J-A16035-14

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

VIRGINIA M. ZIEGLAR AND LAWRENCE B. GOLDER, Her Husband, Appellants v. GEORGE F. REUSS AND MARTHA H. REUSS, His Wife, Appellees	:	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1588 WDA 2013

Appeal from the Judgment entered on November 4, 2013
in the Court of Common Pleas of Westmoreland County,
Civil Division, No. 6529 of 2099

BEFORE: DONOHUE, OTT and MUSMANNO, JJ.

MEMORANDUM BY MUSMANNO, J.: FILED JUNE 20, 2014

In this real property dispute, Virginia M. Zieglar ("Virginia") and her husband, Lawrence B. Golder ("Lawrence") (collectively referred to as "Plaintiffs"), appeal from the Judgment[1] entered against them and in favor of George F. Reuss ("George") and his wife, Martha H. Reuss ("Martha") (collectively referred to as "Defendants"). We affirm.

[1] Plaintiffs purport to appeal from the trial court's Order dated September 3, 2013, which denied their Post-Trial Motion. An appeal from an order denying post-trial motions is interlocutory and not appealable. ***See, e.g., Sagamore Estates Prop. Owners Ass'n v. Sklar***, 81 A.3d 981, 983 n.3 (Pa. Super. 2013). However, Plaintiffs filed a praecipe to enter judgment on November 4, 2013, and the prothonotary entered Judgment against them. The entry of judgment perfects our jurisdiction, and we may proceed to consider the appeal on its merits. ***See id.***; ***see also*** Pa.R.A.P. 905(a)(5). We have corrected the caption to reflect that Plaintiffs' appeal lies from the November 4, 2013 Judgment.

The trial court set forth the relevant facts underlying this appeal in its May 15, 2013 Decision and Order (hereinafter "Trial Court Opinion"), including a description of the property in question (hereinafter referred to as "the Disputed Property").[2] ***See*** Trial Court Opinion, 5/15/13, at 1-3. We adopt the court's recitation herein by reference. ***See id.***

In July 2009, Plaintiffs filed a Complaint, and, subsequently, an Amended Complaint in November 2011, claiming ownership of the Disputed Property by adverse possession and prescriptive easement. In February 2012, Defendants filed an Answer, which included a Counterclaim in Ejectment against Plaintiffs, requesting that the trial court order Plaintiffs to remove the deck and shed that encroached upon the 15-foot alleyway portion of the Disputed Property.

The matter proceeded to a non-jury trial, after which the trial court entered an Order on May 15, 2013, ruling that Plaintiffs do not have any

[2] The .60-acre Disputed Property consists of an area that is largely comprised of wooded land, which is located to the east of Plaintiffs' parcel ("Lot 5"). Running through this wooded area is a dirt pathway (hereinafter "the pathway" or "the roadway"), access to which is restricted by a locked gate. The Disputed Property is additionally comprised of a small strip of cleared land abutting the northern boundary of Lot 5, and a cleared, unpaved, 15-foot wide alleyway (hereinafter referred to as "the 15-foot alleyway") that abuts the eastern boundary of Lot 5. ***See*** Plaintiffs' Amended Complaint, 11/7/11, Exhibit D. We have included a copy of Plaintiffs' Exhibit D with the Trial Court Opinion that we have attached to this Memorandum. Plaintiffs had encroached upon the Disputed Property by constructing a wooden deck and maintaining a storage shed on the 15-foot alleyway. ***See id.***

interest in the Disputed Property by way of either adverse possession or prescriptive easement. The trial court's Order further stated as follows:

> Virginia [] and Lawrence [] have a personal license to use the portion of the [D]isputed [P]roperty in the manner it had been used for years by Virginia and Lawrence, as well as their predecessors in title. This license is explicitly personal to Virginia [] and Lawrence [] only. It is further Ordered that the license granted cannot be revoked by George and Martha during their period of ownership. However, when the land is conveyed by George or Martha, or the survivor of them, for valuable consideration, to a bona fide purchaser, the license will terminate. It is further Ordered that the area of the license is confined to the pathway[,] as it now exists[,] and the area of [the Disputed P]roperty that has been cleared and used by Virginia and Lawrence to the east and north of Lot 5[,] and includes the improvements located thereon.

Order, 5/15/13.

In July 2013, Plaintiffs filed a Motion for Post-Trial Relief. On September 3, 2013, the trial court entered an Order (1) denying Plaintiffs' Post-Trial Motion; (2) denying Defendants' Counterclaim;[3] and (3) restating the trial court's prior ruling in the May 5, 2013 Order, which granted Plaintiffs a personal license to continue their encroachment upon the 15-foot alleyway. Plaintiffs filed a Notice of Appeal from the September 3, 2013 Order, and the prothonotary subsequently entered Judgment against Plaintiffs.

Plaintiffs present the following issues for our review:

> I. Whether it was [] err[or] for the Trial Court to hold that [Plaintiffs] did not satisfy the requirements of adverse possession and prescriptive easement with regard to

[3] Defendants have not appealed from the denial of their Counterclaim.

