STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: MAY 21, 2012)

JOHN R. HURLEY, JR. and CHRISTINE A. HURLEY	:	
v.	:	**C.A. No. PC 06-3722**
WILLIAM SCHMIDT and REBECCA ALTIERI	:	

DECISION

SAVAGE, J. This matter is before the Court for decision following a non-jury trial. Plaintiffs John R. Hurley, Jr. and Christine A. Hurley seek to establish title to a strip of land located on the southern boundary of their property along Iroquois Road in Cumberland, Rhode Island. Defendants William Schmidt and Rebecca Altieri currently hold record title to the disputed strip. Plaintiffs assert that they have acquired title to the parcel though adverse possession (Compl. ¶ 4.) and, in the alternative, by acquiescence. (Compl. ¶ 5.) Defendants have counterclaimed seeking a declaratory judgment that they are the sole and rightful owners of the strip of land by deed and, alternatively, by acquiescence (Counts I and II). They also assert claims of trespass (Count III), slander of title (Count IV), and abuse of process (Count V) against the Plaintiffs.

For the reasons set forth in this Decision, this Court grants judgment in Plaintiffs' favor as to their adverse possession claim but denies them judgment as to their claim of acquiescence. It denies Defendants' Counterclaim entirely.

I

Facts and Travel

Plaintiffs reside at 99 Iroquois Road in Cumberland, Rhode Island, more particularly described as Lot 311 on Tax Assessors Plat 18. (John Hurley Trial Tr. 13:2-3 (Jan. 13, 2011); Pls.' Ex. 4, Dupont Survey, July 27, 2006). Plaintiffs' lot is rectangular and fronts on Iroquois Road, which runs in a northwest to southeasterly direction. (Ex. 4, Dupont Survey). Their house sits on the front of the lot near the road and faces west with a side yard to the south and their rear yard to the east. (Ex. 4, Dupont Survey). Plaintiffs purchased their property in 1984 from Varnum and Elaine Elliott who had lived there since 1973. (Elaine Elliott Trial Tr. 36:5-6 (Jan. 14, 2011)). Before the Elliotts, Earl and Irene Miller owned the property. Id.; (Pls' Ex. 1, Deed from Earl and Irene Miller to Varnum and Elaine Elliott, June 14, 1973).

To the rear of the Plaintiffs' rectangular lot is the property of the Defendants located at 84 Hines Road in Cumberland, Rhode Island, more particularly described as Lot 776 on Tax Assessor's Plat 18. (Rebecca Altieri Trial Tr. 95:16-17 (Jan. 14, 2011); Ex. 4, Dupont Survey). Defendants purchased their lot from the Hines family who previously had operated a dairy farm on the property and, in 1998, subdivided their farm into six lots. (J. Hurley Trial Tr. 36:11-17; Lawrence Poirier Trial Tr. 60:9-11 (Jan. 14, 2011); Altieri Trial Tr. 97:7-18). Five of these lots are rectangular in shape and front Hines Road facing east. (Pls' Ex. 6, Revised Hines Farm Site Plan by Caito Corporation, Jan. 5, 1998). Defendants' lot, identified as Lot 6 on the Revised Caito Survey, fronts Hines Road to the north of the five other lots and is closest to Plaintiffs' property. Id. It includes a field that extends back toward the west and south behind the other five lots,

essentially between the rear boundaries of the other five lots and the rear boundaries of lots fronting Iroquois Road to the west, which includes Plaintiffs' lot. (Ex. 6, Revised Caito Survey; Def.'s Ex. D, aerial photograph of Hines Farm Site Plan). Additionally, Defendants' lot extends out to Iroquois Road through an approximately 44 foot wide strip of land that runs between Plaintiffs' southern border and the northern boundary of the Jackson Lot which fronts Iroquois to the south. (Ex. 4, Dupont Survey). This bisecting strip purportedly was used by the Hineses as a cow path through which cattle exited their farm, crossed Iroquois Road and drank from a brook located across the street. (J. Hurley Trial Tr. 36:11-17; Poirier Trial Tr. 60:12-16).[1]

Within this strip of land, an irregular line of differently shaped and spaced stones parallel the Plaintiffs' southern property boundary approximately ten feet to the south and runs from Iroquois Road approximately 100 feet back to a point perpendicular with a stone wall that runs north to south marking the rear boundaries of the parties' lots. (J. Hurley Trial Tr. 15:6; Elaine Elliot Trial Tr. 40:2-20 (Jan. 14, 2011); Altieri Trial Tr. 146:9-147:7; Ex. 4, Dupont Survey; Defs' Ex. K and N; Pls' Ex. 20 (showing line of stones)). The parties dispute whether this line of stones constitutes a stone wall, a property marker or just a random cluster of irregular stones. Elaine Elliott testified that she remembered the line of stones as being a low stone wall. (Trial Tr. Elliott 40:2-20). Plaintiffs referred to the line of stones as stone markers, which they considered to demarcate the southern boundary of their property. (Trial Tr. J. Hurley 17:5-19). Defendants testified that the stones were irregular in size and that, particularly in the front

[1] Lawrence Poirier, who lives across the street from the Hurleys at 98 Iroquois Road, testified that the Hineses also owned a strip of land along his southern boundary that allowed the Hineses' cattle to get to the brook. (Poirier Trial Tr. 61:25-62:9). Poirier purchased this strip from the Hineses in December of 1991. Id. at 62:10-14.

of Plaintiffs' yard, there were only three stones in an irregular triangular pattern that often were covered by woods and not visible from the front. (Altieri Trial Tr. 111:6-112:6; Defs' Ex. H, J and K (showing irregular configuration of large stones in front semi-covered by foliage)). Mr. Poirier testified that the stones were part of a stone wall used to guide the Hineses' cows through the back strip out to Iroquois Road where they would cross and drink behind his house. (Poirier Trial Tr. 65:5-11). On the Dupont Survey, the line of stones is referred to as a "reminisce of old stone wall," and it is clear to the Court, based on photographs entered in evidence as well as the purpose to which the strip of land was used by the Hineses to run their cows out to Iroquois Road, that the stone line was at one time some sort of a wall or barrier rather than a random grouping of rocks as Defendants assert. Accordingly, the Court will refer to this line as the "stone line" for the remainder of this Decision. This roughly 1000 square-foot area at issue between Plaintiffs' southern boundary by deed and the stone line, and bordered by Iroquois Road to the west and the stone wall separating the parties' rear boundary to the east, is the parcel from which the instant adverse possession dispute arises (hereinafter the "Disputed Area").

When Defendants purchased their property in December of 1999, they did so with the intention of eventually subdividing it into an additional residential lot. (Trial Tr. Altieri 95:22-23, 100:7-9). The Hineses originally had planned to subdivide their farm into seven lots, and, rather than Lot 6 encompassing the large field behind the subdivided lots as it does now, Lot 7 would have sat to the north of the other six lots on Hines Road with less frontage than the others and included the field running behind and to the south between the lots on Iroquois and Hines Roads. (Plfs' Ex. 28, Original Site Plan of Hines

Farm by Caito Corp., Dec. 1997). Prior to the actual subdivision, however, Lots 6 and 7 were merged into a single Lot 6 with the understanding that the purchaser of the unified lot could subdivide it later into two lots with the restriction that there also would be an open space lot and that no public road could traverse the property. (Richard Couchon Trial Tr. 156:16-157:12 (Jan. 24, 2011); Ex. 6, Revised Caito Survey; Defs' Ex. A, Real Estate Listing for Lot 6 (noting approval for one subdivision); William Schmidt Trial Tr. 2:14:19 (Jan. 18, 2011) (recalling deed restrictions concerning subdivision of Lot 6); Plfs' Ex. 29, Resolution of the Town of Cumberland Zoning Board of Review (Aug. 15, 2006) (approving subdivision of Lot 6 into a single buildable lot)).

