

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC.

SUPERIOR COURT

(FILED: November 27, 2013)

G. ALLEN BROOKS AND
ELIZABETH C. BROOKS

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V.

C.A. No. WC 2009-0810

LINDA F. ATKINS, CHESTER P.
ATKINS, AND DOUGLAS J. ATKINS

DECISION

K. RODGERS, J. This property dispute between abutting property owners involves a narrow triangular strip of land in Charlestown, Rhode Island. Plaintiffs, G. Allen and Elizabeth C. Brooks (Plaintiffs or the Brooks), seek to establish title to the land which is approximately twelve feet wide at its widest point and runs between their property and that of Defendants, Linda F., Chester P., and Douglas J. Atkins (Defendants or the Atkins). Following a non-jury trial, this Court requested the parties to submit post trial briefs. Having reviewed said briefs, this Court now will render a Decision.

Jurisdiction is pursuant to G.L. 1956 §§ 8-2-13 and 8-2-14(a). For the reasons set forth herein, judgment shall enter for Defendants.

I

FINDINGS OF FACT

Having reviewed the evidence presented by both parties, the Court makes the following findings of fact. Plaintiffs and Defendants own abutting properties in the Shady Harbor area in the town of Charlestown, Rhode Island. The Brooks' property is

situated at 209 Shirley Drive, identified as Lot 90 on Tax Assessor's Map 3 (formerly Lot 26), and the Atkins' property is situated at 2 Arnold Street, identified as Lot 89 (formerly Lots 24 and 25) on the same plat. Plaintiffs' property and Defendants' property share a common boundary along the southerly line of Plaintiffs' property and the northerly line of Defendants' property.

A

Chain of Title

The chain of title to the subject properties traces back to Everett R. Graichen and Lucy Graichen, who owned what was then identified as Lots 24, 25 and 26, on a subdivision plan known as Shady Harbor, Section 1. In or about 1961, Ralph B. Catlin, Jr. and Irene Catlin (the Catlins) acquired title to all of the property comprising Plaintiffs' and Defendants' lots and later conveyed the lots at different times to different grantees.

1

Plaintiffs' Property

On June 15, 1973, the Catlins conveyed to David A. Buck and Linda M. Buck (the Bucks) the property which currently belongs to Plaintiffs. The metes and bounds description used in that deed reads in pertinent part:

“Beginning at a point marked by an iron pipe in the northeasterly corner of the premises, thence run the following courses and distances:

WESTERLY for a distance of 128.38 feet to a point in the easterly highway of Lou Avenue, thence turning an interior angle of 83° 29' and run

SOUTHERLY for a distance of 80.00 feet by and with the easterly highway line of Lou Avenue to a point thence turning an interior angle of 90° 33' 14" and run

EASTERLY 123.16 feet to a point in the westerly highway line of Shirley Drive, thence turning an interior angle of 79° 28' 46" and run

NORTHERLY by and with the said westerly highway line of Shirley Drive 21.00 feet to a point, thence turn an interior angle of 197° 57' and run

NORTHERLY by and with the said westerly highway line of Shirley Drive for a distance of 56.50 feet to the point and place of beginning.

The said last course makes an interior angle of 88° 38' with the first course hereinbefore described.” Joint Ex. 3 (emphasis added).

The Bucks conveyed their interest in the property to Roger M. and Betty C. Dove (the Doves), in 1977, which deed reflects the same metes and bounds description used in the deed from the Catlins to the Bucks. Cf. Joint Ex. 3, Joint Ex. 5. In 1981, the Doves conveyed the property to Richard A. and Pamela H. Holthaus (the Holthauses), which deed, for the first time, identified the metes and bounds description as follows:

“BEGINNING at an iron pipe in the northeasterly corner of said the [sic] premises; thence running westerly a distance of 128.38 feet to a point in the easterly highway of Lou Avenue; thence turning an interior angle of 83° 29', and running southerly a distance of 80.00 feet by and with the easterly highway line of Lou Avenue to a point; thence turning an interior angle of 90° 33' 14" and running easterly 123.16 feet to a point in the westerly highway line of Shirley Drive; thence turning an interior angle of 78° 28' 46" and running northerly by and with the said westerly highway line of Shirley Drive 21.00 feet to a point; thence turning an interior angle of 197° 57' and running northerly by and with the said westerly highway line of Shirley Drive for a distance of 56.50 feet to the point and place of beginning.

. . . .