> the [D]isputed [P]roperty[,] including the [15-foot] alleyway?
>
> II. Whether the Trial Court erred as a matter of law in its definition of prescriptive easement in requiring both adverse and hostile use?
>
> III. Whether the Trial Court erred in failing to resolve the issues raised in [Defendants'] Counterclaim regarding the [15-foot] alleyway and the applicable law as being different and separate from the other property in dispute in finding that there was not adverse possession or prescriptive easement with regard to the [15-foot] alleyway?

Brief for Plaintiffs at 6.

Plaintiffs first argue that the trial court erred in holding that they had failed to establish the requirements of adverse possession or prescriptive easement of the Disputed Property, including the 15-foot alleyway. ***Id.*** at 18-22. Plaintiffs challenge the trial court's ruling that the Disputed Property constituted "woodlands" for the purpose of adverse possession/easement by prescription. ***Id.*** at 18-19; ***see also*** Trial Court Opinion, 5/15/13, at 5-11. Plaintiffs aver that "the disputed area is cleared … and [] visible from the street." Brief for Plaintiffs at 18. Plaintiffs further point out that they cleared, maintained and mowed the 15-foot alleyway, and that the deck attached to Plaintiffs' residence, and the storage shed, are situated on the 15-foot alleyway. ***Id.*** at 18, 19.

Our standard of review is as follows:

> When reviewing the results of a non-jury trial, we give great deference to the factual findings of the trial court. We must determine whether the trial court's verdict is supported by

> competent evidence in the record and is free from legal error. For discretionary questions, we review for an abuse of that discretion. For pure questions of law, our review is *de novo*.

Recreation Land Corp. v. Hartzfeld, 947 A.2d 771, 774 (Pa. Super. 2008) (citations omitted).

The trial court addressed Plaintiffs' first issue in its Opinion, thoroughly set forth its rationale and discussed the applicable law, and correctly determined that Plaintiffs had failed to establish adverse possession or a prescriptive easement of the Disputed Property. ***See*** Trial Court Opinion, 5/15/13, at 3-14.[4] Our review discloses that the trial court's cogent analysis is supported by the law and competent evidence of record. We discern no error of law or abuse of discretion in the trial court's ruling, and we therefore incorporate the trial court's analysis herein by reference. ***See id.***

Plaintiffs also argue, in their first issue, that

> [t]he Trial Court [] erred in holding that adverse possession or prescriptive easement could not be established due to permissive use granted by [George] to a former tenant of Lot [] 5[, Eugene Zieglar ("Eugene")[5]]. First, the permissive use involved only a permissive license between Eugene [] and [George, *i.e.*, for use of the pathway,] and could not transfer to [Plaintiffs]. Moreover, Eugene [] did not have any property

[4] The trial court also properly concluded that, under the doctrine of equitable estoppel, Plaintiffs had a personal license to use and encroach upon the 15-foot alleyway, and to continue to use (1) the area of the Disputed Property that has been cleared and maintained by Plaintiffs; and (2) the pathway. ***See*** Trial Court Opinion, 5/15/13, at 14-15.

[5] Eugene is the son of Katherine Zieglar ("Katherine"), and brother of Virginia. Katherine is the original titleholder of Lot 5, and predecessor-in-title to Plaintiffs.

> interest or right to bind either the original property owner or [Plaintiffs].

Brief for Plaintiffs at 16 (footnote added). We conclude that this claim lacks merit, as the trial court expressly found that George had not only given Eugene permission to use the pathway, but had also given permission to Katherine. ***See*** Trial Court Opinion, 5/15/13, at 3, 5. The trial court additionally found that George had given a key to the gate located at the beginning of the pathway to both Eugene and Katherine, and that both of them had used the pathway. ***See id.*** Accordingly, Plaintiffs' first issue lacks merit.

Plaintiffs next argue that the trial court erred as a matter of law in determining that a claimant is required to prove both adverse *and hostile* use to establish a prescriptive easement, and assert that they satisfied their burden by proving that their use of the Disputed Property was adverse. Brief for Plaintiffs at 16, 22-23; ***see also*** Trial Court Opinion, 5/15/13, at 13-14 (wherein the trial court judge stated, *inter alia*, that "I agree that the term adverse subsumes the term hostility. In order to be adverse[,] the asserted possession must by its very nature be hostile."). This claim does not entitle Plaintiffs to relief. Even assuming, *arguendo*, that hostile use is not a separate, necessary requirement, the trial court properly determined that Plaintiffs had failed to establish that their use of the Disputed Property was adverse, and, therefore, Plaintiffs failed to prove a *prima facie* claim.

Finally, Plaintiffs assert that the trial court committed reversible error, and violated Pa.R.C.P. 1038(b),[6] by failing to resolve the issues raised in Defendants' Counterclaim in Ejectment, and in Plaintiffs' Answer and New Matter filed in response thereto. Brief for Plaintiffs at 24-25. We disagree.

