STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: June 19, 2015)

C & G REALTY, LLC	:	
	:	
V.	:	**C.A. No. PC-2005-4073**
	:	
ANTHONY SALVATORE	:	
and MARGUERITE SALVATORE	:	

DECISION

MCGUIRL, J. This matter arises out of mistaken assumptions regarding the location of a cesspool sewage disposal system (cesspool) in relation to the sale of real property (the Property). C & G Realty, LLC (C & G Realty) brought suit against Anthony Salvatore (Mr. Salvatore) and Marguerite Salvatore (Mrs. Salvatore) (collectively, the Salvatores) upon discovering that land sold by the Salvatores did not include a cesspool. Rather the cesspool was located beneath a shed on land that the Salvatores retained (the Adjacent Parcel) when they sold C & G Realty three other contiguous lots. C & G Realty claims there was misrepresentation on the part of the Salvatores, a mutual mistake of fact, and that C & G Realty has adversely possessed the shed and the cesspool. In October of 2014, the case proceeded to a non-jury trial. Jurisdiction is pursuant to Super. R. Civ. P. 52(a).

I

Facts & Travel

C & G Realty commenced the instant suit in July of 2005. The trial was held in October of 2014, and Mr. Salvatore testified along with George German (George) and Charles German (Charles), who own C & G Realty. Having reviewed the evidence presented by both parties at trial, the Court makes the following findings of fact.

At trial, C & G Realty argued that Mr. Salvatore misrepresented the location of the cesspool, as well as whether the shed located upon the Adjacent Parcel was part of what C & G Realty was purchasing. Alternatively, C & G Realty proposed that there had been a mutual mistake as to the disputed area, in particular the location of the cesspool. Finally, C & G Realty argued that it had successfully adversely possessed the Adjacent Parcel.

Mr. Salvatore testified that he did not know about the cesspool's location at the time of the sale of the Property, and that he had never had a survey of the Property performed. He testified that he has been going onto the Adjacent Parcel consistently since C & G Realty purchased the Property. He attested that he has been using the shed for storage and still has property in it, and also that he put a fence up around the Adjacent Parcel. He was clear, however, that the fence was not meant to keep C & G Realty's employees from accessing the shed or Adjacent Parcel. Furthermore, Mr. Salvatore testified that he never physically removed C & G Realty or told them to stop using the shed and some of the land around it, and he did testify that he knew C & G Realty was using the land. Mr. Salvatore also testified about walking the Property with George; he stated that all five lots he owned were for sale, but C & G Realty initialed the three lots it chose to purchase on a map of the Property. Mr. Salvatore did not recall having any specific conversations about the shed, nor does he recall discussing the removal of any of his belongings from the shed after the closing. He attested that he visited the shed two or three times a year, and that he would occasionally see one of the German brothers. He testified that when he discovered the location of the cesspool under the shed, he went to see George to inform him of the problem, and that this meeting, which occurred in late 2004, resulted in C & G Realty making an offer to purchase the contested area with the cesspool. According to Mr. Salvatore, George offered $20,000, which Mr. Salvatore refused. He did make a counteroffer of

$60,000, which C & G Realty rejected. Mr. Salvatore attested that one of his lawyers sent a letter to C & G Realty in January of 2005 disputing title to the shed on the Adjacent Parcel.

George is part-owner of C & G Realty, and he testified that he assumed the shed was part of the land that C & G Realty purchased from the Salvatores. George testified that he recalled seeing Mr. Salvatore visiting the shed only once or twice, and that Mr. Salvatore did put a fence up, but that C & G Realty employees moved the fence and continued to access the shed. He attested that C & G Realty performed maintenance on and around the shed, and that the business used it continuously for ten years. George did not recall ever having a specific discussion with Mr. Salvatore when they walked the premises about whether the shed was included, and he testified that C & G Realty made an offer to purchase the disputed area sometime after Mr. Salvatore informed him of the problem with the cesspool in January of 2005.

Charles, also part-owner of C & G Realty, testified that he assumed the shed was included in what C & G Realty purchased back in 1995. He testified that he also walked the Property with Mr. Salvatore, and that there was a representation by Mr. Salvatore about the shed being included. Charles recalled receiving a letter notifying C & G Realty of the cesspool's location in January of 2005, and that an offer to purchase was made in order to resolve the problem. He, too, testified that C & G Realty has been using the shed and some of the land around it since they purchased the Property in 1995.