Being the same premises conveyed to the grantors by deed of David A. Buck et ux, dated July 15, 1977, recorded in Book 56, at Page 898 of said records.” Joint Ex. 6 (emphasis added).

Thus, the 1981 deed from the Doves to the Holthausens, while recognizing that it conveys the same property conveyed in the deed from the Bucks to the Doves in 1977, reflects a different interior angle in the southeast corner of Lot 90: $78^{\circ} 28' 46''$ as compared to $79^{\circ} 28' 46''$, with all other measurements and calls therein being the same. Cf. Joint Ex. 5, Joint Ex. 6.

In 1982, the Holthausens conveyed their interest in the property to Walter A. and Jean A. Fell (the Fells). Joint Ex. 7. Like the deed from the Doves to the Holthausens, the 1982 deed also reflected the interior angle of the southeast corner as $78^{\circ} 28' 46''$, with all other measurements and calls being the same as set forth in all the subject deeds prior to 1981. The Fells conveyed their interest in the property to Plaintiffs on October 6, 1997. Joint Ex. 8. That deed also identifies the interior angle of the southeast corner as $78^{\circ} 28' 46''$. Id.

2

Defendants' Property

On May 11, 1974, almost one year after having conveyed a portion of their property to the Bucks, the Catlins conveyed the balance of their property to Chester P. Atkins, Sr. (Chet Sr.) and Nella Atkins, the Defendants' late parents and predecessors in title. Unlike the deed to Plaintiffs' predecessors in title, the Catlins' deed conveying the remainder of the property to Chet Sr. and Nella Atkins did not describe the property by metes and bounds. Accordingly, there are no corresponding angles or distances set forth in the Catlins' deed to the Atkins that would be helpful to the issues presented to the Court in the instant action.

B

The Hedgerow

When Chet Sr. and Nella Atkins took title to Lot 89 from the Catlins, it was undeveloped and had a split-rail fence around its entire boundary. On or about the Fourth of July weekend in 1975, Chet Sr.,¹ with his family's help, planted a row of hemlock trees to provide privacy from the neighboring lots. That hedgerow ran from Lou Avenue near the northwest corner of Lot 89, at a position eleven to twelve feet south of the northwestern end of the split-rail fence, to Shirley Drive at the northeast corner of Lot 89. Thus, the hedgerow created a triangle with the split-rail fence, and it is this area that is the subject of this lawsuit (the Disputed Area).

Chet Jr. testified that the hemlocks were deliberately planted on an angle, as opposed to running parallel to the split-rail fence, and began on Lou Avenue approximately 11.5 feet south of the split-rail fence. The purpose in doing so was to leave the hemlocks room to grow and to allow access at Lou Avenue to maintain the hedgerow, while also not blocking the water view from Lot 89 on the Shirley Drive side of the lot.

The Atkins' residence was constructed on Lot 89 and completed in 1976. In the early 1980s, while a full-time resident at the property, Chet Jr. removed the portion of the split-rail fence which ran along his lot's boundary with Lot 90 due to its deteriorated condition. As of the 1980s, only the hemlocks remained between the Atkins' Lots 89 and 90.

¹ Due to the numerous Atkins family members involved in this action as present owners and as predecessors in interest, they will be referred to herein by their first names. No disrespect is intended.

According to the credible evidence presented at trial, Defendants maintained and utilized the Disputed Area from 1975 to the present. Chet Jr. testified that the Atkins collectively maintained and trimmed both sides of the hedgerow each season from 1975 to the present, usually during the month of August. In the earlier years, Chet Jr. and/or members of his family would trim the tops and sides of the hedgerow, but as the years passed and the hemlocks grew, they only trimmed the sides and not the top from approximately 1993 to the present. Chet Jr., his wife Cheryl, and his sister Linda, all testified consistently that the family maintained the hedgerow on both sides from 1975 to the present.

For the entire period from 1975 to the present, there was nothing that physically prevented the Atkins from gaining access to the hedgerow for this maintenance. Similarly, the Atkins regularly mowed the grass around both sides of the hemlocks after grass was planted in 1976. Mowing would take place more frequently in the wet spring and less in the summer when the grass would typically burn out. According to Cheryl and Linda, a lawnmower could easily pass through at Lou Avenue, north of the hemlocks, to mow and maintain the Disputed Area. Cheryl and Linda both acknowledged that when the Fells owned the adjacent property, the forsythia at the southwestern corner of the Fells' lot bordering Lou Avenue became overgrown, creating a tight space through which to pass, but nonetheless a lawnmower could still get through the roughly twelve foot Disputed Area bordering Lou Avenue.