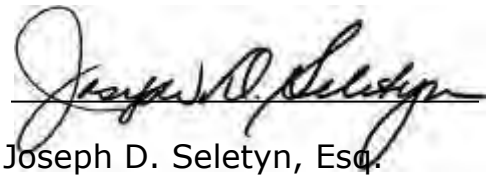
Initially, we observe that Plaintiffs fail to acknowledge that the trial court expressly denied Defendants' Counterclaim in Ejectment that requested the trial court to order Plaintiffs to remove the wooden deck and storage shed that encroached upon the 15-foot alleyway. ***See*** Order, 9/3/13. Moreover, we note our agreement with Defendants' assertion on appeal that "[i]t seems that what is really at issue [in Plaintiffs' instant claim] is [their] dissatisfaction that the Trial Court awarded them a personal license to use the [15-foot] alley[]way[,] rather than ownership by adverse possession." Brief for Defendants at 10. Indeed, the remainder of Plaintiffs' argument in connection with this claim urges that this panel hold that the trial court erred in failing to award Plaintiffs title to the 15-foot alleyway under the doctrines of adverse possession or prescriptive easement. ***See id.*** at 25-27. We have already addressed this claim above, and concluded that

[6] Rule 1038(b) provides, in relevant part, that in a non-jury trial, "[t]he decision of the trial judge may consist only of general findings as to all parties but shall dispose of all claims for relief." Pa.R.C.P. 1038(b).

it lacks merit, and there is thus no reason to address it again here.[7]

Judgment affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/20/2014

[7] We observe that, in its Opinion, the trial court acknowledged and discussed Plaintiffs' use of the 15-foot alleyway, and their construction and maintenance of improvements situated thereon. ***See*** Trial Court Opinion, 5/15/13, at 4, 9-10, 15. Accordingly, contrary to Plaintiffs' argument on appeal, the trial court considered the 15-foot alleyway in determining that Plaintiffs had failed to meet the requirements of adverse possession or prescriptive easement regarding all of the Disputed Property, including the 15-foot alleyway.

J-A16035/14

IN THE COURT OF COMMON PLEAS OF WESTMORELAND COUNTY, PENNSYLVANIA

CIVIL DIVISION-LAW

VIRGINIA M. ZIEGLAR and
LAWRENCE B. GOLDER, her
Husband,

PLAINTIFFS/COUNTERCLAIM
DEFENDANTS,

VS. NO. 6529 OF 2009

GEORGE F. REUSS and
MARTHA H. REUSS,
his wife,

DEFENDANTS/COUNTERCLAIM
PLAINTIFFS.

DECISION AND ORDER

This matter is before me for disposition as the result of a non-jury trial. Having heard such oral testimony as the parties chose to introduce and examined the pertinent exhibits and reviewed testimony and heard oral arguments and considered written submissions, I make the following findings based upon the credible evidence and the reasonable inferences to be drawn there from. I make these findings by a preponderance of the evidence.

Virginia M. Zieglar (hereinafter "Virginia") and Lawrence B. Golder (hereinafter "Lawrence") are the plaintiffs. They purchased 2400 Scotch Hill Road in Irwin, Pennsylvania, in April of 1987. This property is known as Lot 5 in the plan of lots surveyed for Eva Reuss. The Plan of Survey made for Mrs. Eva Reuss that was recorded

on August 25, 1927 is a plan of 5 lots and a parcel containing an unknown amount of acreage, but which is described by metes and bounds in Joint Exhibit 1, and shows a 15 foot alley running along the eastern boundary of Lot No. 5

The defendants, George F. Reuss (hereinafter "George") and Martha H. Reuss, (hereinafter "Martha"), received their property in August of 1976. Their property is adjacent and north and east of the plaintiffs' property. This property contains 6.7709 acres. This conveyance excepted and reserved from the conveyance the above described 5 Lots and two 15 foot alleys contained in the Eva Reuss Plan. Thus, the alley to the East of Lot No. 5 remained in the Eva Reuss Plan of Lots and is not part of the property conveyed.

The description of the property that is allegedly used by the plaintiffs and which is in dispute is described by metes and bounds in a joint exhibit that has been admitted into evidence by the parties. The disputed property contains .60 acres. As stated previously, the entire property behind and to the east of Lot No. 5 contains 6.7709 acres and includes this .60 acres.

Katherine and Henry Zielgar, the mother and father of Virginia, owned Lots 4 and 5 before Virginia and Lawrence purchased their property, i.e., Lot 5. Katherine and Henry had used the property in dispute from 1949 until August of 1984, when Virginia and Lawrence moved in to the dwelling on Lot 5. As noted, Virginia and Lawrence later purchased Lot 5 in 1987. The shed in question was on the property when Lawrence and Virginia purchased the property. The deck was not added to the house until around 1999. At the time Virginia and Lawrence moved into the residence on Lot 5, there was a

pathway east of lot 5 on the property of Reuss, access to which was restricted by a locked gate.