II

Standard of Review

Rule 52(a) of the Rhode Island Rules of Civil Procedure, which governs non-jury trials, provides 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[.]" Super. R. Civ. P. 52(a). When sitting

without a jury, therefore, "[t]he trial justice sits as a trier of fact as well as of law." Hood v. Hawkins, 478 A.2d 181, 184 (R.I. 1984). It is also the trial justice's role at such a proceeding to determine the credibility of witnesses. See McEntee v. Davis, 861 A.2d 459, 464 (R.I. 2004). "[A]s a front-row spectator[,] the trial justice has the chance to observe the witnesses as they testify and is therefore in a 'better position to weigh the evidence and to pass upon the credibility of the witnesses[.]'" Perry v. Garey, 799 A.2d 1018, 1022 (R.I. 2002) (quoting Nisenzon v. Sadowski, 689 A.2d 1037, 1042 (R.I. 1997)).

In making the required specific findings of fact and conclusions of law, "brief findings will suffice as long as they address and resolve the controlling factual and legal issues." White v. LeClerc, 468 A.2d 289, 290 (R.I. 1983); see Super. R. Civ. P. 52(a). The findings, however, must be supported by competent evidence. See Nisenzon, 689 A.2d at 1042. While the trial justice need not categorically accept or reject every piece of evidence, the trial justice should address the issues raised by the pleadings and testified to during the trial. See Notarantonio v. Notarantonio, 941 A.2d 138, 147 (R.I. 2008); Nardone v. Ritacco, 936 A.2d 200, 206 (R.I. 2007).

III

Findings of Fact

C & G Realty purchased the Property at 231 Putnam Pike located in Johnston, Rhode Island from Mr. Salvatore and Mrs. Salvatore in February of 1995. Behind the Property is the Adjacent Parcel, a piece of land that includes a shed,[1] and the Salvatores own the Adjacent Parcel. In late 2004, Mr. Salvatore discovered that the cesspool for the Property

[1] Mr. Salvatore originally owned five lots; three of these lots—numbered 46, 47, and 48—were sold to C & G Realty in 1995. The other two lots—numbered 43 and 44—were retained by the Salvatores, and the two lots were eventually merged into one by the Town of Johnston. Title to lots 43 and 44 were transferred from Mr. Salvatore to Mrs. Salvatore in early 1995.

that C & G Realty purchased is situated directly underneath the shed located on the Adjacent Parcel. C & G Realty's building has a toilet and washbasin, which uses the cesspool, and C & G Realty require ownership of the cesspool. Mr. Salvatore or his attorneys notified C & G Realty of this problem in late 2004 or early 2005. C & G Realty responded with an offer to purchase the Adjacent Parcel in an effort to resolve the dispute and obtain possession over the cesspool. Mr. Salvatore rejected the offer to purchase, and the parties were unable to agree on a price.

C & G Realty has used the shed and some of the land directly around it continuously for the ten years between purchase and the discovery of the cesspool's location. C & G Realty maintained the shed, mowed the lawn, and removed a fence put up by Mr. Salvatore. Mr. Salvatore had knowledge of C & G Realty's use of the shed and some of the land immediately around it. Mr. Salvatore never told C & G Realty to stop using the shed, nor did he make any efforts to exclude C & G Realty's employees. Mr. Salvatore did visit the shed throughout the ten years at issue; he was seen very infrequently by either George or Charles, but it is possible he visited the shed without being observed by any C & G Realty employees.

There was never any actual representation by Mr. Salvatore to the Germans about whether the shed was included with the lots C & G Realty purchased. There was also never any representation by Mr. Salvatore to the Germans about the inclusion or location of the cesspool at the time of the sale, nor was there any discussion at all about the shed. All parties concerned operated upon assumptions about the location of the cesspool and about what C & G Realty purchased from the Salvatores. Neither party has, to this day, had a survey done of the Property or the Adjacent Parcel. There was never any discussion about whether either party had a responsibility to have a survey done. Both parties failed to discuss the location of

the cesspool at the time of sale, but they agreed it is necessary for the Property have a working cesspool.