C

Use of the Disputed Area

While the Atkins always considered the Disputed Area their own, they were accommodating to their neighbors, at least until 2007. In 1992, Chet Jr. told Plaintiffs' predecessor in title, Walter Fell (Fell), that he could keep his twenty-two foot "Mako" boat in the northwesterly section of the Disputed Area; in other words, closer to Lou Avenue and on the northern side of the hedgerow. Chet Jr. also testified that he and Fell jointly trimmed the hedgerow once or twice until they had a falling out in the mid-1990s when Fell cut a notch in the section of the hedgerow near Shirley Drive to obtain a water view. Fell confirmed this unfortunate disagreement concerning his efforts to enhance the view from his own property at the expense of the Atkins' hedgerow.

The evidence also shows that the Brooks made efforts to maintain the Disputed Area once they took title from the Fells in October 1997. David Murdock (Murdock), a licensed arborist who maintained the Brooks' property since 1999, testified that he was required to cut back the hemlock hedge on the Brooks' side of the property in order to mow the Brooks' lawn and did not observe evidence that the Atkins mowed the lawn in the Disputed Area until after Labor Day of 2007. Both Cheryl and Linda Atkins, however, testified that the Disputed Area was at times "double mowed" since the Brooks purchased the property.

The Disputed Area was, at various times, used for storage. In the early to mid-1990s, the Atkins and their friend Walter "Billy" Greenhalgh (Greenhalgh) kept their boat trailers and automobiles in the northwesterly part of the Disputed Area at or near Lou Avenue. While Chet Jr. had also given Fell permission to keep his boat in the

Disputed Area, there was no evidence presented that Fell actually did keep his boat in the Disputed Area, but rather the Fells' boat was generally kept closer to the Fells' own screened-in porch on level ground or in the Fells' driveway. The Atkins also utilized the Disputed Area in the mid-2000s to park cars of their guests.

D

The Surveys

Soon after the Brooks took title to Lot 90 in October 1997, in early 1998 the Brooks had their property surveyed by James Kasierski (Kasierski) for the purpose of ascertaining the property line with the Brooks' neighbor to the north, Frances O'Connell (O'Connell). Kasierski marked the southwesterly corner of the Brooks' property with a pin set eighty feet from the property's northwestern most point. The pin was placed in roughly the same place as the old fence line that Chet Jr. had removed in the 1980s.

The Brooks had a second survey done in 2007 by Wesley Grant, III (Grant), a local land surveyor. Grant's survey reflects that rebar was identified in both the northwest and southwest corners of Lot 90, i.e., at the two corners of Lot 90 on Lou Avenue. Joint Ex. 17. In completing that survey, Grant noticed a discrepancy in the Brooks' deed inasmuch as the metes and bounds description, exactly as set out in the deed, would not close the property survey. In sum, Grant discovered if the interior angle of the southwestern portion of the Brooks' property were to make a $90^{\circ} 33' 14''$ angle and run easterly for 123.16 feet, as the deed called for, before turning at an interior angle of $79^{\circ} 28' 46''$ at the southeastern portion of the property (as in the earlier deeds in the

Brooks' chain of title)², then the portion of land that ran along Lou Avenue from the northwestern corner of the Brooks' property to the edge of the Atkins' property would need to be ninety feet, not eighty feet, in order to close the lot. See Joint Exs. 3, 17. Thus, Grant concluded that there was a scrivener's error in the length of the distance running southerly on Lou Avenue.

E

Labor Day 2007

After Grant's survey was completed, there were several efforts by the Brooks to acquire the Disputed Area from the Atkins. One such effort was a visit by Mr. Brooks to the Atkins' home, and thereafter came an e-mail from Mr. Brooks to Chet Jr. requesting that the Atkins voluntarily give him a deed that sets the distance along Lou Avenue at ninety feet rather than eighty feet. Defs.' Ex. B. Alternatively, Mr. Brooks suggested in that email that a lawsuit to resolve this issue would be time-consuming and expensive. Id. Chet Jr. did not immediately respond to these requests.