After a few years, in December of 2005, Defendants submitted to the Town a master plan to subdivide their property to which the Plaintiffs and Poirier objected. (Altieri Trial Tr. 102:11-14; 103:7-10). Poirier claimed that Lot 6 was only to have one house and, if subdivided, the additional lot was to be preserved as non-buildable open space. (Poirier Trial Tr. 75:18-23). The Zoning Board and then the Superior Court rejected Poirier's argument. (Pls' Ex. 29, Zoning Board Resolution dated Aug. 15, 2006); see also Poirier v. Morris et al., C.A. No. PC-2006-4551 (R.I. Super. Ct. filed Oct. 29, 2007) (Procaccini, J.). As part of their subdivision plan, Defendants intended to use the Disputed Area as a driveway for the newly subdivided lot. (Altieri Trial Tr. 106:17-22). Defendants needed to include the Disputed Area in their subdivision plan to ensure that the newly created lot would have sufficient frontage on Iroquois Road to satisfy the frontage requirements of the zoning ordinance. (Schmidt Trial Tr. 10:24-2).

In July of 2006, Defendants surveyed and staked their property so as to ensure that the size of the driveway and the frontage of the newly subdivided lot were adequate.

(Altieri Trial Tr. 106:17-107:1). The surveyor placed the stake marking the northern boundary not on the stone line but on Plaintiffs' right side lawn -- effectively indicating that a portion of Plaintiffs' side yard was on Defendants' property -- which gave rise to the instant dispute. (Plfs' Ex. 19 (July 25, 2006 photographs of placement of stake)); J. Hurley Trial Tr. 25:18-25, 33:10-34:2; Schmidt Trial Tr. 18:23-25 (acknowledging that the photographs in Ex. 19 accurately portray the location of the stake)). According to Plaintiffs, they had no idea until Defendants' survey that their southern boundary by deed only extended as far as the stake. (J. Hurley Trial Tr. 26:12-16; Christine Hurley Trial Tr. 8:16-21 (Jan. 14, 2011)). They instead believed that the line of irregular stones running eight to ten feet south of the stake, along the edge of the Disputed Area, marked their southern boundary. (J. Hurley Trial Tr. 26:20-27:7; C. Hurley Trial Tr. 9:18-23). Plaintiffs claim that when they purchased the property in 1984, the Elliotts told them that the line of stones marked their southern boundary. Similarly, Elaine Elliott testified that when she and her husband purchased the property, their predecessors in interest, the Millers, said the same. (J. Hurley Trial Tr. 26:12-16; C. Hurley Trial Tr. 13:24-14:3; Elliott Trial Tr. 40:2-24).

Plaintiffs immediately filed suit on July 13, 2006, claiming title to the Disputed Area under the doctrines of adverse possession and acquiescence. Plaintiffs claim that they have mowed grass, planted flowers, and erected a perpendicular fence within the Disputed Area and that their predecessors in interest have taken other similar actions for more than the statutorily required ten-year period such that they have acquired title to the Disputed Area by adverse possession. In the alternative, Plaintiffs argue that they and the Defendants, as well as their respective predecessors in interest, mutually recognized the

stone line as their true boundary such that they have acquired title to the Disputed Area by acquiescence. After filing their complaint, Plaintiffs commissioned a survey by Dupont Engineering (Ex. 4), which shows the line of stones (referred to as "Reminisce of Old Stone Wall") that Plaintiffs claim is the parties' actual property line. (Ex. 4, Dupont Survey; J. Hurley Trial Tr. 25:8-15).

Defendants counter, however, that evidence of Plaintiffs' activities within the Disputed Area is insufficient to satisfy the clear and convincing evidentiary standard required for adverse possession. Additionally, at the beginning of trial, Defendants sought an in limine ruling from the Court to exclude Plaintiffs' evidence of adverse possession that pre-dated 1986. Defendants argue that adverse possession claims are governed by the general statute of limitations, R.I. Gen. Laws § 34-7-1, which effectively limits the consideration of adverse possession evidence to ten years beyond the statutorily required ten-year period required to prove adverse possession. According to the Defendants, because Plaintiffs filed their Complaint in 2006, they could present evidence only within a twenty-year time period before that date or from on or after July 13, 2006; evidence stemming from the time Plaintiffs purchased their property in 1984 as well as the alleged use of the Disputed Area by their predecessors in interest, the Elliotts, thus would be inadmissible. The Court reserved decision on this issue and allowed Plaintiffs to present evidence from both before and after 1986 without prejudice to Defendants arguing its inadmissibility post-trial.

Further, Defendants dispute Plaintiffs' claim of acquiescence. They deny that an understanding existed between the parties or their respective predecessors in interest that the stone line constituted their boundary line. While Plaintiffs referred to the stone line

as a stone wall or stone markers, Defendants argue that the pattern of the stones is too irregular to be considered an adequate boundary marker.

In addition to disputing Plaintiffs' claims of title to the Disputed Area by adverse possession or through acquiescence, Defendants seek a declaratory judgment that they have title to the Disputed Area in accordance with their deed and that they and Plaintiffs acquiesced to the property line as shown in the parties' deeds. Based on their claim of title, Defendants also have filed a counterclaim by which they argue that Plaintiffs' activities within the Disputed Area constitute a trespass for which Defendants are entitled to damages.

Finally, Defendants have filed a counterclaim and seek damages for slander of title and abuse of process. Defendants claim in this regard that instead of a good faith effort to quiet title, Plaintiffs' suit is in reality a coordinated scheme to thwart Defendants' attempt to subdivide their lot by clouding title. In addition to their Complaint, Plaintiffs filed a notice of lis pendens on Defendants' property on July 17, 2006 that, according to Defendants, has required them to submit a revised subdivision plan that does not include the Disputed Area. (Schmidt Trial Tr. 10:24-11:9). To meet frontage requirements for the new lot, Defendants claim that they have had to give up some of the frontage for Lot 6 on Hines Road to allow sufficient frontage for the new Lot 7. (Schmidt Trial Tr. 10:24-11:9). As a result, Defendants argue that they have burdened the new lot with an easement to allow them to access their septic tank, which will likely reduce the selling price of the new lot. Id. at 11:20-12-5. Defendants thus seek damages from Plaintiffs for the alleged decreased value of their property and associated litigation expenses based on claims of abuse of process and slander of title. Plaintiffs counter,

however, that their only motivation for filing suit and a notice of lis pendens was to prevent the loss of the Disputed Area, which since 1984 they genuinely believed to be part of their side yard.[2]