IV

Analysis

A

Misrepresentation

A misrepresentation is "'* * * any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts.'" Halpert v. Rosenthal, 107 R.I. 406, 413, 267 A.2d 730, 734 (1970) (citing Restatement (First) Contracts § 470(1)). To be considered material, a misrepresentation must be "likely to affect the conduct of a reasonable man with reference to a transaction with another person." Id. Even if innocently made, a misrepresentation "may be actionable, if made and relied on as a positive statement of fact." Id. at 415, 267 A.2d at 735. In that case, the party making the representation will be held liable. Id. While actions alone, "whether by word or deed, may create a duty of care running to the plaintiff where none existed," there must be an actual misrepresentation. Mallette v. Children's Friend and Serv., 661 A.2d 67, 70-71 (R.I. 1995) (a cause of action for negligent misrepresentation was established where an adoption agency volunteered information about the child's biological mother's medical and genetic background; offering this information established a duty that the agency would "refrain from making negligent misrepresentations"). Misrepresentation must be proved by a preponderance of the evidence. Nisenzon, 689 A.2d at 1046 n.11 (citing Ostalkiewicz v. Guardian Alarm, Div. of Colbert's Sec. Servs., Inc., 520 A.2d 563, 569 (R.I. 1987)).

In the instant case, there are two potential instances of misrepresentation. First, C & G Realty alleges there was a misrepresentation by Mr. Salvatore regarding the location of the cesspool. They argue that this misrepresentation was one of omission. The thrust of C & G Realty's argument is that to have a toilet and washbasin requires having a cesspool on the same parcel of land, and that Mr. Salvatore therefore represented that the cesspool was located on the Property when he made it available for purchase. C & G Realty further alleges that it would not have purchased the Property had it been aware that the cesspool was located on the Adjacent Parcel. However, at trial, it was made clear that neither Mr. Salvatore nor C & G Realty knew where the cesspool was, and a survey of the Property has never been performed, nor was one ever discussed. Both Mr. Salvatore and C & G Realty made an assumption about the location of the cesspool, but this assumption—and putting the Property up for sale—do not rise to the level of a misrepresentation on the part of Mr. Salvatore. Cf. Dudzik v. Leesona Corp., 473 A.2d 762, 766 (R.I. 1984) (finding that an employer's erroneous statement regarding the exercise of a stock option that caused the employee to take action in reliance upon the statement was a misrepresentation, regardless of the employer's good faith).

Both parties agree that there was never any specific discussion regarding the location of the cesspool, and neither the Salvatores nor C & G Realty have ever had a survey done of the Property. George and Charles, the owners of C & G Realty, assumed the Property included the cesspool, and Mr. Salvatore operated under the same belief. Where there was no discussion about the location of the cesspool and neither party even considered it as a potential problem, it cannot be said that Mr. Salvatore did anything, either verbally or by way of conduct, that could be construed as an "assertion." See Nisenzon, 689 A.2d at 1046 n.11 (citing Dudzik, 473 A.2d at 766) (finding that a misrepresentation requires words or other conduct that "amounts to an

assertion not in accordance with the facts"). At most, Mr. Salvatore could have made an innocent misrepresentation, but even an innocent one requires some form of representation, which is lacking here. Cf. Halpert, 107 R.I. at 411, 267 A.2d at 733 (where real estate agent represented that a house was free of termite issues and that an inspection was not necessary but in reality there was a termite problem; that qualified as an innocent misrepresentation even though the agent believed the representation was true).

An innocent misrepresentation is not "some species of fraud." Halpert, 107 R.I. at 417, 267 A.2d at 736. Rather, the theory behind an innocent misrepresentation is that "[u]nqualified statements imply certainty," and "[r]eliance is more likely to be placed on a positive statement of fact than a mere expression of opinion or a qualified statement." Id. at 418, 267 A.2d at 736. Thus, "[t]he speaker who uses the unqualified statement does so at his peril." Id. Here, Mr. Salvatore made no positive representations about the location of the cesspool, and the faulty assumptions of both parties sound in mutual mistake rather than misrepresentation.

The second alleged misrepresentation occurred regarding whether the shed, which is located on the Adjacent Parcel, was part of the Property purchased by C & G Realty. Prior to the sale, Mr. Salvatore walked the Property with one or both of the owners of C & G Realty. He recalls walking the Property with George, and he does not recall ever having a specific conversation with him regarding whether the shed was part of the Property. George's testimony at trial aligned with what Mr. Salvatore said; George recalled walking the Property, but he could not remember specifically discussing whether the shed was included on the Property. Charles claimed he also walked the Property with Mr. Salvatore and George, and he further testified that after the closing, Mr. Salvatore told them the shed was theirs. His account, however, is the only one that includes a direct statement by Mr. Salvatore regarding whether C & G Realty was

purchasing or had purchased the shed. Mr. Salvatore testified that he believed that both George and Charles knew the shed was not on the Property, and that it was on a lot the two men did not want to purchase.

