverse to Plaintiffs Despite Mutual Mistake, Because Defendants' Exclusive Claim Was to a Visible Line on the Ground

Plaintiffs assert that the roof of their shed partially overhanging the Defendants' fence due to a mistaken boundary line destroyed the adverse claim of right needed for adverse possession claims. It is factually undisputed that Defendants claimed the land in question up to the fence line, and that Plaintiffs or their predecessors in interest did not substantially interfere with such claim during the 15-year period supporting Defendants' adverse possession claim.

> If an intention is manifested to claim title to a visible, fixed, and ascertained boundary line in all events, the possession is hostile for purposes of adverse possession, even if it is erroneously assumed to be the true line and the possession is held and the claim made because of the mistake as to the location of the boundary. In other words, if the claim is to a visible boundary in all events, whether it is the true line or not, the possession is hostile. Thus, if an occupant claims land up to an established and visible line, such as a fence, and although the line as marked by the fence is erroneous in fact as a boundary line, the possession up to the fence is hostile if the occupant believes it to be the true boundary line and intends to hold and claim the land to it.

3 Am. Jur. 2d Adverse Possession § 52 (footnotes omitted). Here, Defendants' initial mistake regarding the boundary line did not negate their adverse possession claim.

> [T]he rule in Virginia, may be taken to be that, where the proof is that the location of the line in question was caused in the first instance by a mistake as to the true boundary, the other facts and circumstances in the case must negative by a preponderance of evidence the inference which will otherwise arise that there was no definite and fixed intention on the part of the possessor to occupy, use and claim as his own the land up to a particular and definite line on the ground. That is to say, on the whole proof a case must be presented in which the preponderance of evidence as to the character of the possession, how held, how evidenced on the ground, how regarded by the adjoining land owner, etc., etc., supplies the proof that the definite and positive intention on the part of the possessor to occupy, use and claim as his own the land up to a particular and definite line *on the ground* existed, coupled with the requisite possession, for the statutory period, in order to ripen title under the statute. Whether the positive and definite intention to claim *as one's own* the land up to a particular and definite line *on the ground* existed, is the practical test in such cases.

Christian v. Bulbeck, 120 Va. 74, 110-111 (1916) (emphasis in original).

The circumstances of the instant case are that, even though the mistake was mutual, Plaintiffs admitted that they were unclear whether the boundary line extended that far prior to constructing the roof of their shed that overhangs Defendant's fence. Therefore, the "character of the possession [of Defendants' fence], how held, how evidenced on the ground, how regarded by the adjoining land owner" clearly outline that Defendants manifested a "definite intention" to claim the portion of the constructed fence on Plaintiffs' property "*as* [their] *own* . . . land up to a particular and definite line *on the ground.*" *Id.* (emphasis in original).

It is important to note that Defendants' possessory rights are to be measured as exercised "on the ground." There is no evidence the roof of Plaintiffs' shed was constructed seeking to interfere with Defendants' use of their fence. Indeed, Ms. Willems indicated she was unsure the fence constituted the correct property line, but nevertheless asked permission of Defendants to add gutters to the roof of her shed that may have

further extended the shed roof eave over the fence line and did not follow through with her plan when Defendants denied her consent to do so.

Additionally, it is the general rule in Virginia that "[u]se and occupation of property, evidenced by fencing the property, constitutes proof of *actual* possession." *Grappo v. Blanks,* 241 Va. 58, 62 (1991) (citing *LaDue*, 201 Va. at 207) (emphasis in original). Defendants' "use of the disputed property was . . . exclusive to the extent that" Defendants' "right to use it was not dependent upon the right of others to do so and the land was not open to public use[.]" *See Levy v. Kurpil*, 168 A.D.2d 881, 883, 564 N.Y.S.2d 556, 557–58 (1990). Therefore, irrespective of the mistaken boundary line, it is clear Defendants formed the necessary intent needed to establish adverse possession of the land enclosed by their fence.

B. Plaintiffs' Shed Roof Eave Did Not Disrupt the Continuity or Exclusivity of Defendants' Adverse Possession

In response to Plaintiffs' assertion that the roof eave overhang of their shed destroyed the continuity and exclusivity required for Defendants to prevail on their adverse possession defense, Defendants dispute that position to be established factually. Defendants maintain that the roof eave of the Plaintiffs' shed and the fence at most "meet at the property line." (Def's. Opp'n and Cross-Mot. to Reconsider, at 3.) Defendants thus concede factually that the roof eave of the Plaintiffs' shed is not across or on Defendants' property line for purposes of any future litigation, for "[n]o litigant . . . will be permitted to approbate and reprobate — to invite error . . . and then to take advantage of the situation created by [their] own wrong." *Cohn v. Knowledge Connections, Inc.,* 266 Va. 362, 367 (2003).

Plaintiffs nevertheless maintain their installation of a new roof on their shed, which appears to overhang part of Defendants' fence, occurred during the 15-year period requisite for adverse possession, and thereby disrupted the exclusivity of Defendants' adverse possession. Plaintiffs aver "the common law regards the fee simple owner of the land as the owner of everything above and below the surface from the sky to the center of the earth," relying on *Clinchfield Corp. v. Compton,* 148 Va. 437, 451 (1927).[2] *Clinchfield* is not factually identical to the instant case. Importantly, that case also makes clear that the above-stated rule cited by Plaintiffs may be outdated, at least in application to water rights:

> It is said that the earlier American cases followed this doctrine and some of them still do, but that the trend of modern opinion is in favor of the "reasonable use" rule which has come to be called the American rule. 27 R.C.L., page 1171, section 91. The "reasonable use" rule does not forbid the use of the percolating water for all purposes properly connected with the use, enjoyment and development of the land itself, but it does forbid maliciously cutting it off, its unnecessary waste, or withdrawal for sale or distribution for uses not connected with the beneficial enjoyment or ownership of the land from which it is taken.