In early September 2007, Mr. Brooks placed his boat in the Disputed Area. Chet Jr. called the Charlestown Police who, in turn, suggested that Mr. Brooks remove the boat. Mr. Brooks complied. The Atkins then filed a "Notice to Prevent Adverse Possession Pursuant to Section 34-7-6 of the Rhode Island General Laws As Amended" in the Charlestown Land Evidence Records on October 3, 2007, just three days before the tenth anniversary of the Brooks taking title to Lot 90. Joint Ex. 13. Thereafter, Chet Jr. installed a small section of split-rail fence along the boundary previously marked by the

² Grant also concluded that the 78° 28' 46" interior angle measurement (as reflected in the Dove-to-Holthaus, Holthaus-to-Fells and Fells-to-Atkins deeds marked as Joint Exs. 5, 6 and 8) would not work to close this lot either, regardless of whether the Lou Avenue portion of the Brooks' property was ninety feet or eighty feet in length.

old fence, beginning on Lou Avenue eighty feet from the northwestern corner of Plaintiffs' Lot.

The Brooks brought this action in December 2009 to quiet title to the triangular strip of land between their property and the Atkins' property. The Brooks allege that the hedgerow forms their southern boundary with the Atkins' property and that the deeds in their chain of title contain a scrivener's error describing the boundary along Lou Avenue as eighty feet, instead of ninety feet. As such, the Brooks seek reformation of the deed. In the alternative, the Brooks seek to establish ownership over the Disputed Area through either adverse possession or acquiescence. The Brooks also filed claims for slander of title and trespass. The Atkins counterclaimed—in the event this Court deemed the Brooks the rightful owners of the Disputed Area—seeking to establish their ownership rights to the Disputed Area, either through adverse possession or a prescriptive easement.

II

PRESENTATION OF WITNESSES

Fourteen witnesses testified at trial. To a great extent, many of the witnesses had limited access or familiarity with the subject properties and/or had some bias as between the parties, and therefore such testimony is of limited value to the Court. In addition to their own testimony, Plaintiffs presented the testimony of their surveyor, Wesley Grant; Fell, their predecessor in title; Peter Sacco (Sacco) an engineer who performed work on the Brooks' property in 1998; Chant Clapham (Clapham), a realtor involved in the Brooks' purchase of their property; Karen and Willard Conklin, Mrs. Brooks' sister-in-law and brother; and Murdock, Plaintiffs' landscaper. Defendants Chet Jr. and Linda Atkins testified, as did Chet Jr.'s wife, Cheryl, and Chet Jr.'s friend Greenhalgh, and

O'Connell, Plaintiffs' neighbor to the north. For reasons discussed, the testimony of the witnesses is of limited value to the Court.

Plaintiffs reside in Texas and have spent limited time at their vacation home in Charlestown. Before purchasing their vacation home, Plaintiffs walked the property with their realtor, Clapham, and "assumed" that the hemlock hedge represented the property line with the property to the south. Mr. Brooks testified that the hedgerow was overgrown and extending into the yard of the property they were considering purchasing. Plaintiffs produced several photographs which purport to display such unruly overgrowth of the hemlocks at various times, including in July 1997. See Pls.' Ex. 2. Mr. Brooks also testified that at the time they purchased the property, there was an abandoned boat trailer in the back area of the property, generally in or about the Disputed Area, which served as a planter of sorts. There were no photographs of this dilapidated trailer/planter and no evidence that demonstrated that it was situated within the Disputed Area.

Plaintiffs closed on the property on October 6, 1997, via power of attorney. Thus, according to Mr. Brooks, Plaintiffs were only in Rhode Island in early December 1997, for a brief visit to confer with contractors.

Sacco began construction in March 1998 and finished in May 1998, correcting structural problems and generally modernizing the Brooks' vacation home. Additional photographs were introduced reflecting Sacco's work in 1998. See Pls.' Exs. 3-4. Plaintiffs urge this Court to conclude from those photographs, as well as Plaintiffs' Exhibit 5, that access from Lou Avenue to the hemlock hedge was impossible in 1998 due to the overgrowth of the hemlock hedge and the forsythia in the southwest corner of the Brooks' property. However, the angles from which each photograph was taken and

the greenery depicted in the far background of such photographs do not lead to such a clear conclusion as Plaintiffs suggest.

While Sacco was performing work on the Brooks' property and clearing the back southwest corner of the Brooks' property, including removing the old boat trailer/planter, he observed an iron pipe near the hedgerow.³ He did not know how far away that iron pipe was situated from the hemlock hedge but testified that the iron pipe was a typical surveyor's tool to mark a boundary corner. During the three months Sacco and/or his company were working on the Brooks' property in 1998, no neighbors had ever questioned his role in cleaning up that southwest corner of the Brooks' property. Importantly, in the absence of any evidence that the dilapidated boat trailer/planter was situated within the Disputed Area, there appears to be no reason why the removal of that structure would prompt the Atkins to question Sacco's work in that area. Thus, Sacco's testimony was both limited in time and in value to this Court's consideration of the issues.