Based on the evidence presented at trial, the issue of the shed was never directly addressed, and Mr. Salvatore did not make any representations, accurate or otherwise, about its ownership. C & G Realty has the burden of proving misrepresentation by a preponderance of the evidence, and C & G Realty has not offered sufficient evidence to meet that burden. See id. at 419, 267 A.2d at 737. Both Charles and George made assumptions about the inclusion of the shed because it is close to the building on the Property, and it is built in the same style as the main building. However, as the buyer, C & G Realty, represented by George and Charles, should have inquired as to what exactly it was purchasing or where the property line was. Mr. Salvatore did not make a definite statement about the shed, and he should not be punished for the assumptions of the buyer. See Stebbins v. Wells, 766 A.2d 369, 373 (R.I. 2001) (quoting Eramo v. Condoco, 655 A.2d 697, 697 (R.I. 1995)) (mem.) (holding that while there are exceptions, "'[t]he doctrine of Caveat Emptor is still very much applied to sales of real estate'"). Thus, C & G Realty does not have a claim to the shed based on misrepresentation.

B

Adverse Possession

Adverse possession is governed by G.L. 1956 § 34-7-1.[2] The Rhode Island Supreme Court has consistently found that to establish a claim of adverse possession, "a claimant's

[2] Rhode Island's statute on adverse possession reads:

> "Where any person or persons, or others from whom he, she, or they derive their title, either by themselves, tenants or lessees, shall have been for the space of ten (10) years in the uninterrupted, quiet, peaceful and actual seisin and possession of any lands, tenements or hereditaments for and during that time, claiming the same as his, her or their

possession must be actual, open, notorious, hostile, under claim of right, continuous, and exclusive for the statutory period of ten years." Carnevale v. Dupee, 783 A.2d 404, 409 (R.I. 2001) (internal citations omitted). "The party claiming title by adverse possession must prove each of these elements by 'strict proof, that is, proof by clear and convincing evidence.'" Id. (citing Anthony v. Searle, 681 A.2d 892, 897 (R.I. 1996)).

Statutory Period

The first issue is whether C & G Realty proved that it has possessed the Adjacent Parcel for a statutory period of ten years. See § 34-7-1. It is uncontested that C & G Realty took title to the Property in February of 1995, and George testified that C & G Realty also took possession of the shed at that time. C & G Realty contends that at no time since it took possession of the shed did Mr. Salvatore do anything to interrupt that possession until he filed his counterclaim against C & G Realty in October of 2005.

C & G Realty and its employees have used the shed and some of the land around it since they took possession in 1995. George and Charles both testified extensively about using the shed for storage, maintaining it, and performing landscaping around it. George testified that Mr. Salvatore came back only one or twice; he removed his things from the shed, and George saw him there only one other time. Furthermore, there are C & G Realty employees on the Property daily, and Mr. Salvatore has to go on C & G Realty's property to access the shed, so the Germans would have known if Mr. Salvatore was visiting the shed frequently. When and if Mr.

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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; and any plaintiff suing for the recovery of any such lands may rely upon the possession as conclusive title thereto, and this chapter being pleaded in bar to any action that shall be brought for the lands, tenements or hereditaments, and the actual seisin and possession being duly proved, shall be allowed to be good, valid and effectual in law for barring the action." Sec. 34-7-1.

Salvatore did visit the shed, he would have been aware of C & G Realty's use and maintenance of the shed and surrounding land. Mr. Salvatore testified he was aware of the use, but he testified that he never told C & G Realty to cease its use of the shed. At some point, Mr. Salvatore put a fence up near the shed, but he specifically testified that this shed was not meant to keep C & G Realty's employees from using the shed, and, eventually, C & G Realty removed the fence.

