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Re: Schaller v. The State of Delaware, Department of Natural Resources and Environmental Control, Division of Fish and Wildlife
C.A. No. 970-K
Date Submitted: August 16, 2006

Dear Counsel:

Plaintiffs Gene H. Schaller and Thelma S. Schaller ("the Schallers") hold record title to a 45-acre, wooded tract near Petersburg, in Kent County, Delaware. Defendant The State of Delaware, by the Department of Natural Resources and Environmental Control and its Division of Fish and Wildlife (the "State"), claims title to a small (approximately one-quarter acre) portion of that tract (the "Parcel")

by adverse possession. This letter opinion sets forth the Court's post-trial findings of fact and conclusions of law.[1]

In September 1954, the United States, through the Department of Agriculture ("USDA"), conveyed a collection of parcels in excess of 2,600 acres to the State. The lands are now part of the Norman G. Wilder Wildlife Area (the "Wildlife Area"). The USDA had these lands, which it had acquired in the 1930s, surveyed in 1940; the survey included the Parcel as part of the lands owned by the United States.[2] In this respect, the USDA survey was in error.[3] In 1963, Mr. Schaller's parents acquired two tracts totaling approximately 155 acres. One of those tracts includes the lands in dispute. Over time, the Schallers have acquired title to both tracts.[4]

The Parcel is roughly triangular in shape, approximately 60 feet at its widest with 406 feet of frontage along the north side of Fire Tower Road. The balance of

[1] On August 16, 2006, with counsel, the Court viewed the Parcel and its environs.
[2] Def.'s Ex. ("DX") 3.
[3] The State, in this action, initially claimed record title to the Parcel. It abandoned that position shortly before trial. Thus, it is undisputed that the Schallers are the record title holders of the Parcel.
[4] *See* Pl.'s Ex. ("PX") 1; PX 2.

the Schallers' lands lie to the north and east of the Parcel. On the opposite side of Fire Tower Road are lands owned by the State as part of the Wildlife Area.

The State points to two ways in which it has laid claim to the Parcel: (i) pipes set in the ground as part of the 1940 USDA survey which are said to mark the boundary between the State's lands and the Schaller's other lands and (ii) the State's posting of the Parcel.

First, when the USDA survey was performed, pipes were set.[5] Two pipes were set, as the result of the USDA survey, along the boundary line claimed by the State: one at the intersection of the boundary line with the line of adjacent owners along the northwesterly side of the Parcel (USDA Cap 206) and one set several feet from the public road along the claimed boundary, a short distance from where it intersects with Fire Tower Road (USDA Cap 207). A large stone and a metal stake also mark the point in the line of adjacent lands (also marked by USDA Cap 206).[6] That point, however, serves another purpose: it is the starting point for

[5] *E.g.*, DX 7. It is reasonable to infer that the pipes were set at approximately the same time as the USDA survey was performed; the pipes have notations, although perhaps not easy to read, that indicate a USDA survey.
[6] DX 5; DX 6.

the line dividing the lands of adjoining property owners on the northwesterly side of the Schallers' lands (including the Parcel). That line separates lands now or formerly of Hudson from the lands now or formerly of Holland. Those lands are privately held and, thus, there is no apparent purpose for a government marker to be there, unless it is marking a line or corner of a public tract. The pipe along the claimed boundary line (USDA Cap 207) would serve no purpose except for marking a public boundary line. That pipe, which, as with the other pipe, comes approximately four to six inches out of the ground, although not difficult to find if one knows where to look for it, is not readily visible unless one comes directly upon it, especially when ground vegetation is lush.

Second, the State posted signs along the boundary between the Parcel and the rest of the Schallers' lands.[7] The number of signs and when they were posted is not altogether clear. It is reasonable to conclude that the State placed between two and five signs, three inches by five inches, on trees along the line. Trees "grew around" some of the signs. This suggests that the signs have been in place for some time. The signs, face away from Fire Tower Road (*i.e.*, toward the

[7] Mr. Schaller did not see the signs until 1999 or 2000.

balance of the Schallers' lands), and are not readily visible, unless one happens to approach them closely. The small three-by-five signs bear the notation of the Game and Fish Commission.[8] That Commission was eliminated (and its functions assigned to the Department of Natural Resources and Environmental Control) in 1970.[9] No one knows for certain when the small signs were posted. It is possible that the signs were used even after the reorganization that did away with the commission form of government. However, the better inference is that the signs were posted either during the time of the Game and Fish Commission, (*i.e.*, before 1970) or shortly thereafter. Most important, it is very reasonable to conclude that the signs were posted well before 1985.