The previously mentioned locked gate was placed at the beginning of a pathway through the .60 acre in the decade of the 1970's by Eugene Zeiglar, the brother of Virginia. Eugene had received permission to place the gate at that location by George. This gate and pathway existed by virtue of permission that had been granted by George to Eugene Zieglar, the brother of plaintiff, Virginia Zieglar. A key to this gate was provided to both Eugene and Katherine Zieglar. On March 12, 1981, Eugene Zieglar memorialized the permission he was granted by George Reuss, when he wrote a note stating "I have installed a gate + fence on your property with your permission. The reason for this was to keep people from coming on to my property through yours. I allso (sic) installed a lock on the gate and a key is available to you at any time." This note was signed by Eugene Zieglar. Katherine and Eugene had a key to the gate. George and Martha did not request use of a key to the gate at that time. Eugene lived on ~~the~~ Lot 5 from 1972 until 1982. The use by Virginia and Lawrence was permitted to continue until March 6, 2009, at which time George placed a different lock on the gate and denied Virginia and Lawrence access.

It has been held by our Supreme Court that if there was a prior permissive use by a predecessor in title, it will continue unless and until the new user has asserted a hostile right. Margoline v. Holefelder, 218 A.2d 227 (Pa. 1966). If possession was at its inception permissive, the 21 year period to allow an adverse possession claim will not begin to run until there has been some subsequent act of disseisin or an open disavowal of the true owner's title. Disseisin means that there has been an exercise of such powers and

privileges of ownership as to keep out or displace the person to whom the privileges of ownership belong. Furthermore, a use based upon permission cannot ripen into a prescriptive right unless the owner of the land is given clear notice that the character of the use has changed from a permissive use to an adverse use and the adverse use then continues for the full prescriptive period of 21 years. Waltimyer v. Smith, 556 A.2d 912 (Pa. Super. 1989).

From August 1984 until March of 2009, the defendants, George and Martha, did not have a key to the subject gate and did not use the disputed property. Virginia and Lawrence had cleared and used a portion of the property owned by George and Martha east of Lot 5 and north of Lots 4 and 5. The area that was cleared was only a portion of the .60 acres previously described as the disputed property. Virginia and Lawrence maintained portions of the disputed property that had been cleared. They also controlled who was permitted to use the property. During this period, Lawrence stored materials on the portions of the disputed property that had been cleared. Also, at various times, Virginia and Lawrence and their family had planted a garden, cut and grew trees, and grew flowers and bushes on the portions of the disputed property that had been cleared. Over the course of time, the plaintiffs used the portions of the disputed property that had been cleared for recreational, social and family uses, including things such as a swing set, picnic table and bon fires. They would cut and trim the grass on portions of the disputed property, and particularly the roadway between the gate and their sheds. Overtime this roadway was modified by the plaintiffs. They had also cut out a parking space for a neighbor to park and erected a light pole. There has also been testimony that the gate to

the roadway and portions of the disputed area that were cleared surrounding the residence to the north and east of Lot 5 were visible from the public roadway.

There has been no evidence presented that the use made of the property by Virginia and Lawrence was any different than the use made by the prior owners of Lot 5. In fact, Lawrence specifically testified that he and Virginia continue to use the property in the same manner as it was used when Virginia's mother, Katherine, owned Lot 5. (TT p. 16, October 11, 2012) There is no evidence that Virginia and Lawrence gave notice, by their words or use of the property, to George and Martha that they intended that their continued use was anything other than by the same permission that had previously been granted to Katherine and Eugene. Therefore, the possession and use of the disputed property was not adverse and thus the plaintiffs did not acquire an interest in the disputed property by way of adverse possession or prescription.

As an additional defense, the defendants maintain that the disputed area is woodlands and therefore there could be no adverse possession or easement by prescription. In support of that position, they cite the case of Piston v. Hughes, 62 A.3rd 440 (Pa. Super. 2013). In the Piston case, the trial court entered a judgment against the Appellants, Mr. and Mrs. Hughes, and in favor of the Pistons. The Appellants claimed that they had acquired certain land now owned by the Pistons by adverse possession. The trial court found that the Appellants had not acquired the land by adverse possession. One of the first issues that the Superior Court had to decide is whether the evidence at trial proved that the tract was woodlands. In analyzing the Piston case, it is important to remember that appellate review in a non-jury case is limited to a determination of whether the findings of the trial court are supported by competent evidence and whether

the trial court committed error in the application of law. Findings of the trial judge in a non-jury case must be given the same weight and effect on appeal as a verdict of a jury and will not be disturbed on appeal absent error of law or abuse of discretion. When ~~this~~ an appellate Court reviews the findings of the trial judge, the evidence is viewed in the light most favorable to the victorious party below and all evidence and proper inferences favorable to that party must be taken as true and all unfavorable inferences rejected. Shaffer v. O'Toole, 964 A.2d 420, 422 (Pa.Super.2009) (quoting Hart v. Arnold, 884 A.2d 316, 330–331 (Pa.Super.2005) (citations omitted)). The [trial] court's findings are especially binding on appeal, where they are based upon the credibility of the witnesses, unless it appears that the court abused its discretion or that the court's findings lack evidentiary support or that the court capriciously disbelieved the evidence. Conclusions of law, however, are not binding on an appellate court, whose duty it is to determine whether there was a proper application of law to fact by the [trial] court. With regard to such matters, the scope of review is plenary as it is with any review of questions of law. *Id.* at 422–23 (quoting *Christian v. Yanoviak*, 945 A.2d 220, 224–25 (Pa.Super.2008) (some internal citations and quotation marks omitted)); accord *Zuk v. Zuk*, 55 A.3d 102, 106 (Pa.Super.2012).