There are three ways in which a record owner can interrupt a claimant's adverse possession: "(1) filing of an action to quiet title; (2) filing of 'notice of intent to dispute' adverse possession under § 34-7-6; and (3) physical ouster of the claimant or a 'substantial interruption' of the claimant's possession by the record owner." Carnevale, 783 A.2d at 409-410 (quoting LaFreniere v. Sprague, 108 R.I. 43, 52, 271 A.2d 819, 824 (1970)). In this case, Mr. Salvatore did not file an action to quiet title, nor did he file notice of intent to dispute adverse possession until October of 2005—after the ten year period had run—and he did not physically remove C & G Realty from the shed and/or Adjacent Parcel. Thus, the only way in which Mr. Salvatore could have interrupted C & G Realty's adverse possession was by a "substantial interruption."

What qualifies as a "substantial interruption" is not clearly defined. Generally,

> "the owner's use of land occupied by another under claim of right is presumed to constitute an exercise of the right of the owner to enjoy possession of such land. It has been held that such use of the land under dispute is an exercise of the right of ownership that would interrupt the continuity required by the statute." LaFreniere, 108 R.I. at 53, 271 A.2d at 824.

In LaFreniere, however, the Rhode Island Supreme Court held that even though the rightful owners had a survey done that clearly showed where their land was—and that the claimants had planted trees on that land and maintained it—"the [rightful owners] did nothing that interrupted the [claimant's] occupation. To the contrary, it appears that [the claimant] immediately removed

the stakes placed by the surveyors and continued to maintain the lawn and to occupy the disputed area." Id. Even where a survey is completed and notice is sent to the claimant—who then continues to use the disputed land as before—our Court found this was not sufficient to interrupt possession. Carnevale, 783 A.2d at 411. "[O]rdinarly, the mere act of going on the land by the owner is not enough to interrupt the claimant's adverse possession. To regain the lost possession, the owner must assert a claim to the land or perform some act that would reinstate the owner in possession." 3 Am. Jur. 2d Adverse Possession § 98.

In this case, Mr. Salvatore testified that since selling the Property, he has had access to the shed and has been there occasionally, using it for storage. He testified further that he erected a fence between the Property and the Adjacent Parcel, but the fence was meant to keep people from dumping trash into the ravine behind the Adjacent Parcel, and that was the only reason for the fence. George, however, testified that he only saw Mr. Salvatore use the shed once between the 1995 closing and the erection of the fence in 2005. Furthermore, George stated that he is on the Property seven days per week, and he would know if someone entered it to access the shed.[3] As to the fence, George testified that it did block his access to the shed, but that he peeled back a section of fence to access the shed, and eventually the fence fell down and was removed.

C & G Realty's situation in this matter is comparable to the situation in LaFreniere. In that case, stakes were erected as part of a survey performed by the owner of record, but they were subsequently removed by the claimant, who continued to use the property as before. See LaFreniere, 108 R.I. at 53, 271 A.2d at 824. Similarly here, employees of C & G Realty appear to have moved the fence in order to access the shed, and their use of the shed continued as it had before Mr. Salvatore erected the fence. Furthermore, Mr. Salvatore's use of the shed never

[3] Mr. Salvatore testified that he had to enter the Property to reach the shed because that was the only way to access the Adjacent Parcel.

prevented C & G Realty from accessing and using it, and he testified that the fence was meant to prevent third parties, not C & G Realty, from accessing the Adjacent Parcel. Thus, Mr. Salvatore's actions did not rise to the level of a "substantial interruption" that might have caused the ten-year statute of limitations to cease running. Rather, possession ran from February of 1995 until October of 2005 when Mr. Salvatore raised his counterclaim, and C & G Realty has successfully established its possession of the Adjacent Parcel for the statutorily required ten-year period.

At trial, Mr. Salvatore testified that, upon discovering the cesspool was on the Adjacent Parcel, he went to see George, co-owner of C & G Realty, and, as a result of the meeting, C & G Realty made an offer to purchase the Adjacent Parcel for $20,000 to end the dispute. Mr. Salvatore rejected the offer, and he proposed a price of $60,000, which C & G Realty in turn rejected. Mr. Salvatore claims this happened in December of 2004, but the Germans testified that they did not make an offer to purchase until January of 2005. It is also unclear if the offer to purchase was in response to a letter from Mr. Salvatore's lawyer or to a visit by Mr. Salvatore himself. A letter was never produced by Mr. Salvatore during the instant trial, and it is entirely unclear whether it ever existed. Even if such a letter had been sent or if Mr. Salvatore went to George and put him on notice about the cesspool, such a letter or a visit could not have interrupted C & G Realty's possession of the shed. As discussed above, there are only three ways to achieve interruption, and a visit from Mr. Salvatore is neither a filing of an action to quiet title, a filing of a notice of intent to dispute C & G Realty's adverse possession, nor is it a physical ousting or a substantial interruption. See Carnevale, 783 A.2d at 409-410 (quoting LaFreniere, 108 R.I. at 52, 271 A.2d at 824). Thus, regardless of whether or when Mr. Salvatore

may have notified the Germans and C & G Realty about the cesspool location, his actions could not have interrupted C & G Realty's possession for the statutory period.