At trial, Plaintiffs provided credible testimonial evidence to show that they and their predecessors in interest maintained the Disputed Area in a manner consistent with how owners of residential property typically maintain their side yards. In 1984, when Plaintiffs purchased their property, and prior to that time, the Elliotts had used the Disputed Area as part of their yard by mowing the grass and clearing the ground up to trees that sat in line with the line of stones. (Pls' Ex. 7 (1984 photograph of Plaintiffs' house and side yard at the time it was purchased); J. Hurley Trial Tr. 17:6-21; C. Hurley Trial Tr. 3:9-11; Elliott Trial Tr. 37:15-24). After purchasing the property, the Plaintiffs continued to maintain the side yard by raking and mowing it. (C. Hurley Trial Tr. 9:2-9; Poirier Trial Tr. 68:6-13; Pls' Ex. 8 (1986 photograph showing lawn in back yard mowed to the line of trees)). In 1991, Plaintiffs installed a privacy fence from their garage across their side yard, through the Disputed Area, to the line of stones. (Pls' Ex. 8 (1991 photographs of wooden privacy fence); Defs' Ex. K and N (showing where fence and line of stones meet at the southern boundary of the Disputed Area); J. Hurley Trial Tr. 21:17-23:1; C. Hurley Trial Tr. 5:2-5; Poirier Trial Tr. 67:21-68:5; Pls' Ex. 22 (entries in check register of payments for fence installation dated in 1991)). The fence remained in place from 1991 until trial - - with the exception of a brief period of time between 2003 and 2004 when the Plaintiffs removed the fence to allow for heavy equipment access for installation of a septic system. (J. Hurley Trial Tr. 24:5-12; C. Hurley Trial Tr. 7:15-8:6;

[2] On May 10, 2010, Defendants filed a motion for summary judgment on both of Plaintiffs' claims, which a hearing justice of this Court denied.

Pls' Ex. 11, 14 and 15 (photographs of privacy fence dated between 1993 and 1998 showing fence extending to stone line); Defs' Ex. B (property record of Plaintiffs' house with 2004 photograph showing fence removed but post still installed next to Plaintiffs' garage); Pls' Ex. 19 (2006 photograph showing fence across side yard and beyond stake into Disputed Area; Pls' Ex. 4, Dupont Survey (noting location of privacy fence across Disputed Area to stone line)).

Plaintiffs also produced credible evidence to show that they planted vegetation in the Disputed Area in a manner consistent with a side yard. In 1991 and again in 1993, Plaintiffs installed retaining walls to assist in leveling their back yard due to an approximately eight foot slope from the stone wall that marks their rear property line down to Iroquois Road. (J. Hurley Trial Tr. 24:13-23, 28:9-16). The 1991 retaining wall ran north to south just west of the eastern boundary of their property and stopped approximately ten feet short of the stone line. (J. Hurley Trial Tr. 23:10-17; Pls' Ex. 10 (showing newly completed rear retaining wall)). The 1993 retaining wall, built by Plaintiffs with railroad ties, ran from east to west from the southern end of the 1991 retaining wall to the middle of Plaintiffs' backyard, which ironically was along the actual boundary line between the Plaintiffs' property and the Disputed Area, approximately ten to twelve feet from the line of stones. (J. Hurley Trial Tr. 28:9-16; 31:21-32:15; C. Hurley Trial Tr. 10:24-6; Pls' Ex. 12 and 13 (showing corner where rear stone retaining wall and side retaining wall of railroad ties meet)). Plaintiffs subsequently replaced the railroad ties with a concrete retaining wall in 2000. (J. Hurley Trial Tr. 30:3-4; C. Hurley Trial Tr. 6:1-6; Pls' Ex. 17 (showing intersection of rear retaining wall with new concrete side retaining wall)). It was behind this retaining wall to the south, first when it

was comprised of railroad ties and later when it was made of concrete, that Plaintiffs mowed, placed mulch, and planted beds and flowers within the Disputed Area for a period of ten years. (J. Hurley Trial Tr. 28:17-29:4, 28:24-29:17; Pls' Ex. 12, 13, 16, 17, 18 and 19 (series of photographs dated 1996, 1997, 2000, 2002 and 2006, respectively, depicting the side retaining wall with mulch and plantings behind it)).

The credible evidence also showed that Plaintiffs planted miniature firs and flower beds in front of their privacy fence beginning in 1993. (C. Hurley Trial Tr. 4:13-5:1; Pls' Ex. 14, 15 and 19 (photographs from 1997, 1998 and 2006, respectively, showing miniature firs and planting beds extending to the edge of the privacy fence and within the Disputed Area)). In particular, the evidence showed that Plaintiffs maintained a tipped over whiskey barrel within the Disputed Area that contained a planting of annual flowers. (C. Hurley Trial Tr. 6:23-7:14; Poirier Trial Tr. 68:6-12; Pls' Ex. 15 and 19).

In an effort to show that Plaintiffs knew their property did not extend into the Disputed Area, Defendants questioned why Plaintiffs' rear retaining wall stopped just short of the Disputed Area if Plaintiffs legitimately believed that their property extended to the line of stones. According to the credible testimony of Plaintiff Christine Hurley, the entire yard was not excavated to the line of stones because their landscaper was concerned that the stones would collapse into the backyard and that the roots of trees lining the Disputed Area to the south would be damaged. (C. Hurley Trial Tr. 10:4-23). Defendants also claimed that when they walked the property in 1999, they viewed the Disputed Area and found it to be wooded and without evidence of occupation. (Altieri Trial Tr. 98:5-19; Schmidt Trial Tr. 1:22-2:6). Referring to photographs taken post-litigation that show evidence of plantings and mowing up to the line of stones, (Def's Ex.

E, I, L, N, O, S, U), Defendants claimed that Plaintiffs cleared the woods and planted intermittently and that the entire Disputed Area, at least when the Defendants had occasion to view it, was completely wooded up to the stakes on the Plaintiffs' true southern boundary. (Altieri Trial Tr. 110:8-111:5, 112:7-19, 113:12-25; Schmidt Trial Tr. 5:21-6:14).

The evidence revealed, however, that the Defendants only viewed the Disputed Area at most approximately twice a year to collect debris, generally in early spring and again in the fall when, according to Defendants, there were no flowers or evidence of cultivation. (Schmidt Trial Tr. 3:20-4:15, 20:25; Defs' Ex. P (2009 photograph showing snow covering Plaintiffs' backyard demonstrating obstructed view of plantings and mowing up to stone wall)). Defendants further testified that for much of the spring and summer, their rear parcel extending to Iroquois Road, which includes the Disputed Area, was thickly wooded, difficult to access and hard to view. (Altieri Trial Tr. 100:12-23; 151:21-152:5).