The Superior Court in Piston points out that our case law has developed a rather strict standard for proving adverse possession of woodland. It has been held that a person establishes actual possession of woodland by residence or cultivation of a part of the tract of land to which the woodland belongs. In the Piston case, the trial court found that the 75 by 90 foot parcel in question was "woodland". In doing so the court relied upon the expert witness testifying on behalf of the land owner. The trial court statement of what

constitutes woodlands was that "woodlands encompasses property that contains not only various sizes of trees and standing timber, but also brush, swampland, open areas within the woodlands and/or along its outer perimeter[,] as well as creeks, ponds, lakes, valleys, various rock formations, etc." In Piston it was undisputed that the 75 by 90 foot unimproved vacant lot is within the tree line of the larger 43 acre tract of land purchased by the Pistons and would be grown up brush if it would not have been mowed by the Appellants. The expert in Piston testified that he saw no evidence or indication that this area had been cultivated for commercial or personal use and gave the expert opinion that the area in question was "woodlands". The trial court further found that the Appellants at no time erected and/or maintained a residence and/or cultivated the subject parcel except for the de minimis small garden planted on a few feet of the subject parcel prior to 2004. The trial court relied heavily on the expert, who testified that he saw no evidence or indication that this area had been cultivated for commercial or personal use. He further stated that he observed no evidence of a residence or dwelling on the property. He also explained that the openings and places where the trees had thinned are considered "part of the forested landscape." Even though the Appellants testified that they had mowed, used and maintained the disputed parcel, the trial court credited the testimony of the expert regarding whether the parcel had been cultivated. The Superior Court believed that this credibility finding was binding upon them.

Cultivate is defined by the American Heritage Dictionary, Fourth Edition, as "**1a**. To improve and prepare (land), as by plowing or fertilizing, for raising crops; till. **b**. To loosen or dig soil around (growing plants). **2**. To grow or tend (a plant or crop). **3**. To promote the growth of (a biological culture)..."

Unlike the trial court in Piston, I do not have the benefit of expert testimony. I do have the testimony referred to above by the plaintiffs that they had cleared a portion of the Reuss property immediately adjacent and north and east of Lot 5. During this period the plaintiffs stored materials on portions of the disputed property that they had cleared. Also, at various times, the plaintiffs and their family had planted a garden, cut and grew trees, grew flowers and bushes on portions of the disputed property that they had cleared. Over the course of time, the plaintiffs used portions of the disputed property for recreational, social and family uses including things such as a swing set, picnic table and bon fires. They would cut and trim the grass on portions of the disputed property. They also cut out a parking space for a neighbor to park and erected a light pole. The plaintiffs have also admitted into evidence photos of the disputed property for my examination. These photos depict a heavily wooded area with some areas that have been cleared as described. George admitted into evidence an aerial map from Westmoreland County in 2009 that showed the six acres in question as being heavily wooded. In this area depicted in the aerial map that includes the .60 acres known as the disputed area, there is no fence or cultivation shown on the map, nor can any improvements be seen in the wooded area. Even Virginia and Lawrence have testified that in their opinion, the area in question is woodland, except for those portions they have consistently used.

To maintain an actual possession to woodlands, it is necessary that the person entering take actual possession by residence or cultivation of a part of the tract to which the woodland belongs. Niles v. Falls Creek Hunting Club, 545 A.2d 926 (Pa. Super. 1988, Hole v. Rittenhouse, 37 Pa. 116 (1860). Actual possession can be taken by enclosing and cultivation or by residence. This is completely different from the

occasional or temporary use of the land without the intention of permanently cultivating or residing on the premises. The enclosure must be substantial in character and not just a gate and pathway without a fence.

In Seven Springs Farm, Inc., v. King, 344 A.2d 641 (Pa. Super. 1975) a barbed wire fence that was poorly maintained was insufficient to constitute enclosure and possession. Cutting and taking of timber, removing stone, nor hunting, fishing and picnicking was sufficient under circumstances to establish actual possession. Where land is not cultivated, or permanent improvements erected thereon, occasional removal of timber and surface stone only amounts to repeated acts of trespass, insufficient to show such possession. Hunting, fishing, or picnicking on a largely wooded tract of considerable size has been held to not represent extensive, systematic use of property so as to constitute possession.

In the present case, in the area cleared and maintained by Virginia and Lawrence and their predecessors, there were located two structures. One was a portion of a deck attached to the dwelling and the other was a storage shed. Although there had been a portion of the area that had been cleared, the plaintiffs did not cultivate the land nor grow crops. The largest portion of the disputed property was a heavily wooded area, as can be seen by all pictures available, including those offered by Virginia and Lawrence. Virginia and Lawrence stored material in a small portion of the disputed area and planted a garden, and cut and grew trees and flowers and bushes in a small portion of the disputed property. The small portion of the disputed property was used by them over the years for recreational, social and family purposes. However, the nature of the use of the land described by the plaintiffs did not constitute cultivation or residence of the property. It

further did not constitute the type of possession that would support a claim of adverse possession.