Actual & Continuous

In addition to meeting the statutory period, it must be determined whether C & G Realty maintained the shed and Adjacent Parcel in "actual, open, notorious, hostile, under the claim of right, [and] continuous" possession during that ten-year period. Carnevale, 783 A.2d at 409. To establish the elements of "actual" and "continuous" the claimant need not prove constant use; rather, "the test is whether 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." Lee v. Raymond, 456 A.2d 1179, 1183 (R.I. 1983) (citing Russo v. Stearns Farms Realty, Inc., 117 R.I. 387, 392, 367 A.2d 714, 717 (1977)).

George testified that C & G Realty used the shed as storage for maintenance equipment and that they used it continuously. He explained that C & G Realty maintained the land to the west of the shed by cutting the grass and the shrubs. See Gammons v. Caswell, 447 A.2d 361, 363 (R.I. 1982) (holding that clearing and taking care of the property was sufficient to quiet title in favor of the claimant). Additionally, C & G Realty maintained the shed by providing a new roof and siding, as well as painting it. George also testified about the dumpster C & G Realty keeps on the Adjacent Parcel, as well as the continued use of the cesspool. Based on George's testimony, C & G Realty used the shed continuously for the ten-year period; in fact, George testified that C & G Realty was, at the time of trial, continuing to care for the land and using the shed for storage, as well as painting it. See Walsh v. Cappuccio, 602 A.2d 927, 931 (R.I. 1992) (citing Lee, 456 A.2d at 1183) (reaffirming that constant use is not required, rather "continuity of the possession must be sufficient to signal the true owner of the land that a claim of title contrary

to his own is being asserted"). Furthermore, C & G Realty's use of the shed and Adjacent Parcel has been precisely what Mr. Salvatore testified as to using it for—storage and maintenance. See Lee, 456 A.2d at 1183 (finding that the elements of actual and continuous were satisfied where the claimants used a disputed field for recreational purposes, employed a handyman to build a road across, and regularly cleared the field of brush). Thus, C & G Realty has satisfied the elements of "actual" and "continuous."

Open & Notorious

Establishing the elements of "openness" and "notorious" requires a 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." Anthony, 681 A.2d at 897-98 (citing Gammons, 477 A.2d at 367). In other words, the "claimants must show that their use of the land was sufficiently open and notorious to put a reasonable property owner on notice of their hostile claim." Tavares v. Beck, 814 A.2d 346, 352 (R.I. 2003). "No particular act or acts on the part of the claimant is required to put the world on notice of the adverse claim . . . ." Id. For example, in Tavares, the Court found that these elements were satisfied where the claimant built a twelve-foot stone wall on the property. 814 A.2d at 355. In Gammons, the claimant did not build a wall, but he did cultivate the property by clearing away underbrush, establishing gardens, and planting trees. 447 A.2d at 367. Here, C & G Realty used the shed for storage, maintained the shed and the grass and shrubs on the Adjacent Parcel, kept a dumpster next to the shed, and used the cesspool. See Anthony, 681 A.2d at 898 (finding that placing a permanent structure—a rabbit hutch in this case—on the disputed property satisfied the elements of open and notorious). These activities were open for Mr. Salvatore to observe; he still owned the Adjacent Parcel behind the Property, and he could have seen, and did see, that C & G Realty

was using the shed for storage since he entered it at least once in order to discover the location of the cesspool. Thus, the Court finds that C & G Realty's actions were both open and notorious.