Defendants also claimed that they had never seen a privacy fence extending into the Disputed Area until the Disputed Area was staked in 2006. (Schmidt Trial Tr. 15:21-16:5; 150:19-151:4). They also assert that when they purchased Lot 6 in 1999, they relied on the Caito Survey (Pls' Ex. 28), which did not show the existence of Plaintiffs' privacy fence. (Couchon Trial Tr. 161:21-162:3, 169:9-15). The Court questions the reliability of the Caito Survey, however, given the extensive evidence showing the existence of the fence from 1991 almost continuously until the time of trial. (Pls' Ex. 11, 14 and 15 (photographs of privacy fence dated between 1993 and 1998 showing fence extending to stone line); Pls' Ex. 19 (2006 photograph showing fence across side yard

and beyond stake into Disputed Area); Pls' Ex. 4, Dupont Survey (noting location of privacy fence across Disputed Area to stone line)). The Court further notes that Mr. Couchon, who certified the Survey as complete and accurate, never physically viewed the subject properties. (Couchon Trial Tr. 163:6-9). Instead, the surveyor noted fences and other markers based on aerial photographs taken by aircraft from 3,000 feet above the Hines Farm. Id. at 167:7-11. According to Couchon, if an object is covered by tree canopies, the aircraft will not see it. Id. at 166:9-167:6. He thus acknowledged that Plaintiffs' fence could have been missed by the surveyor making the survey defective. Id. at 171:25-172:9.

This Court conducted a three-day non-jury trial of Plaintiffs' Complaint and Defendants' Counterclaim after the parties waived their rights to a trial by jury. At the close of the evidence in the Plaintiffs' case, Defendants made an oral motion for judgment as a matter of law pursuant to Rule 52(c) of the Rhode Island Rules of Civil Procedure as to Plaintiffs' adverse possession and acquiescence claims. The Court reserved its decision on that motion and allowed the case to proceed. At the close of the evidence in the Defendants' case, Plaintiffs made a Rule 52(c) motion as to the Defendants' Counterclaim for trespass, slander of title and abuse of process. The Court also reserved decision on that motion. At the close of all the evidence, both parties renewed their respective Rule 52(c) motions, and the Court again reserved decision. The parties thereafter submitted legal memoranda and the full trial transcript. As this Court

has jurisdiction of this action pursuant to R.I. Gen. Laws §§ 8-2-14[3], 9-30-2[4] and 34-16-3[5], it will proceed to decision.

II

Standard of Review

Rule 52 of the Rhode Island Superior Court Rules of Civil Procedure states that "[i]n all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon . . . ." Super. R. Civ. P. 52(a). When deciding a non-jury case, "the justice sits as trier of fact as well as law." Hood v. Hawkins, 478 A.2d 181, 184 (R.I. 1984). "Consequently, [s]he weighs and considers the evidence, passes upon credibility of the witnesses, and draws proper inferences." Id. "The task of determining the credibility of witnesses is peculiarly the function of the trial justice when sitting without a jury." Walton v. Baird, 433 A.2d 963, 964 (R.I. 1981). "It is also the province of the trial justice to draw inferences from the testimony of witnesses . . . ." Id.; see also Rodriques v. Santos, 466 A.2d 306, 312 (R.I. 1983) (the question of who is to be believed is one for the trier of fact). Further, "a trial justice 'need not engage in extensive analysis or discussion of all of the evidence. Even brief findings and conclusions are sufficient if they address and resolve the controlling

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[3] "The superior court shall have original jurisdiction of all actions at law where title to real estate or some right or interest therein is at issue . . . [and] exclusive original jurisdiction of all other actions at law in which the amount in controversy shall exceed the sum of ten thousand dollars ($10,000)." § 8-2-14.
[4] "Any person interest under a deed . . . may have determined any question of construction or validity arising under the instrument . . . and obtain a declaration of rights, status or other legal relations thereunder." § 9-30-2.
[5] "[T]he court shall determine the validity of the title of the plaintiffs, and may affirm the interest, title, and estate of those parties therein . . . and all decrees in the action shall forever thereafter be binding upon all parties . . . ." § 34-16-3.

and essential factual issues in the case.'" Parella v. Montalbano, 899 A.2d 1226, 1239 (R.I. 2006) (citing Donnelly v. Cowsill, 716 A.2d 742, 747 (R.I. 1998)).

Under Rule 52(c), a party may move for judgment as a matter of law in a non-jury case after the presentation of evidence in an opposing party's case, but the standard is different than in the jury context. Broadley v. State, 939 A.2d 1016, 1020 (R.I. 2008). "[T]he court may enter judgment as a matter of law against the party who has been fully heard on an issue, but "'[s]uch a judgment shall be supported by findings of fact and conclusions of law . . . .'" Id. (quoting Rule 52(c)). When deciding a Rule 52(c) motion, the justice considers "the credibility of witnesses and determines the weight of the evidence presented by the plaintiff." Pillar Property Management, L.L.C. v. Caste's, Inc., 714 A.2d 619, 620 (R.I. 1998) (mem.). Further, unlike in a jury trial, the trial justice when sitting without a jury "need not view the evidence in the light most favorable to the nonmoving party." Broadley, 939 A.2d at 1020 (citing Estate of Meller v. Adolf Meller Co., 554 A.2d 648, 651 (R.I. 1989)).

III

Analysis[6]

A

Adverse Possession

The adverse possession statute states, in pertinent part, as follows:

> Where any person or persons, or others from whom he, she, or they derive their title . . . shall have been for the space of

[6] The Court finds that Plaintiffs have offered sufficient evidence in support of their adverse possession and boundary by acquiescence claims to warrant considering them on their merits. Similarly, Defendants have provided sufficient evidence to warrant consideration on the merits of their trespass, slander of title and abuse of process claims. Accordingly, both parties' Rule 52(c) motions with respect to each others' claims are denied.

> ten (10) years in the uninterrupted, quiet, peaceful and actual seisin and possession of any lands. . . claiming the same as his, her or their proper, sole and rightful estate in fee simple, the actual seisin and possession shall be allowed to give and make a good and rightful title to the person or persons, their heirs and assigns forever . . . .

R.I. Gen. Laws § 34-7-1. Under this statute, a party who does not hold record title to property thus may obtain title by occupying the land in a manner consistent with the statute for a period of ten years. Id. A successful claim for adverse possession "requires actual, open, notorious, hostile, continuous and exclusive use of property under a claim of right" for the requisite statutory period of ten years. Cahill v. Morrow, 11 A.3d 82, 88 (R.I. 2011) (citing Corrigan v. Nanian, 950 A.2d 1179, 1179 (R.I. 2008) (mem.)).

A party who asserts title by adverse possession must "establish the required elements by strict proof, that is, proof by clear and convincing evidence." McGarry v. Coletti, 33 A.3d 140, 144 (R.I. 2011) (citing Corrigan, 950 A.2d at 1179). Clear and convincing evidence is evidence sufficient to persuade the factfinder that a proposition is "highly probable" or that "produce[s] . . . a firm belief or conviction that the allegations are true." Cahill, 11 A.3d at 87 n.7 (internal citations omitted). While this standard is higher than the preponderance of the evidence standard often employed in civil cases, it does not require "that the evidence negate all reasonable doubt or that the evidence must be uncontroverted." Id. Evidence is clear and convincing when it is unambiguous and affirmative in character. Locke v. O'Brien, 610 A.2d 552, 555 (R.I. 1992) (quoting Hilley v. Simmler, 463 A.2d 1302, 1304 (R.I. 1983)). Based on the testimony, surveys and photographs presented by the parties at trial, this Court is satisfied that Plaintiffs have proven each element of their claim of adverse possession by clear and convincing evidence.

1.