The State has also posted safety zone signs at the edge of the Parcel (along Fire Tower Road) informing the public that no hunting or shooting into the posted area was permitted. They were not posted until after the current dispute surfaced in 1999.[10]

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[8] They read: "Boundary Marker/Public Hunting Area Delaware Game & Fish Comm."
[9] *See* 57 DEL. LAWS c. 302 § 1 (1970); 29 *Del. C.* § 8005.
[10] The State does not rely upon that signage.

The Parcel has plenty—more than 400 feet—of road frontage, but the State did not post signs claiming ownership along Fire Tower Road, where the signage would have been highly visible.[11] It had a perfectly good reason for that: posting as State-owned would have signified that it was available for public hunting, but any hunter entering the Parcel would quickly (in less than twenty yards) have entered private property. Accordingly, the State was legitimately concerned that posting signs along the road would inevitably lead to hunters trespassing on the balance of the Schallers' lands. Although the State's reason for not posting along the road is understandable, it resulted in a much less visible form of demonstrating control and providing notice of its claim to the Parcel.

The State manages the Parcel as part of a wildlife preserve that also accommodates other activities, such as horseback riding, hiking, and the like. The Parcel, however, is small and isolated, across the road from other public lands, and, thus, it has had little or no use by the public, including State employees. There is no evidence of the "State's actions" conducted on the parcel.[12]

[11] The State's holdings on the opposite side of Fire Tower Road are conspicuously posted.

[12] The Schallers suggest that the State did nothing with the lands. Use of undeveloped lands for a wildlife preserve is not "doing nothing" with the lands. The difficulty, in this context, is that

Although in the absence of specific statutory authorization the lands of the State may not be lost through adverse possession,[13] the State may acquire title by adverse possession.[14] A party asserting an adverse possession claim must establish that he "has openly, exclusively, notoriously, continuously, and adversely possessed the [d]isputed [l]ands for a period of twenty years."[15] The State's challenge in this case is to demonstrate that it "intend[ed] to hold the land[s] for [it]self, and that intention [was] made manifest by [its] actions."[16] The adverse possessor's actions must be sufficient to put the rightful and diligent owner on notice of his claim.[17] "It is sometimes difficult to establish ownership by right of

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the absence of observable activity substantially impairs an effort to demonstrate the type of control and, thus, notice necessary to assert an adverse possession claim. Another common means of exercising control over a tract is fencing, but fencing is inconsistent with the purpose of a wildlife management area because it would impede the natural movement of wildlife.

[13] *Comm'rs of Lewes v. Blankenberg*, 161 A.2d 424, 426 (Del. Ch. 1960).

[14] *See, e.g.*, *Maryland v. West Virginia*, 217 U.S. 577 (1910); *Roche v. Town of Fairfield*, 442 A.2d 911, 916-17 (Conn. 1982).

[15] *Acierno v. Goldstein*, 2004 WL 1488673, at *6 (Del. Ch. June 29, 2004); *see* 10 *Del. C.* § 7901.

[16] *Marvel v. Barley Mill Road Homes, Inc.*, 104 A.2d 908, 911 (Del. Ch. 1954).

[17] *See id.* ("The owner is, of course, chargeable with knowledge of what is openly done on his land and therefore calculated to attract attention.").

possession of a property such as [woodlands], where there are no improvements on the land, no occupancy by the claimants, and no tilling of the soil."[18]

The State's actions with respect to the Parcel fall short of providing sufficient notice (with which the Schallers and their predecessors may be charged) to satisfy the open and notorious prong of the adverse possession standard.[19] Two pipes have marked the disputed boundary for more than 60 years. One is in the Schallers' northwesterly line at a corner for other private lands. That may be a somewhat unusual location for a governmental survey marker, but it does not evidence, by itself, a claim to the Schallers' lands. The other pipe, in the brush of the woodland, is not readily discernable. It is along the boundary line and, unless it marks a government boundary line, could serve no useful purpose, but it would require more than a reasonable inspection of one's lands for an owner to have found it.

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[18] *Id.* at 912. *See also Edwards v. Estate of Muller*, 1994 WL 728791, at *6 (Del. Ch. Dec. 13, 1994) (reflecting on similar difficulties with marshland.)

[19] Because some of the evidence of the marking of the Wildlife Area's boundary traces back to conduct of the USDA in 1940, the State's claim could, at least in theory, be proven by reference to any continuous period of 20 years since then.