In the present case, as in Recreation Land Corp. v. Hartzfeld, 947 A.2d 771 (Pa. Super. 2008), it is undisputed that the land at issue was far less extensive or forested than the land in *Bride* v. Robwood Lodge, 713 A.2d 109 (Pa. Super. 1998) *See Bride* (disputed area was 18 acres of woodland used for hunting and removing timber). However, the disputed property has an extensively wooded character, and is unenclosed. Moreover, it is undisputed that Virginia and Lawrence did not significantly cultivate or significantly enclose or erect a residence on neither the disputed property nor the portion of the disputed property that they cleared. There is a wooded area contained within the .60 acres that was not in continuous use by Virginia and Lawrence. It is only those areas that have been cleared, and the existing roadway beyond the gate that traverses the property to the area around the subject shed, that has been used to some extent. Virginia and Lawrence occasionally used the roadway and portion of the disputed area for access to their shed or the delivery of large packages. However, all of the uses described by Virginia and Lawrence were sporadic. Such acts that are not significant and continuous on the land contained in the woodlands, without the intention to seek and occupy it for a residence and/or cultivation or other permanent uses consistent with the nature of the property, do not result in the type of actual possession of woodlands that is required to find adverse possession of woodlands. To maintain an actual possession to woodland, as such, it is necessary that the person entering take actual possession by residence or cultivation of a part of the tract to which the woodland belongs. Hole v. Rittenhouse, 37 Pa. 116 (1860). Actual possession can be taken by enclosing and cultivation or by residence. This is

completely different from the occasional or temporary use of the land without the intention of permanently cultivating or residing on the premises. The enclosure must be substantial in character. A gate without a fence certainly is not an enclosure. Further, the type of use by Virginia and Lawrence was not cultivation. Thus they failed to prove "actual" possession of the woodland, as required by Pennsylvania law, by clear and convincing evidence. Because actual possession is necessary to a finding of adverse possession, it is not an error to reject the adverse possession claim of Virginia and Lawrence.

It is serious matter indeed to take away another's property. That is why the law imposes such strict requirements of proof on one who claims title by adverse possession.

The legislature, as well, has felt so very strongly that it has provided that even an easement, let alone adverse possession, can not be acquired through woodlands. In this regard, it enacted a statute in 1850, and reenacted and amended the statute in 1981 (68 P.S. §411), which sets forth the following:

> No right of way shall be hereafter acquired by user where such way passes through unenclosed wood land; but on clearing such wood land the owner or owners thereof shall be at liberty to enclose the same as if no such way had been used through the same before such clearing or enclosure.

Therefore, based upon the above rationale, the plaintiffs have not acquired an interest in the disputed "woodlands" property by way of adverse possession or prescriptive easement.

Furthermore, I find from the evidence presented that the adverse possession period was tolled when Lawrence engaged in conduct that constituted recognition of the

superior title of George and Martha in the disputed property that Lawrence and Virginia claim by adverse possession and prescription. The plaintiff, Lawrence, spoke to George in 1995 at the funeral of a Mr. Muentzer and asked if he could have a right of first refusal if George ever intended to sell the property behind Lot 5. Based upon my review of all of the testimony, I find that Lawrence was requesting a right of first refusal for the whole property owned by George and Martha containing 6.7709 acres, located to the north and east of his residence. Lawrence advised George that he had wanted to talk to George about "the property behind my property." Lawrence wanted a right of first refusal in the event George would sell that property. Lawrence was asked by counsel for the defendants if he wanted to buy "all of the property", and he said "yes." Despite Lawrence's counsel attempt to rehabilitate Lawrence on the question of what property he wished to purchase, I find that he wanted a right of first refusal on the entire 6.7709 acres. One who claims title by adverse possession must prove actual, continuous, exclusive, visible, notorious, distinct, and hostile possession of the land in question for a period of twenty-one years. Each of these must exist; otherwise the possession will not confer title. Recreation. Land Corp.v. Hartzfeld, 947 A.2d 771 (Pa. Super. 2008). It is necessary that a person asserting a claim by adverse possession conduct themselves in a way that signifies a hostile occupation of the parcel for the requisite time period. The case law of Pennsylvania has developed a strict standard for proving adverse possession.

However, when a person conducts themselves in a manner that acknowledges the title of the person against whom they are claiming adverse possession; it will undermine their claim that their possession is "adverse and hostile." This amounts to recognition by the person making the claim of adverse possession that his/her title is subservient to the

title of the true owner. Such recognition results in the possession no longer being "hostile". The person claiming title by adverse possession must at all times act as though they have superior title to that of the true owner in order for their possession to be considered "hostile". If, during the 21-year period, they act in a way that recognizes that the true owner has superior title, their claim of adverse possession will fail. Pistner Bros., Inc. v. Agheli, 518 A.2d 838 (Pa. 1986). When Lawrence requested a right of first refusal in 1995 from George, this amounted to recognition that George and Martha had a superior title, and from thence forward the possession by Virginia and Lawrence would not be considered hostile.