Actual and Continuous Possession

The elements of actual and continuous possession are established when a claimant shows that "the use to which the land has been put is similar to that which would ordinarily be made of like land by the owners thereof." Anthony v. Searle, 681 A.2d 892, 897-898 (R.I. 1996) (citations omitted). Constant use is not required when the property is of such character as to preclude such continuous occupation. See Walsh v. Cappuccio, 602 A.2d 927, 931 (R.I. 1992) (quoting Lee v. Raymond, 456 A.2d 1179, 1183 (R.I. 1983)). "It is necessary that [the use] be continuous only in the sense that the claimant exercised a claim of right without interference at such times as it was reasonable to make a proper use of the land." See Russo v. Stearns Farms Realty, Inc., 117 R.I. 387, 392, 367 A.2d 714, 717 (R.I. 1977) (quoting LaFreniere v. Sprague, 108 R.I. 43, 52-53, 271 A.2d 819, 824 (1970)). The exercise of continuous possession, however, must be "sufficient to provide notice to the world" that a claim of title contrary to the true owner is being asserted. Id.

In the instant case, Plaintiffs used the Disputed Area, which is essentially a side yard, continuously since their acquisition of the property in 1984. The evidence shows that Plaintiffs maintained and cultivated the Disputed Area on a weekly basis, which included mowing the grass, spreading mulch and planting hostas, flowers, and ivies within the Disputed Area. (J. Hurley Trial Tr. 19:17-20). In addition, the evidence shows that Plaintiffs' predecessors in interest used the Disputed Area in a similar fashion. (Elliott Trial Tr. 40:21-41:15). This use of the land is similar to that which one would expect a rightful owner to make of his or her side yard. See Acompora v. Pearson et al.,

899 A.2d 459, 467 (R.I. 2006) (finding claimant's mowing of grass, maintaining property and holding outdoor activities was consistent with the actions of a true owner of a side yard); see also Gammons v. Caswell, 447 A.2d 361, 368 (R.I. 1982) (noting that "'cultivating land, planting trees, and making other improvements in such a manner as is usual for comparable land [has] been successfully relied on as proof of the required possession'") (citing Powell, The Law of Real Property § 1018 at 740 (1981)).

Defendants' argument that the planting of annual flowers and hostas is insufficient evidence to establish actual and continuous possession because the plants are not visible from the fall to the spring is unavailing. Even assuming that no vestige of these plantings would have been visible to Defendants from the fall to early spring, which this Court finds doubtful, year-round occupation is not required to prove actual and continuous possession. See Lee v. Raymond, 456 A.2d 1179, 1183 (R.I. 1983) (finding summer camping in disputed parcel sufficiently continuous where such use was consistent with the use of neighboring owners with like properties). Obviously, there will be less vegetation and observable signs of landscaping in the fall, winter and early spring. Thus, Defendants cannot assert that because Plaintiffs' flowers were not blooming in late fall when Defendants purportedly walked their property, Plaintiffs' possession of the Disputed Area was somehow not continuous. Plaintiffs' mowing and raking of grass, planting vegetation and other activities within the Disputed Area, as well as the similar activities of their predecessors in interest, constituted an actual and continuous use of a normal side yard.

Moreover, the evidence in this case of actual and continuous possession goes well beyond the mowing of grass and the planting of vegetation over time. Plaintiffs erected a

fence in 1991 that has encroached upon Defendants' land since that time by passing through the Disputed Area to the stone line. While Defendants attempt to suggest that Plaintiffs' removal of the fence in 2003 for the purpose of installing a septic tank evidences a break in the chain of continuous possession, the evidence establishes that it was only those sections of the fence closest to Plaintiffs' garage that were removed. The southerly sections of the fence on the Disputed Area near the stone wall remained in place at all times. (J. Hurley Trial Tr. 38:15-20). Additionally, while a 2004 photograph of Plaintiffs' house does not show the entire fence stretched across Plaintiffs' side yard (see Ex. B), the photograph does show the first post of the fence next to the garage still in place during that period. See Russo, 117 R.I. at 392-93 (finding removal of outhouse from disputed parcel did not break chain of continuous possession because parcel was rural and continuous use was not expected and because claimants still undertook other activities within the disputed area when the outhouse was removed). This Court finds, therefore, that Plaintiffs have established by clear and convincing evidence that the use of the Disputed Area by them and their predecessors in interest, both through maintenance and cultivation of the property as well as erection of their privacy fence, was actual and continuous in excess of the requisite ten-year statutory period.

2.

Open and Notorious Possession

The requirement that an adverse possessor must use the land in a manner similar to that of a real owner of similarly situated property "ensures that a claimant's use of the land was 'sufficiently open and notorious to put a reasonable property owner on notice of their hostile claim.'" McGarry, 33 A.3d at 145 (quoting Acampora, 899 A.2d at 467).

Our Supreme Court has made clear previously that "no particular act to establish an intention to claim ownership is required to give notice to the world of the claim" and that "[i]t is sufficient for the claimant to go upon the disputed land and use it adversely to the true owner." Id. (quoting Lee, 456 A.2d at 1183 (R.I. 1983)). Upon use of land adverse to its true owner, the owner "becomes chargeable with knowledge of whatever occurs on the land in an open manner." Id.

In Carnevale v. Dupee, 853 A.2d 1197, 1201 (R.I. 2004), our Supreme Court found that an adverse possessor had met the "open and notorious" elements of adverse possession because he frequently mowed the disputed land and maintained a fence that surrounded the property. Additionally, the Court in Carnevale stated specifically that "the fact that a portion of land is inaccessible and not easily visible to the record owner is not conclusive evidence that the claimant's use was not open and notorious." Id. at 1200 (internal citation omitted); see also Acampora, 899 A.2d at 467 (holding that an adverse possessor proved "open and notorious" use of the land by showing that she "cut the lawn, maintained the property, and used the disputed land for outdoor activities").

In the instant case, Plaintiffs also cut grass, cleared debris and planted hostas and flowers within the Disputed Area, and their predecessors in interest mowed that area to the stone line. These activities were clearly visible to Defendants and their predecessors in interest.

Additionally, for well over ten years, Plaintiffs' fence ran across the Disputed Area to the stone line. Had Defendants commissioned a true and accurate survey of their property before this dispute, they would have known of this obvious encroachment. Regardless of season or time of day, the placing of a structure, such as an eight foot long

fence that encroaches on a true owner's land, should put a reasonable property owner on notice of a trespass. Tavares, 814 A.2d at 354 (holding that "it is not essential for an adverse claimant to show that the uses in question were observable from the nearest improved road or lot line . . . the proper inquiry is whether [the claimant] used the property in a manner consistent with [] other owners . . . .").

While Defendants attempted to suggest that there was no fence or vegetation visible on the Disputed Area because they inspected that area of their property on a bi-annual basis and failed to observe the fence and vegetation, this Court finds Defendants' testimony in this regard lacking in weight and credibility. It also does not account for what Defendants' predecessors in interest may have observed. It is incomprehensible that Defendants could miss the eight foot encroachment of Plaintiffs' fence onto Defendants' property and the vegetation planted consistent with it if Defendants truly believed that they owned the Disputed Area. See Reitsma v. Pascoag Reservior & Dam, LLC, 774 A.2d 826, 834-35 (R.I. 2001) (finding that placing a permanent physical structure on another's property without the owner's permission and maintaining it for ten years is "so inconsistent with the true ownership of that property [that] it is therefore notorious, adverse, hostile and under claim of right as a matter of law") (emphasis in original). It is more likely that, even if Defendants walked their property, they failed to observe the fence and vegetation as an encroachment because they did not know at that time that their property extended beyond the stone line into the Disputed Area.