Hostility & Claim of Right

C & G Realty must also prove that its possession was hostile and under a claim of right. In Tavares, our Supreme Court held that requiring adverse possession under a claim of right is the same as requiring hostility. 814 A.2d at 351. The two terms "simply indicate that the claimant is holding the property with an intent that is adverse to the interests of the true owner." Id. (quoting 16 Powell on Real Property, § 91.05[4] at 91-31). These elements may be proven "'by implication through objective acts of ownership that are adverse to the true owner's rights, one of which is to exclude or to prevent such use.'" Id. (quoting Reitsma v. Pascoag Reservoir & Dam, LLC, 774 A.2d 826, 832 (R.I. 2001)). The "pertinent inquiry" thus "centers on the claimants' objective manifestations of adverse use rather than on the claimants' knowledge that they lacked colorable legal title." Tavares, 814 A.2d at 351. Our Supreme Court has held that "even when the claimants know they are nothing more than black-hearted trespassers, they can still adversely possess the property in question under a claim [of] right to do so if they use it openly, notoriously, and in a manner that is adverse to the true owner's rights for the requisite ten-year period." Cahill v. Morrow, 11 A.3d 82, 89 (R.I. 2011) (quoting Tavares, 814 A.2d at 351).

Here, C & G Realty has "continuously assert[ed] dominion over the" Adjacent Parcel, including the cesspool. Lee, 456 A.2d at 1183. Hostile "does not connote a communicated emotion but, rather, action inconsistent with the claims of others." Id. C & G Realty used the shed and surrounding land in just such a way; Charles and George testified that from 1995 to the time of trial, the shed was used for storage, they kept a dumpster on the land, and C & G Realty

maintained the shed and the land. See Anthony, 681 A.2d at 898. Neither Charles nor George saw Mr. Salvatore on the Adjacent Parcel, except for a few discrete times during the over ten-year period. See Lee, 456 A.2d at 1184 (finding that where the record owners made no use of their land save for passing through it, such occasional visits were not enough to overcome adverse possession). Mr. Salvatore did put up a fence, but he permitted Charles and George to take this fence down. Regardless of where the true boundary line was between the Property and the Adjacent Parcel, C & G Realty has used the Adjacent Parcel and the shed in a way that satisfies the element of hostility.

Effect of Offer to Purchase

Finally, it must be determined whether C & G Realty's offer to purchase affected its adverse possession claim. The impact of an offer to purchase a disputed piece of land in an adverse possession case has been addressed by the Rhode Island Supreme Court in Cahill. In that case, the plaintiff sent a letter to the defendant offering to purchase the disputed property. The plaintiff "did not deny [the defendant's] title when she sent her 1997 letter. . . . Rather, she was outwardly declaring to the rightful owner himself the viability of his title and fully acknowledging her subservient interest to that owner's title. This manifestation from [the plaintiff] interrupted the accrual of her claim." Cahill, 11 A.3d at 90. However, "an offer to purchase does not automatically invalidate a claim already vested by statute. . . ." Id. at 93.

In Cahill, our Supreme Court drew a careful distinction between the situation before it and an Oklahoma case cited by the trial judge and the plaintiff: Richterberg v. Wittich Mem'l Church, 222 F. Supp. 324, 328 (W.D. Okla. 1963). In Richterberg, the offer to purchase was part of an already disputed claim. This situation is distinct from Cahill, where there was no ongoing dispute when the plaintiff sent the purchase offer. As such, the Supreme Court held that "[the

plaintiff's] cited authorities [did] not convince [the] Court that an offer to purchase does not destroy the elements of hostility and claim of right when there is no ongoing dispute or outstanding claim." Cahill, 11 A.3d at 93 (emphasis added). An offer to purchase may be "an olive branch meant to put an end to pending litigation," and, in that case, such an offer should be treated differently than an offer to purchase that is a "clear declaration" that the claimant seeks to acquire title to the property from the record owner. Id. at 91.

C & G Realty's offer to purchase is distinguishable from Cahill. Here, as in Richterberg, there was already an ongoing dispute when C & G Realty made the offer to purchase the Adjacent Parcel for $20,000. Mr. Salvatore or his legal representation raised the issue of the cesspool and the shed. When C & G Realty made the offer, both parties were then aware that the Salvatores were the record owners. C & G Realty did not need to make an offer to purchase to establish this fact. Rather, C & G Realty, once it was aware of the cesspool's location, sought to end the dispute and acquire the cesspool. C & G Realty's offer to purchase was an "olive branch" presented in the hopes of resolving a dispute swiftly and easily and not an admission that the Salvatores were the true owners. See id. As such, the offer to purchase did not extinguish C & G Realty's adverse possession claim. It is C & G Realty's burden to prove the elements of adverse possession by clear and convincing evidence. Based on the testimony that this Court finds to be credible and evidence that this Court considers to be compelling, C & G Realty has met the requirements for adverse possession as to the shed.