Thus, it appears that the possession by the plaintiff only remained "hostile" until such time that the request was made for the right of first refusal and the plaintiffs made an acknowledgment of the superior title of the defendants to the property in question. Therefore, since the adverse possession had only lasted for the period from April of 1987 to February 1995, or a period of approximately eight (8) years, I find that the plaintiffs have not established their claim of adverse possession.

There is some question whether this request for a right of first refusal, thereby recognizing George and Martha's superior title, would also defeat the assertion of a prescriptive easement. I find that it does. I agree that the term adverse subsumes the term hostility. In order to be adverse, the asserted possession must by its very nature be hostile. As pointed out by counsel for the defendants, Black's Law Dictionary defines "adverse" as being opposed; contrary; in resistance or opposition to a claim...;having opposing interests. The preeminent authority on conveyancing, "Ladner of Conveyancing", at §11.02(c) states that "The theory of law is that continuous, open,

visible, notorious, ***hostile*** (emphasis mine) and adverse use of an easement for twenty-one years or more gives rise to a presumption that at some time in the remote past an express grant of such easement has been made." In the case of Margoline v. Holefelder, 218 A.2d 227 (Pa. 1966), the Supreme Court of Pennsylvania, when dealing with a claim of prescriptive easement, stated that "If a plaintiff can rebut or impeach the showing that the prior use was permissive or show that he asserted a ***hostile*** (emphasis mine) right twenty-one years or more before his path was barred in 1962, he must prevail." Thus, the Supreme Court recognized that hostility was necessary to claim an easement by prescription. Therefore, the request for a right of first refusal on "the whole property" also defeats the assertion of plaintiffs for an interest in the disputed property by way of prescriptive easement.

However, based upon the evidence presented, I do find that a license was created with regard to the pathway and the area that has been cleared and maintained by Virginia and Lawrence, along with the improvements located thereon such as the deck and shed. When an owner of land, with full knowledge of the facts, tacitly permits another to do acts upon the land, a license is implied. Such a license is generally revocable. However, a license may become irrevocable when the person granted the license has expended money and treated the property in a manner that they would not have treated it, but for the license. Zivari v. willis, 611 A.2d 293 (Pa. Super. 1992). This doctrine is based upon the equitable principle of estoppel.

Based upon the evidence in this case, I find that there was, by way of equitable estoppel, created a license to use a portion of the premises in the manner it had been used for years by Virginia and Lawrence, as well as their predecessors in title. The license that

was granted caused Virginia and Lawrence, and their predecessors in title, to use the property in a manner that they otherwise would not have. In addition, they have expended money to maintain the pathway and to clear the property and place improvements upon the property such as the deck and shed. I find that the license is personal to Virginia and Lawrence only. Based upon equitable principles of estoppel, I find that the license granted cannot be revoked by George and Martha during their period of ownership. However, when the land is conveyed by George or Martha, or the survivor of them, for valuable consideration, to a bona fide purchaser, the license will terminate. I further find that the area of the license is confined to the pathway as it now exists, and the area of property that has been cleared and used by Virginia and Lawrence to the east and north of Lot 5, and includes the improvements located thereon.

IN THE COURT OF COMMON PLEAS OF WESTMORELAND COUNTY, PENNSYLVANIA

CIVIL DIVISION-LAW

VIRGINIA M. ZIEGLAR and
LAWRENCE B. GOLDER, her
Husband,

PLAINTIFFS/COUNTERCLAIM
DEFENDANTS,

VS. NO. 6529 OF 2009

GEORGE F. REUSS and
MARTHA H. REUSS,
his wife,

DEFENDANTS/COUNTERCLAIM
PLAINTIFFS.

ORDER OF COURT

AND NOW, this 15th day of May 2013, in accordance with the above Decision it is hereby ORDERED and DECREED that:

1. The plaintiffs do not have an interest in the disputed property by way of adverse possession.
2. The plaintiffs do not have an interest in the disputed property by way of prescriptive easement.
3. Virginia Zieglar and Lawrence Golder have a personal license to use the portion of the disputed property in the manner it had been used for years by Virginia and Lawrence, as well as their predecessors in title. This license is explicitly personal to Virginia Zieglar and Lawrence Golder only. It is further

Ordered that the license granted cannot be revoked by George and Martha during their period of ownership. However, when the land is conveyed by George or Martha, or the survivor of them, for valuable consideration, to a bona fide purchaser, the license will terminate. It is further Ordered that the area of the license is confined to the pathway as it now exists and the area of property that has been cleared and used by Virginia and Lawrence to the east and north of Lot 5 and includes the improvements located thereon.