Moreover, regardless of what Defendants knew, they are charged "with [the] knowledge of whatever occurs on the[ir] land in an open manner." Lee, 456 A.2d at 1183. "[T]he notorious and openness elements [of adverse possession] are established by

showing that 'the claimant goes upon the land openly and uses it adversely to the true owner. The owner then becomes chargeable with knowledge of what is done openly on the land.'" Carnevale, 853 A.2d at 1201 (citing Gammons, 447 A.2d at 368). This Court thus finds by clear and convincing evidence that Plaintiffs' actions, and the actions of their predecessors in interest, within the Disputed Area were sufficiently open and notorious to give the Defendants and their predecessors in interest either actual or constructive knowledge of Plaintiffs' use of Defendants' land for a period of time in excess of the ten-year statutory period.

3.

Hostile Possession

A claimant can prove the "hostile" element of adverse possession by showing that he or she took "action inconsistent with the claims of others." Taffinder v. Thomas, 119 R.I. 454, 552, 381 A.2d 519, 523 (1977). A person is a hostile occupant of land even if that person did not know that he or she is occupying the land of another. See Lee, 456 A.2d at 1183. In fact, the intent of the adverse possessor, whether he or she was on the property of another by mistake or as a conscious "black-hearted trespasser[]," is irrelevant to the determination of whether the adverse possessor's actions were sufficiently hostile. See Tavares, 814 A.2d at 351 (noting that an adverse possessor "'need not be under a good faith mistake that he or she had legal title to the land'") (quoting 16 Powell on Real Property, § 91.05[1] at 91-23 (2000)). It is instead the objective actions of the adverse possessor that inform a court's inquiry into whether he or she can prove hostile possession of land. See Cahill, 11 A.3d at 90 (finding claimant's

offer to purchase the disputed parcel to be evidence that her occupation was not hostile to the true owner).[7]

Here, the Court finds that Plaintiffs' possession of the Disputed Area for the requisite statutory period, and that of their predecessors in interest, rested on a misunderstanding as to the location of the parties' true boundary line. At the time Plaintiffs took possession of their property, they accepted the representation of the Elliotts (just as the Elliotts had accepted the representation of the Millers) that their lot extended to the line of stones. See Lee, 456 A.2d at 1183 (accepting claimant's mistaken belief with regard to the property line in part because claimant's predecessor in interest conveyed misinformation to the claimant as to the location of the boundary line when the two walked together before the sale of the land). The Court finds such a belief to be reasonable given that the stone line appears to be a boundary line and runs from the back of Plaintiffs' lot to Iroquois Road in a manner consistent with a typical side yard property boundary. Based on this belief, Plaintiffs and their predecessors in interest asserted dominion over the Disputed Area up to the stone line in a manner clearly inconsistent with the interests of Defendants and their predecessors in interest. See Tavares, 814 A.2d at 351 (noting that hostile use is "'such as would entitle the owner to a cause of action

[7] In Cahill, the Supreme Court qualified its recognition in Tavares that even a "black-hearted trespasser" may obtain title through adverse possession. Cahill, 11 A.2d at 91. The Court noted that while such an understanding is 'legally correct," it is not meant to encourage an "invade-and-conquer mentality in modern property law." Id. To the extent that an adverse possessor's intent may have an effect on his or her overall right to title by adverse possession, this Court discerns no effect from this recent distinction upon the analysis of hostility. Additionally, this Court finds that, in the instant matter, Plaintiffs occupied the Disputed Area out of mistake rather than intentionally seeking to strip Defendants of title to their land.

against the intruder [for trespass]'") (quoting 16 Powell on Real Property, § 91.05[1] at 91-23 (2000)).

As previously discussed, Plaintiffs have cultivated and maintained the yard within the Disputed Area since their acquisition of the property in 1984, and their predecessors in interest did the same before them. Additionally, the continuous location and maintenance of the Plaintiffs' privacy fence, which extended into the Disputed Area, serves as further evidence that their use and possession of the Disputed Area was hostile to the interests of Defendants and their predecessors in interest in the Disputed Area.

Yet, Defendants attempt to undercut Plaintiffs' assertion of hostility by claiming that Plaintiffs expressly avoided occupying the entire Disputed Area. Specifically, Defendants argue that when Plaintiffs leveled their backyard in 1991, they were careful not to level the Disputed Area. Defendants point to Plaintiffs' placement of their retaining wall, east to west, as well as their planting of rhododendrons and evergreens both behind and in front of their privacy fence - - all stopping short of the Disputed Area -- as evidence of Plaintiffs' conscious avoidance of encroachment. Defendants argue that Plaintiffs knew the location of the true boundary line and were careful not to extend their occupation beyond it.

At trial, however, plaintiffs offered credible testimony that in placing the retaining wall, they relied on the advice of their contractor. He instructed them that if they were to level the yard all the way across the Disputed Area, the stone wall might collapse into the back yard and the roots of trees might be disturbed. (C. Hurley Trial Tr. 10:11-10:15). As a precaution, according to Plaintiffs, they stopped several feet short of the stone line to ensure its stability. The Court finds this explanation to be credible and further notes

that Plaintiffs' evidence of mowing and planting by them and their predecessors in interest as well as their erection of the privacy fence demonstrates that the possession of the Disputed Area by Plaintiffs and their predecessors in interest was sufficiently hostile to Defendants and their predecessors in interest.

Plaintiffs did not need to go to extraordinary lengths to evidence hostile possession (such as extending their house or building a second garage inside the Disputed Area). All that the law requires is that Plaintiffs used the Disputed Area in a manner typical of similarly situated owners' side yards that was hostile to the interests of Defendants and their predecessors in interest as true owners of that property. See Anthony, 681 A.2d at 898 ("[T]he ultimate fact to be proved is that the claimant has acted toward the land in question 'as would an average owner, taking into account the geophysical nature of this land.'") (quoting Gammons, 447 A.2d at 368); see also DeCosta v. DeCosta, 819 A.2d 1261, 1264 (R.I. 2003) (finding fence erected approximately one foot beyond the hedgerow was a further encroachment onto plaintiff's property and clearly adverse to plaintiff's ownership interest). Based on all the evidence, therefore, this Court finds that Plaintiffs' cultivation and maintenance of the Disputed Area (and the similar actions of their predecessors in interest) as well as their erection of a fence on Defendants' property proves by clear and convincing evidence that their possession of the Disputed Area was hostile to the Defendants and their predecessors in interest as true owners for the requisite statutory period of time.

4.