C

Mutual Mistake

C & G Realty has argued that, at the time of the sale of the Property, both parties were operating under a mutual mistake as to the location of the cesspool. Under Rhode Island law,

"[a] mutual mistake is one common to both parties where each labors under a misconception respecting the same terms of the written agreement sought to be corrected." Fleet Nat'l Bank v. 175 Post Road, LLC, 851 A.2d 267, 274 (R.I. 2004). "An agreement containing a mutual mistake fails in a material respect correctly to reflect the understanding of both parties." Rivera v. Gagnon, 847 A.2d 280, 284 (R.I. 2004). It is well established that "mutual mistake must be proven by clear and convincing evidence before a reformation of an instrument should be granted. . . ." Id. "Mutual mistake as to material facts or matters, will avoid a contract, or justify the granting of relief to the party against who it is sought to be enforced, on the ground that a mutual error or mistake defeats the real intention of the contracting parties. . . ." 17A C.J.S. Contracts § 185. What determines the existence of a mutual mistake is the parties' intent. Id. (citing Nunes v. Meadowbrook Dev. Co., 824 A.2d 421, 425 (R.I. 2003) ("To warrant reformation, it must appear that by reason of a mistake, common to the parties, their agreement fails in some material respect correctly to reflect their prior completed understanding. . . . Thus, the parties' intent is a determinative factor") (internal citations omitted) (emphasis in original)). Specifically as to property, our Supreme Court has found that "shared ignorance about the correct boundary line [between two properties] does not unequivocally equate with mutual mistake of the parties. Indeed, it is not merely the existence of common error that creates mutual mistake." McEntee, 861 A.2d at 463.

In the instant case, C & G Realty maintains that both parties labored under the mistaken assumption that the cesspool was located on the Property. It is uncontested that the Property includes a working toilet and washbasin. Furthermore, both parties acknowledge that a cesspool must be located on the same property as the toilet and washbasin. In fact, the Rhode Island Department of Environmental Management (DEM) requires that any building with plumbing

fixtures that produce wastewater must have an onsite wastewater treatment system (OWTS), which must "be located within the boundary of the property upon which the building or dwelling is located." Rules Establishing Minimum Standards Relating to Location, Design, Construction and Maintenance of Onsite Wastewater Treatment Systems, Rule 14.1. The issue here is more than a border dispute; it is essential for C & G Realty to have a cesspool. George testified that, as a business, C & G Realty requires a toilet and running water. Mr. Salvatore testified that, at the time of sale, neither he nor C & G Realty knew where the cesspool was. Tr. 88:15-16, Oct. 1, 2014. Rather, the parties proceeded with the sale operating under the assumption that the cesspool was on the Property. It was not the intention of either C & G Realty or Mr. Salvatore to sever the cesspool from the Property upon which the toilet and washbasin were located. See Nunes, 824 A.2d at 425 (holding that the "parties' intent is a determinative factor" in finding a mutual mistake existed). C & G Realty has met its burden of convincing "the court without hesitancy of the truth of the precise facts in issue" that there was a mutual mistake of fact as to the cesspool. McEntee, 861 A.2d at 464. Thus, this Court finds there was a mutual mistake of fact, and C & G Realty is entitled to relief on that basis.

V

Conclusion

C & G Realty has proved that its possession of the shed and land used and maintained around the shed was actual, hostile, under the claim of right, continuous, and exclusive for the statutory period of ten years as required for adverse possession. This has been established by clear and convincing evidence. Thus, C & G Realty's claim of adverse possession is granted. C & G Realty has also proved by clear and convincing evidence that there was a mutual mistake of fact as to the cesspool. As such, C & G Realty's claim of mutual mistake is also granted. This

Court finds that C & G Realty has acquired title to the disputed property by adverse possession. Counsel shall submit the appropriate judgment for entry.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**C & G Realty, LLC v. Salvatore, et al.**
CASE NO:	**PC-2005-4073**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**June 19, 2015**
JUSTICE/MAGISTRATE:	**McGuirl, J.**
ATTORNEYS:	
For Plaintiff:	**Alfred G. Thibodeau, Esq.**
For Defendant:	**Raymond R. Pezza, Esq.**