BY THE COURT:

Gary P. Caruso

GARY P. CARUSO,
PRESIDENT JUDGE

ATTEST:

Christine O'Brien

PROTHONOTARY

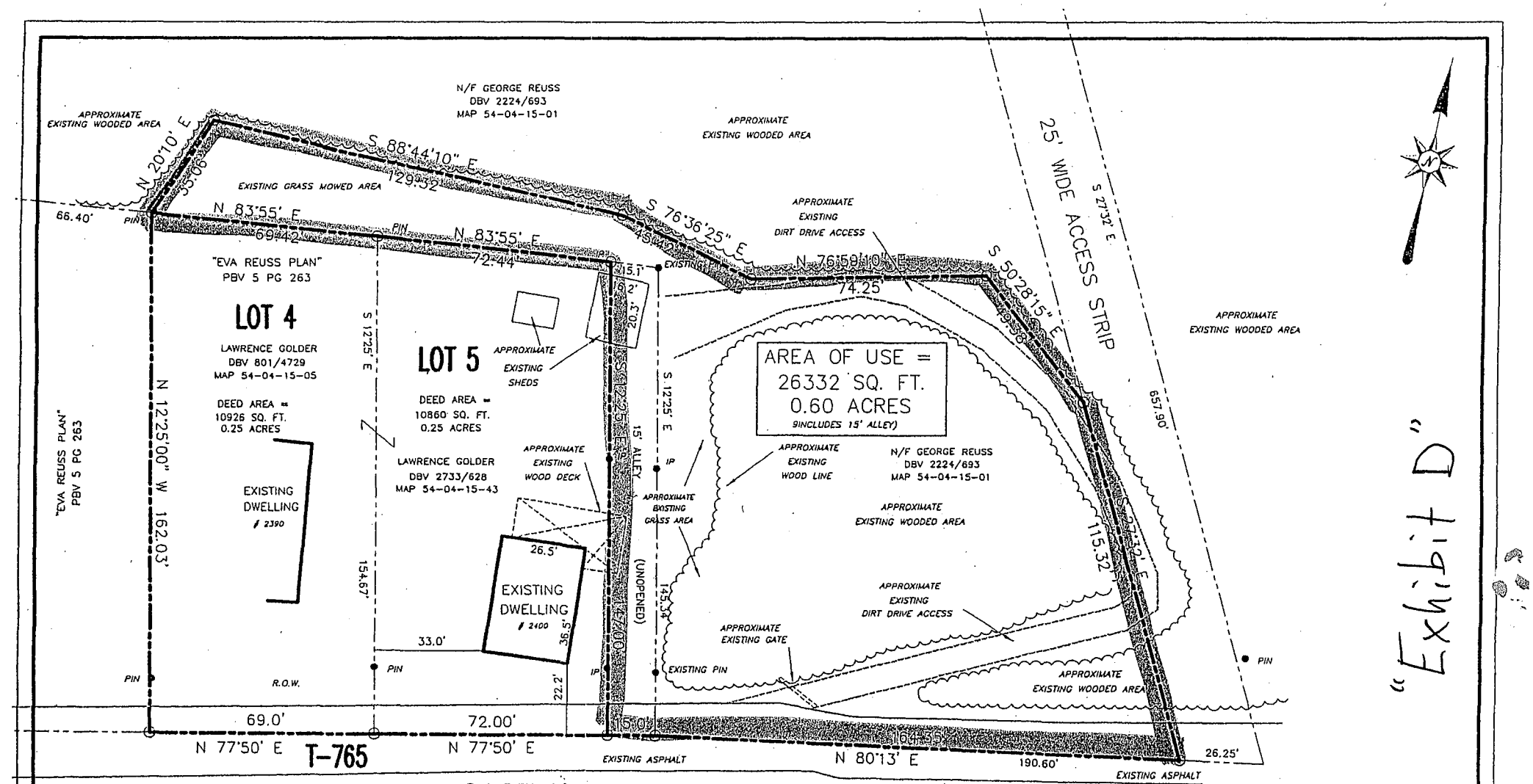
CERTIFICATE OF SERVICE

AND NOW, this 15th day of May, 20 13, I do hereby certify that I have sent a copy of this document to:

James L. Silvis Esq
Kyle M. Baxter, Esq

Anita M. Vivio

ANITA M. VIVIO, SECRETARY



"Exhibit D"

SCOTCH HILL RD. No. 1

CALL BEFORE YOU DIG!
PENNSYLVANIA LAW REQUIRES
3 WORKING DAYS NOTICE FOR
CONSTRUCTION PHASE AND 10 WORKING
DAYS IN DESIGN STAGE-STOP CALL
Pennsylvania One Call System, Inc.
1-800-242-1776
Act 287 General Assembly
Requires owner/contractor insure utility companies are notified to verify exact locations of all utilities, right of ways before any excavation/fill on this site.

0' 20' 40' 60'

DO NOT COPY THIS DOCUMENT

SEAL
COMMONWEALTH OF PENNSYLVANIA
REGISTERED PROFESSIONAL
ROBERT R. DeGLAU
LAND SURVEYOR
SU-042317-E

DATE:	10-22-2011
SCALE:	1"= 20'
DRAWN BY:	RRD
DWG. FILE:	09-0137
SHEET No.	1 OF 1
REVISED:	
1	
2	

SURVEY MAPPING SHOWING USE LIMITS

PREPARED FOR
LAWRENCE GOLDER
SITUATE IN
"EVA REUSS PLAN"
N. HUNTINGDON TWP.- WESTMORELAND CO.
PENNSYLVANIA

APPROVED BY: ROBERT R. DEGLAU, PLS

ALLSTATE MAPPING INC.
SURVEYORS • PLANNERS • CONSULTANTS
JOB No. 09-0137