Clapham, the Brooks' realtor, is married to Mrs. Brooks' cousin. She was familiar with the subject properties as she summered in Shady Harbor since 1971, after having lived there year round since 1966. She only recalled a split-rail fence around all of the Catlins' property when they owned it, and could not recall a split-rail fence dividing the two lots that came to be owned by the Atkins and the Brooks. She admittedly never had discussions with anyone concerning the property line between the property the Brooks sought to and did buy and the Atkins' property, and she testified that she never saw anyone maintain the hemlock hedge. Clapham's testimony may have

³ There was no testimony offered that identifies this iron pipe as the same "pin" that Kasierski used and/or as the same "rebar" that Grant identified in his survey.

served to dispute Defendants' assertion that they routinely maintained the hedgerow and accessed the Disputed Area, yet it also served to contradict Plaintiffs' assertion that they, through their landscaper, and their predecessor in title, Fell, maintained the hedge as well.

Karen and Willard Conklin checked on the Brooks' property when Plaintiffs were not in Rhode Island, mainly before the Brooks' came in May each year and when they rented out the property in August each year. They would drive by the property a couple times per month and get out to view the property only on occasion, particularly if there had been a storm. Karen Conklin testified that she only ever saw Plaintiffs' landscapers maintaining the property, and that she never saw boats or cars on the property except for Mr. Brooks' boat or that of renters. Although her ability to identify the ownership of any boats was not tested on cross-examination, it is reasonable to infer that Karen Conklin would not be capable of identifying boats owned by individuals renting the Brooks' house as opposed to boats owned by the Atkins or their guests, should she observe any boat parked to the north of the hedgerow and close to Lou Avenue.

Willard Conklin recalled that the Brooks' property was surrounded by shrubbery and "all closed in" when the Brooks purchased it. While he testified that he did help his brother-in-law launch his boat and park the boat "bow high" using the Lou Avenue access after the forsythia had been removed, he could not recall ever having stored Plaintiffs' boat in the southwest corner of their property near Lou Avenue before the forsythia was removed (which, credible testimony from Mr. Brooks reveals, took place in 2002).

Karen Conklin confirmed that "the whole back area was filled with bushes" when they purchased the property. She further testified that Mrs. Brooks suffered a severe case

of poison ivy in the “Fall of 1997 or 1998” when she pulled vines from the overgrown hedgerow. Notably, the poison ivy incident could not have occurred in the Fall of 1997 if Mr. Brooks’ testimony stating that they were only present for a short time in early December 1997 after they purchased the property is to be believed. Further, the fact that Mrs. Brooks was exposed to poison ivy growing in the hedgerow at any time does little to establish that Plaintiffs are entitled to the relief they seek.

The Court finds the Conklins’ testimony to be of limited value given the infrequency in which they were present at the property, their bias in favor of their sister and brother-in-law, and the inability to distinguish between a boat owned by a renter as opposed to one owned by the Atkins or any of their guests. Moreover, there was no testimony offered concerning recent mowing in the Disputed Area that the Conklins may have observed on the few, short occasions when they checked on the property. Additionally, Willard Conklin’s testimony that Plaintiffs’ boat was stored in the southwest corner of Plaintiffs’ property after 2002 does not come close to the ten-year statutory period required to establish adverse possession and/or acquiescence.

Fell owned Lot 90 from 1982 to 1997, during which time he rented the property in July and August each year. He confirmed that the “back” southwest corner of his property was overgrown with forsythia when he owned it. He also testified that he himself mowed the entire distance along the hedgerow from Shirley Drive to Lou Avenue, doing so in between rentals; although, toward the end of his ownership, he engaged a lawn service to do the same. Fell testified that the hemlocks belonged to the Atkins as they were situated just a few feet over the property line that Fell determined by his own lay measurements. Fell pruned only his side and the tops of the hemlocks as

needed, but further testified that Chet Jr. had pruned the Fells' side of the hedge one or two times, and that Fell helped Chet Jr. prune Chet Jr.'s side as well. Fell confirmed that Chet Jr. was upset with him in roughly the mid-1990s for having pruned the top portion of the hedge to enhance the Fells' view. Thus, during the Fells' ownership, there was some acknowledgment by Fell that Defendants owned the property on which the hemlocks were situated and Defendants had some access to the area to maintain the hedgerow.