Possession under a Claim of Right and Exclusive Possession

"Possession under a claim of right means that the entry by the claimant [onto the land] must be in accordance with a claim to the property as the claimants' own with the intent to hold it for the entire statutory period without interruption." Tavares, 814 A.2d at 351 (internal citations omitted). Possession under a claim of right is essentially the same as hostile possession in that they both "indicate that the claimant is holding the property with an intent that is adverse to the interests of the true owner." Id. A claim of right "will arise by implication through objective acts of ownership that are adverse to the true owner's rights, one of which is to exclude or prevent such use." Reitsma, 774 A.2d at 826; see also Carnevale, 853 A.2d at 1201 (finding that evidence that claimant mowed grass, maintained vegetation and constructed a fence suggested claimant was acting under a claim of right). Here, the evidence shows that since acquiring their property in 1984, the Plaintiffs have mowed, planted and cultivated the land within the Disputed Area and that they erected a fence in 1991 that has extended since that time to the stone line. Their predecessors in interest engaged in similar mowing of the Disputed Area before 1984. These open and visible actions by Plaintiffs and their predecessors in interest occurred without interference from the Defendants or their predecessors in title, the Hineses. The actions of Plaintiffs and their predecessors in interest evidence their use of the Disputed Area in an "objectively observable manner that is inconsistent with the rights [of the Defendants and their predecessors in interest as] the record owner[s]. Tavares, 814 A.2d at 351.

The element of exclusivity is demonstrated by showing that only the claimant has put the subject area to continuous and substantial use. Gammons, 447 A.2d at 368. A claimant fails to show exclusive possession where the record owner or others "ha[ve] made improvements to the land, or at the very least, ha[ve] used the land in a more significant fashion than merely walking across it." Id.; see also Lee, 456 A.2d at 1183. In Gammons, the Supreme Court found that a claimant had maintained exclusive possession of a disputed parcel despite the fact that neighbors frequently crossed the parcel to reach the seashore. 447 A.2d at 368. Noting that the claimants' clearing of brush and planting of grass and flowers demonstrated exclusive use, the Court stated that "[e]vidence of an ouster and the erection of a physical barrier are not required" to show exclusive possession. Id. at 368.

Here, only the Plaintiffs and their predecessors in interest have made improvements to the Disputed Area, including cultivating plants and flowers, mowing the grass and erecting a fence, all to the exclusion of Defendants and their predecessors in interest. There is no evidence showing that the Defendants or their predecessors in interest made any improvements to the Disputed Area or cultivated it beyond the Hineses' improvement of the stone line to guide cattle to Iroquois Road, which had not been done at least since the Elliotts purchased the property in 1973. Even if, as they testified, the Defendants walked over the Disputed Area twice a year, which this Court doubts, such use pales in comparison to the years of cultivation and occupation of the Disputed Area by Plaintiffs and their predecessors. Thus, Plaintiffs have established, by clear and convincing evidence, possession by them and their predecessors under a claim

of right and exclusive possession of the Disputed Area over the requisite statutory time period

5.

Statute of Limitation

Defendants sought an in limine ruling by this Court to exclude relevant evidence of adverse possession pre-dating 1986 because they contend that such evidence is barred by the catchall ten-year statute of limitation codified in R.I. Gen. Laws § 9-1-13(a). This statute states that "[e]xcept as otherwise specially provided, all civil actions shall be commenced within ten (10) years next after the cause of action shall accrue, and not after." § 9-1-13(a). Because the adverse possession statute does not contain an exception to this catchall statute of limitation, Defendants contend that an adverse possessor must file his or her claim within ten years after the claim has accrued. According to Defendants, therefore, an adverse possessor only may submit a maximum of twenty years worth of evidence to support such a claim. As such, Defendants assert that evidence pre-dating 1986 must be excluded from this Court's consideration.

Defendants have a false understanding of the adverse possession statute. The adverse possession statute itself is a statute of limitation. It imposes a ten-year limitation upon claims to recover real property by record titleholders. See Carnevale v. Dupee, 783 A.2d 404, 412 (R.I. 2001) (holding "[s]ection 34-7-1 creates a period of limitations on actions to quiet title that runs against the record owner of the land") (emphasis in original). Like the catchall statute of limitation, where a record owner fails to file an action to remove an adverse possessor for a period of ten years, the owner is forever barred from recovering the property in the future. See Cahill, 11 A.3d at 86 (noting that

"our English predecessors in common law [] settled upon statutes of limitation to effect adverse possession"). Thus, the only statutory limitation on claims in this case is the adverse possession statute itself – which bars a claim of ownership by Defendants to the Disputed Area, not Plaintiffs.

To apply the catchall ten year statute of limitations to an adverse possession claim would make no sense since "[t]he adverse possessor is under no duty to quiet title by judicial action, nor 'to vigorously assert [his or her] right at every opportunity." Carnevale, 783 A.2d at 412. It is the record owner who is "chargeable with knowledge of what has been done openly on the land" and who must assert his or her true ownership before the adverse possession statute has run. Tavares, 814 A.2d at 352. Once the statute has run, title vests automatically in the adverse possessor by operation of the statute, independent of judicial decree or further action on the part of the adverse possessor. See Carnevale, 783 A.2d at 412 ("By statute, upon ten years of 'uninterrupted, quiet, peaceful and actual seisin and possession' of the land, 'good and right title' vests immediately in the adverse claimant.") (emphasis added) (citing § 34-7-1); see also Lee, 456 A.2d at 1183 (stating "no particular act to establish an intention to claim ownership is required to give notice to the world of the claim . . . [i]t is sufficient for the claimant to go upon the disputed land and use it adversely to the true owner"). Thus, Defendants' argument that the catchall statute of limitations should apply to the adverse possession statute, which by itself imposes a limitation on claims by record title holders, is misplaced.

Further, to the extent Defendants argue that a court only may view evidence from a defined ten-year period and nothing from before or after when determining whether title has vested through adverse possession, they are mistaken. Adverse possession

jurisprudence is replete with cases considering evidence from a time-period well in excess of ten years. See McGarry, 33 A.3d at 142 (considered thirty years worth of adverse possession evidence); Cahill, 11 A.3d at 84-85 (evidence of adverse possession began in 1977 and suit was filed in 2006); Acompara, 899 A.2d 459 (concerned twenty years worth of evidence); Tavares, 814 A.2d at 348 (asserted adverse possession over a period of seventy years). Thus, while the adverse possession statute requires clear and convincing evidence of adverse possession for at least the requisite ten year statutory period, it does not at the same time limit the consideration of evidence to a single expressly defined ten year period. The adverse possession statute limits the bringing of actions by a record titleholder, not the amount of evidence an adverse possessor may submit to prove that he or she has met the necessary elements of an adverse possession claim.

The Court further notes that, even if it were to exclude the pre-1986 evidence, the record still provides clear and convincing evidence that Plaintiffs' use of the Disputed Area satisfies the adverse possession statute. Accordingly, the Court finds that Plaintiffs have established each element of their adverse possession claim by clear and convincing evidence such that they are vested with title and ownership of the Disputed Area up to the stone line.

B

Acquiescence

In the alternative, Plaintiffs claim title to the Disputed Area under the doctrine of acquiescence. Plaintiffs assert that based on all of the evidence presented at trial, they have proven that a boundary marker consisting of the stone line existed. Thus, Plaintiffs

argue that a new boundary line in accordance with the stone line should be established under the doctrine of acquiescence. Specifically, Plaintiffs argue that based on the silence of Defendants and Defendants' immediate predecessors in title, as well as Defendants' failure to interfere with Plaintiffs' use of the Disputed Area, Defendants have acquiesced implicitly to the stone wall as a boundary marker. Defendants counter, however, that Plaintiffs have failed to submit any evidence of the Defendants recognizing, either explicitly or implicitly, the stone line as the parties' true boundary marker. Thus, Defendants claim that Plaintiffs have failed to prove their claim of acquiescence by a preponderance of the evidence.