The other evidence of the State's claim to possession for more than 20 years involves the small signs—not visible from (or facing) the public road—nailed on a few trees along the internal boundary line mistakenly established by the USDA survey. A reasonable and prudent owner of woodland cannot be expected to have stumbled upon these signs which might have placed him on notice. In short, an adverse possessor may not rely upon evidence that the owner would discern the claim only if he were lucky. Without luck, the Schallers' (or their predecessors) could not have learned of the State's claim through reasonable attention to their property. The State did not prove that it acted in an "open or notorious" fashion and, accordingly, has failed to establish its claim.[20]

This case, however, has another aspect. In 1984, Mr. Schaller arranged for a survey of the lands.[21] That survey showed an overlap; the surveyor retained by the Schallers was aware of the USDA survey, reviewed it, and found the area of overlap. The Parcel constitutes the area of overlap between the Schallers' record

[20] Thus, the Court need not consider whether the State satisfied the other elements of an adverse possession claim.
[21] DX 4 (August 11, 1984). Thus, the survey was performed more than 20 years before the Schallers filed this action on January 6, 2005. Mr. Schaller (who, at the time owned the tract with his brother) was concerned about an encroachment.

deed and the USDA survey. The Schallers' survey located the iron pipe (USDA Cap 206) along the Schallers' northwesterly boundary line.

The State argues that the Schallers, armed with the survey, could have inspected their woods; they would have found the pipes and, most likely, one or more of the small signs marking the boundary; that would have been sufficient to put them on notice. The Schallers contend that a survey that may be viewed as putting them on notice of a boundary dispute does not impose any special duty on the part of a property owner to search for evidence of another's claim.[22] Adverse possession claims are measured "in the field." Depriving an owner of his property simply because another asserts a claim against it is not to be done lightly. The open and notorious requirement is not subject to an exception in instances where the landowner has otherwise merely learned of a title dispute based on overlapping deeds or plots. It is not the existence of a competing claim; it is the hostile, open

[22] The Schallers explained their failure to pursue, in 1984, the overlap issued identified by the surveyor. Mr. Schaller worked with a Delaware Department of Transportation right-of-way agent who reviewed his agency's maps (which, it turns out, were accurate) and those maps showed the Schallers as the owners of the Parcel. That one agency of the State had accurate maps is not of substantive evidentiary value here; this is offered merely to explain why Mr. Schaller did not react more vigorously after learning of the overlap. In short, he concluded that it was not a real threat to his ownership interest.

possession of the property that necessarily is the focus.[23] The putative adverse possessor must show that its conduct satisfies each of the elements required to establish an adverse possession claim.[24] The State has not done so, and, thus, its claim must be rejected.

Accordingly, judgment will be entered in favor of the Schallers and against the State on the State's adverse possession claim. With the State's earlier concession that the Schallers are the record title owners, it follows that, as between the State and the Schallers, title to the Parcel must be quieted in the Schallers.[25]

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[23] The survey work raises another factual issue. The surveyor, who understandably has no present recollection of his conversations in 1984 with Mr. Schaller, recited that his normal practice would have been to point out the field evidence, such as the pipes, to his client when he uncovered a potential title dispute. Although his plot (DX 4) did not show the pipe along the State's claimed boundary line (USDA Cap 207), it did show the one pipe (USDA Cap 206) at the corner for adjacent private lands along the Schallers' northwesterly boundary. The surveyor was aware of the markers along the State's claimed boundary line, but the better factual conclusion, and the one that the Court draws, based in part on Mr. Schaller's credible testimony, is that Mr. Schaller did not learn of the pipe along the boundary line until 1999 or 2000. The pipe along the northwesterly line (USDA Cap 206), while perhaps raising questions about its location, does not provide the unambiguous notice necessary to support a claim of "open and notorious" possession. In addition, it should be noted that Mr. Schaller did not see the USDA survey, which, of course, depicts the location of USDA Cap 207, until 1999.

[24] *See Acierno*, 2004 WL 1488673, at *6.

[25] The State has relied upon the doctrine of laches. It argues that the Schallers have long known of the State's claims (at least since 1984) and that their delay somehow precludes them from claiming title. With the State's abandonment before trial of its claim to record title, only the adverse possession claim remains. The role of a laches defense in this context is not at all apparent. It seems that the State may be seeking to assert an equitable defense as the basis for an

Counsel are requested to confer and to submit a form of order to implement this letter opinion.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K

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affirmative claim. Putting aside this fundamental obstacle, the State has not proved that the Schallers should be charged with laches. "A claim is barred by the doctrine of laches if the plaintiff, having learned of his claim, unreasonably delayed in asserting his rights and the defendants were prejudiced by the plaintiffs' failure to assert their claim in a timely manner." *Bakerman v. Sidney Frank Importing Co., Inc.*, 2006 WL 2987020, at *20 (Del. Ch. Oct. 10, 2006). The State has demonstrated no adverse consequences flowing from any delay on the part of the Schallers.