While Fell was not questioned about Chet Jr.'s offer to allow him to park his boat in the Disputed Area, Fell did testify that he elected to store his own boat in his driveway because the bottom of the boat killed the grass in the area in which it had been stored on the Fells' lawn. In that same line of testimony, Fell confirmed that guests parked cars on the Fells' side of the hedgerow but was not aware that Defendants parked their boat or cars in that area. A reasonable inference from this line of testimony is that there was indeed access to be able to park cars in the Disputed Area during the Fells' ownership, that Fell was not always present at the site because it was used as rental property, and there was nothing preventing Defendants or their guests from utilizing the Disputed Area for parking cars, boats or trailers or from maintaining the lawn and hedgerow in the Disputed Area.

Murdock offered testimony concerning his professional role in maintaining Plaintiffs' property. While he could only produce three invoices for services provided to the Brooks in 2006, 2010 and 2012, see Pls.' Ex. 15, he testified that he first became familiar with the Brooks' property in 1999 when he began maintaining the lawn, planting beds and trimming bushes. Of note, 2006 was the first time that Murdock was engaged to

trim the hedgerow; therefore, he did not cut the hedge annually from 1999-2006, during which time he or his company was trimming bushes around the rest of Plaintiffs' vacation house. Murdock was only present on site roughly twice a month, although his company mowed Plaintiffs' lawn weekly and routinely mowed up to the hemlock hedge. Notwithstanding his assigned tasks and limited appearance at Plaintiffs' property, he offered that it did not appear that the hemlock hedge had been pruned every year based upon the invasive species growing in and around the hedgerow, such as bittersweet, poison ivy and vines. However, based upon his limited time at Plaintiffs' property, Murdock could not confirm from his own observations that the Disputed Area was never mowed by someone other than him or his company.

Murdock also testified to his limited familiarity with the forsythia in the southwest corner of Plaintiffs' property. He stated that there was no access to the southwest corner of Plaintiffs' property from Lou Avenue back in 1999, but that now there was. He was not responsible for having removed the forsythia and other brush in that area in 2002.

Murdock confirmed two interactions that he had with Chet Jr. regarding the hedgerow. In 2006, while trimming the hemlocks at Plaintiffs' request, a neighbor approached him, handed him a telephone, and Chet Jr. advised him over the phone not to trim the hemlocks. Murdock apologized and complied with his request. A second telephone conversation took place in 2012, while this suit was pending, in which Chet Jr. advised Murdock not to mow in the Disputed Area.

Finally, Plaintiffs relied upon the testimony of Grant, a Rhode Island licensed land surveyor and registered professional engineer who performed the 2007 survey for

the Brooks. Grant testified that, in his opinion, there was an obvious error in the deed description from the Catlins to the Bucks in 1973. He testified that, in his opinion, the distance of the westerly line, along Lou Avenue, should have been ninety feet and not eighty feet. Utilizing Joint Exhibit 17, a survey plan showing the resulting angles and distances using both the 80-foot line and the 90-foot line, Grant identified each of the errors in the deed description set forth in the Fells-to-Brooks deed, see Joint Ex. 8, that would exist if the 80-foot length was maintained as the westerly property line of Lot 90, along Lou Avenue. Specifically, Grant testified that the interior southwest angle of Lot 90 would have to measure $95^{\circ} 11' 20''$ (rather than $90^{\circ} 33' 14''$), the interior southeast angle of Lot 90 would have to measure $75^{\circ} 50' 40''$ (rather than $79^{\circ} 28' 46''$ as in pre-1981 deeds), and the length of the southern boundary line of Lot 90 would have to be 123.76' (rather than 123.16') if the length of the Lou Avenue boundary line was eighty feet. See Joint Ex. 17. However, on cross-examination, Grant conceded that the presence of rebar located eighty feet from the northwestern corner of Lot 90 along Lou Avenue, which his own survey confirms exists, see Joint Ex. 17, would in fact change his opinion that the property line was intended to be at eighty feet rather than ninety feet. In light of this important concession, this Court cannot agree with his opinion that the 80-foot call in the deed was a scrivener's error, and that the intent of the Catlins and the Bucks was to convey property with a western boundary ninety feet in length. The existence of rebar, in the same location as the original split-rail fence taken down by Chet Jr. in the 1980s, supports the conclusion that the length of the western boundary was intended to be eighty feet.