Absent evidence of an express agreement between parties, a party alleging acquiescence must show that a boundary marker existed and that the parties "recognized that boundary for a period equal to that prescribed in the statute of limitations to bar a reentry, or ten years." DelSesto v. Lewis, 754 A.2d 91, 95 (R.I. 2000) (internal citations omitted). "The element of recognition may be inferred from the silence of one party or their predecessors in title" so long as both parties were aware of the new boundary. Locke v. O'Brien, 610 A.2d 552, 556 (R.I. 1992). Before a court may identify the boundary, however, it first must determine "whether there has been the required acquiescence." Essex v. Lukas, 90 R.I. 457, 469, 159 A.2d 612, 613 (1960). Further, the existence of acquiesence is a question of fact that depends on the circumstances of the case. Id. at 459-60, 159 A.2d. at 613.

A party charged with acquiescence must have had "actual notice" of the conditions to which it is claimed he or she has acquiesced. Acampora, 899 A.2d at 465 (citing Powell on Real Property § 68.05[5][a] at 68-27). In Acompora, the Supreme

Court found that the record titleholder had acquiesced to a boundary line within his parcel of land by visiting the claimant while the claimant trimmed hedges at the new property line and not objecting. 899 A.2d at 465-66. In DelSesto, however, the Court remanded a case for further factfinding because the record was unclear as to whether the titleholder was aware of her ex-husband's oral agreement with the neighbors to adjust their property lines. 754 A.2d at 95.

In the instant case, there is no evidence of an agreement among the parties, or their predecessors in title, that the stone wall was to serve as a boundary marker. There was no evidence at trial that the parties or their predecessors in interest ever interacted in a way that would suggest an actual mutual understanding that the stone line was a property marker. Defendants testified that they believed that Plaintiffs' concrete retaining wall, which runs eight to ten feet north of the stone line was the parties' common boundary. (Altieri Trial Tr. 119:19-119:23; Schmidt Trial Tr. 6:19-7:06). As mentioned earlier, the Court questions the extent to which Defendants were familiar with the Disputed Area prior to this litigation and whether Defendants even knew Plaintiffs had a retaining wall in their back yard prior to 2006. Regardless, Plaintiffs have not provided evidence that Defendants knew that the stone line existed and accepted it as the parties' true boundary. "A party charged with acquiescence must have had 'actual notice' of the conditions to which it is claimed [they have] acquiesced." Acampora, 899 A.2d at 465. Additionally, because the Hineses owned the Disputed Area until 1999, to meet the ten-year requirement for acquiescence, Plaintiffs also must show that the Hineses accepted the stone line as the true boundary line as well. Plaintiffs failed to proffer any such evidence.

Mere evidence that Defendants as well as their predecessors in interest did not interfere with Plaintiffs' maintenance of the Disputed Area up to the stone line does not demonstrate an actual acceptance of the stone line as the true boundary marker between the parties. In Essex, our Supreme Court considered the issue of whether a hedge could be the marker of an agreed upon boundary line. 90 R.I. 457, 159 A.2d 612 (R.I. 1960). There, the Court found that "although claimants presented testimony to the effect that they and others always considered the hedge to be the boundary line, there [was] nothing in the evidence indicating that they or their predecessors in title ever stated such belief to the [defendants] or their predecessors in title." Id. at 464, 159 A.2d at 615. The only evidence presented by the claimants in Essex was that "they and their predecessors always took care of the land and hedge on their side." Id. Beyond this evidence of maintenance, the Court found nothing to indicate an agreement or an acknowledgement between the parties of the hedge line as an actual property boundary. Id.

Likewise here, the evidence presented by Plaintiffs merely proves that they as well as their predecessors in interest maintained the Disputed Area up to the stone line. The evidence does not show any interaction between the parties from which the Court can infer an agreement on the part of Defendants to use the stone line as the parties' true boundary. Indeed, neither party knew of the conflict between the property line by deed and Plaintiffs' use of the Disputed Area until 2006 when Defendants surveyed and staked the property. Without this evidence of an acknowledgement, the Court must deny Plaintiffs' claim of acquiescence.

Further, to the extent Defendants have asked this Court in Count II of their Counterclaim for acquiescence to declare the parties' boundary by deed as their true

boundary, it must deny this request as well. It already has determined that Plaintiffs hold title to the Disputed Area up to the stone line under the doctrine of adverse possession. In addition, this Court finds, just as it did in denying Plaintiffs' claim of acquiescence, that the parties did not acquiesce in the boundary line as shown by their deeds. Plaintiffs occupied the Disputed Area because of mistake and thought that the stone line marked the edge of their property. There is no evidence suggesting that Plaintiffs even knew of their boundary by deed with Defendants. Further, the Court questions the extent to which Defendants gave any thought as to the location of their property line with respect to the Disputed Area. According to Schmidt, he did not even inspect the boundary lines drawn on the Caito Survey when he purchased the property. (Schmidt Trial Tr. 29:5-15). It was not until Defendants surveyed and staked their property that the parties learned the location of their true boundary line by deed. Only then did Plaintiffs file their claim for adverse possession and did Defendants contest Plaintiffs' use of the Disputed Area. The Court finds insufficient evidence, therefore, of an agreement or acknowledgment by either party that their boundary by deed was their true property line. Accordingly, Count II of Defendants' Counterclaim is denied.

C

Defendants' Remaining Counterclaims

Having found that Plaintiffs hold title to the Disputed Area under the doctrine of adverse possession, the Court accordingly denies Count I of Defendants' Counterclaim seeking a declaratory judgment to quiet title to the Disputed Area in Defendants. In addition, based on its ruling in favor of Plaintiffs as to their claim of adverse possession, it necessarily follows that this Court must deny Defendants' counterclaims for trespass,

slander of title and abuse of process. The Defendants' trespass claim must fail as a result of this Court's ruling in Plaintiffs' favor as to adverse possession. Further, Plaintiffs' filing of a lis pendens and this litigation was proper to protect their interest in and quiet title to the Disputed Area, thereby defeating Defendants' claims of slander of title and abuse of process.

IV

Conclusion

For all of these reasons, this Court finds that Plaintiffs have shown by clear and convincing evidence that they have title to the Disputed Area of Defendants' property under the doctrine of adverse possession. Plaintiffs have failed, however, to prove their claim of acquiescence. Thus, this Court grants judgment in favor of Plaintiffs on Count I of their Complaint for adverse possession but denies Plaintiffs judgment as to Count II of their Complaint for acquiescence. Having found in Plaintiffs' favor as to their adverse possession claim, this Court denies and dismisses Defendants' claims for declaratory judgment, trespass, slander of title and abuse of process. Accordingly, Defendants' Counterclaim is denied and dismissed in its entirety.

Counsel shall confer and submit to this Court forthwith for entry an agreed upon form of judgment that is consistent with this Decision.