Id., at 452. Furthermore, *Clinchfield* addresses the possessory rights of an owner of land rather than the limiting principle of what it takes to break the exclusivity required to maintain adverse possession.

As for continuity of possession, the element will be satisfied if the claimant actually possessed the land for the statutory period of 15 years. *Quatannens*, 268 Va. at 375. Defendants' fence was constructed in 2003 and therefore has been on Plaintiffs' property

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[2] The actual text from the opinion stating this principle is as follows: "The common law *regarded* the fee simple owner of the land as the owner of everything above and below the surface from the sky to the center of the earth[.]" *Clinchfield Corp.,* 148 Va. at 451 (emphasis added).

for more than 15 years, irrespective even of whether the Plaintiff built a roof over the fence intending to disrupt the continuity requirement. Instead, the fact that the fence existed for a period of more than 15 years is sufficient to satisfy this element in the adverse possession analysis. *See Id.*

Nevertheless, the question remains whether the element of exclusivity is equally sustained. In Virginia, to prove exclusive possession, a claimant must "shut out the rightful owner." *Quatannens*, 268 Va. at 375. In *Quatannens*, a room built on the disputed land "clearly" shut out the owners whose land was subject to adverse possession. *Id.* Here, Plaintiffs introduced Exhibit 14 at trial, which includes, among others two photographs, indicating the roof eave of their shed partially overhangs Defendants' fence along the length of the roof line. However, there was no testimony that Plaintiffs extended the shed roof eave to interrupt Defendants' adverse possession of any portion of Plaintiffs' land. Conversely, there was testimony that on one or more occasions Defendants objected to Plaintiff Ms. Willems climbing onto their side of the property to trim back bamboo. Although the Defendants never objected to the overhanging roof, there was testimony that Plaintiffs asked and were denied permission by Defendants to extend that roof further to add a gutter. In making such a request, Plaintiffs acknowledged the view that Defendants owned a possessory interest in the fence and the property it enclosed.

Plaintiffs' use of the area above the fence through extension of the shed roof eave, *which did not interfere* with Defendants' use of the fenced land during the statutory period for adverse possession, did not thereby render Defendants' possession nonexclusive. *See Robinson v. Robinson*, 34 A.D.3d 975, 977, 825 N.Y.S.2d 277, 280 (2006). Like continuity, exclusivity requires "only that the land be used for the statutory period *as an*

average owner of similar property would use it." *See Vezey v. Green*, 35 P.3d 14, 22 (Alaska 2001) (emphasis added). There was no evidence adduced that Plaintiffs' shed roof eave impeded Defendants' normal use of the fence and any land from which Plaintiffs were shut out.

Defendants did use their fence and whatever minute portion of it sits on land previously owned by Plaintiffs in the shed area as an "average owner" would, while the Plaintiffs did not interfere with such use of the ground in question. When a person is deemed to be in actual possession of the land of another through fencing, like is the case by Defendants, in order to disrupt adverse possession in such a scenario, action must be taken against such circumstance in a manner that interferes with how the land would be used by an average owner or possessor. Wherefore, to the extent the Defendants' fence protrudes onto property of the Plaintiffs parallel to the roof line of Plaintiffs' shed, establishment of the fence base as the border between the parties' properties was not defeated even if the shed roof eave overhangs any portion of such fence. It is plain from the evidence that the Defendants' fence clearly shut out the rightful owners of the land, the Plaintiffs, making the adverse possession by the fencing of land, exclusive. *Quatannens*, 268 Va. at 375.

CONCLUSION

The Court has considered the parties' dueling Motions to Reconsider this Court's Letter Opinion of March 6, 2022, and Final Order of March 9, 2022, wherein the Court ruled on the parties' varied disputes, including that the boundary line between their properties is determined to be the location of the Defendants' fence separating their land

from that of Plaintiffs. This second Letter Opinion addresses the matters of apparent first impression why no follow-on court proceeding is necessary to establish anew the factual finding of the new boundary, and what degree of interference with the fencing of land is required in order to defeat the exclusivity requisite to establish adverse possession.

The Court holds that the Plaintiffs' shed roof eave, to the extent that it overhangs any part of Defendants' fence where such fence extends over onto Plaintiffs' land, does not interrupt the exclusivity or continuity of the fence that Defendants maintained over 15 years so as to break the establishment of adverse possession. When a person is deemed to be in actual possession of the land of another through fencing that shuts out the rightful owner, like is the case by Defendants, action must be taken by such rightful owner against such adverse possessor in a manner that interferes with how the land would be used by an average owner exercising dominion over such terrain in order to disrupt adverse possession. Plaintiffs' shed roof eave, by its height and location, did not disturb or restrict Defendants' normal and average use of the disputed ground.

Consequently, for the reasons as delineated in this and its March 6, 2022, Letter Opinions, the Court's Final Order entered March 9, 2022, is reaffirmed.

The Court shall enter a separate order incorporating its ruling herein, lifting the Suspending Order entered March 29, 2022, and until such time, this cause continues and is not final.

Sincerely,

[redacted]

David Bernhard
Judge, Fairfax Circuit Court

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