Defendants each testified to the collective efforts of the Atkins family members in pruning the hemlock hedge each year, typically in August after they had bloomed. In the earlier years, Chet Jr. and/or members of his family would trim the tops and sides of the hedgerow, but as the years passed and the hemlocks grew, they only trimmed the sides and not the top from approximately 1993 to the present. Cheryl and Linda confirmed that family members regularly maintained the hedgerow on both sides and mowed the grass around both sides of the hemlocks through the mid-1970s to the present. The consistent, credible testimony of Chet Jr., Cheryl and Linda established that there was never any physical barrier that restricted them from accessing the Disputed Area to maintain the hedgerow and the lawn.

Chet Jr.'s friend Billy Greenhalgh testified to his familiarity with Defendants' property in Shady Harbor. He testified that he was present when Chet Jr. offered to allow Fell to park his boat in the Disputed Area, although he had no recollection that Fell responded in any way to that offer. He also recalled that the dilapidated boat trailer/planter was in the area of the forsythia and arborvitae, and not in the vicinity where, from roughly 1990 to 1993, he would park his car "quite often." He also loaned his boat and trailer to Chet Jr. in the Summer of 1992, which trailer he himself had backed into the Disputed Area from Lou Avenue. At that time, although overgrown forsythia was situated to the right of the access point (north along Lou Avenue), Greenhalgh testified that there were no bushes of any kind in the ten foot section to the right of the hemlock hedge and up to the forsythia. The Court notes that while credible, Greenhalgh's testimony was limited in time and scope, and only addresses the ability to

access the Disputed Area in the early 1990s, and Chet Jr.'s offer to Walter Fell to store his boat in the Disputed Area.

Finally, O'Connell testified. She had an earlier boundary dispute with Plaintiffs concerning a lamp post, and she testified against Plaintiffs before the Charlestown Zoning Board of Review. Although denying she had an ax to grind, her general demeanor and the nature of her answers leads this Court to conclude that she was biased against Plaintiffs and interested in having her own day in Court against these Plaintiffs. For these reasons, the Court finds O'Connell's testimony to be without any value.

Plaintiffs make much of the overgrown forsythia and brush in the southwest corner of Plaintiffs' property, asserting that Defendants could not have had access to the Disputed Area for the length of time they claim to have. Plaintiffs introduced a series of photographs attempting to show that there was no access to the Disputed Area from Lou Avenue until 2002. See, e.g., Pls.' Exs. 2-6. Accordingly, Plaintiffs urge this Court to find Chet Jr. to be less than credible and, therefore, reject all of his testimony. The Court declines to make such a finding. First, the photographs offered do not provide such clear evidence as Plaintiffs suggest. Second, notwithstanding the overgrowth of forsythia on Plaintiffs' own property, to which Fell and Greenhalgh testified, Cheryl and Linda Atkins credibly testified that they could nonetheless get a lawnmower through to maintain the Disputed Area from Lou Avenue. Third, the testimony referencing the ability to park cars and boats via Lou Avenue was limited in time to the early 1990s through Greenhalgh's testimony, well before 1997 when Plaintiffs purchased the property from the Fells and 2002 when the overgrown area was cleared out. Finally, the credibility of

Chet Jr.'s testimony alone is inconsequential to the final disposition of the issues in this case and does not entitle Plaintiffs to the judgment they seek.

Chet Jr. testified that in 1975 his father, Chet Sr., planted the hedgerow that ran from Lou Avenue near the northwest corner of Lot 89, at a location approximately eleven to twelve feet south of the then-existing split-rail fence, to Shirley Drive at the southeast corner of the Atkins' property as a privacy screen. According to the testimony of Chet Jr., testimony which this Court finds credible, the hedgerow was never intended to delineate the boundary between the Atkins' property and the lot previously identified as Lot 26, now owned by the Brooks. Linda Atkins corroborated Chet Jr.'s testimony. There is no evidence which contradicts this testimony. Indeed, the presence of rebar in the location where the split-rail fence began on Lou Avenue supports a finding that the Atkins at all times considered the hemlocks to be on their property and the Disputed Area to be entirely their own. Additionally, Fell acknowledged from his own lay measurements that the hedgerow was on the Atkins' property.

G. Allen Brooks testified that he and his wife used and maintained the Disputed Area from the time they purchased the property in October 1997 until the time the Charlestown Police confronted Mr. Brooks regarding the placement of his boat in September 2007. He further testified that he and his wife used the house themselves in the month of August, and yet, at no time in all the years since they purchased the property did they observe the Atkins pruning the hedge on their side. It is undisputed, however, that Chet Jr. made his position on the ownership of the Disputed Area known to the Brooks by Labor Day weekend of 2007, as confirmed by their filing in the Land Evidence Records just three days shy of the ten year statutory period.

III

STANDARD OF REVIEW

Rule 52(a) of the Superior Court Rules of Civil Procedure 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 thereon.” Super. R. Civ. P. 52(a). In a non-jury trial, “the trial justice sits as a trier of fact as well as law.” Parella v. Montalbano, 899 A.2d 1226, 1239 (R.I. 2006) (quoting Hood v. Hawkins, 478 A.2d 181, 184 (R.I. 1984)). “Consequently, he [or she] weighs and considers the evidence, passes upon the credibility of the witnesses, and draws proper inferences.” Id. (quoting Hood, 478 A.2d at 184). It is well established that “assigning credibility to witnesses presented at trial is the function of the trial justice, who has the advantage of seeing and hearing the witnesses testify in court.” McBurney v. Roszkowski, 875 A.2d 428, 436 (R.I. 2005) (citations omitted). The trial justice may also “draw inferences from the testimony of witnesses, and such inferences, if reasonable, are entitled on review to the same weight as other factual determinations.” DeSimone Electric, Inc. v. CMG, Inc., 901 A.2d 613, 621 (R.I. 2006) (quoting Walton v. Baird, 433 A.2d 963, 964 (R.I. 1981)).

Furthermore, “[w]hen rendering a decision in a non-jury trial, a trial justice ‘need not engage in extensive analysis and discussion of all evidence. Even brief findings and conclusions are sufficient if they address and resolve the controlling and essential factual issues in the case.’” Parella, 899 A.2d at 1239 (quoting Donnelly v. Cowsill, 716 A.2d 742, 747 (R.I. 1998) (citation omitted)). The trial justice need not “categorically accept or reject each piece of evidence in his [or her] decision for [the Supreme] Court to uphold it because implicit in the trial justices [sic] decision are sufficient findings of fact to

support his [or her] rulings.” Notarantonio v. Notarantonio, 941 A.2d 138, 147 (R.I. 2008) (quoting Narragansett Elec. Co. v. Carbone, 898 A.2d 87, 102 (R.I. 2006)).

IV

ANALYSIS

A

Deed Reformation

Plaintiffs seek to reform their deed on the basis that the metes and bounds description in their deed calling for a distance of eighty feet along Lou Avenue was a scrivener’s error. “For a contract to be subject to judicial reformation, the court must first find a mutual mistake.” Merrimack Mut. Fire Ins. Co. v. Dufault, 958 A.2d 620, 624 (R.I. 2008) (quoting Gorman v. Gorman, 883 A.2d 732, 740 (R.I. 2005)). “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.” Vanderford v. Kettelle, 75 R.I. 130, 142, 64 A.2d 483, 488 (1949). To warrant reformation here, Plaintiffs must show by clear and convincing evidence not only that the parties had come to a prior complete understanding respecting the essential terms of the agreement, but also that the instrument failed to correctly express the agreement in a material aspect because of the mutual mistake. See id.; Hazard v. Hazard, 45 A.3d 545, 550 (R.I. 2012). While this standard is higher than the preponderance of 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.” Cahill v. Morrow, 11 A.3d 82, 88 (R.I. 2011). The evidence, however, is required to be unambiguous and affirmative in character. Locke v. O’Brien, 610 A.2d 552, 555 (R.I. 1992). In other words, the

evidence must be “such that the mind has no difficulty in reaching a point of decision.” Vanderford, 75 R.I. at 142, 64 A.2d at 489.

Here, the mutual mistake alleged by the Brooks is that there was a scrivener’s error in the original deed between the Catlins and Bucks that set the boundary at eighty feet instead of ninety feet. As such, the intent of the Catlins and Bucks, as original grantors and grantees, respectively, is controlling on the issue. Given the practical difficulty in procuring the parol evidence of the Catlins and Bucks, this Court must rely on circumstantial evidence relating to their intent. To this end, Plaintiffs produced the testimony of Wesley Grant. Grant testified that there was an obvious error in the deed description from the Catlins to the Bucks in 1973, as evidenced by the inconsistent boundary distance and angles in the southwest and southeast corners of the property. Grant further testified that, in his opinion, the distance of the westerly line called out in the deed should have been ninety feet and not eighty feet. However, Grant conceded that all the deeds in the Plaintiffs’ chain of title consistently described the western boundary as running eighty feet along Lou Avenue and, most importantly, conceded that the presence of rebar located eighty feet from the northwestern corner of Lot 90, along Lou Avenue, would change his opinion that the property line was intended to be at eighty feet rather than ninety feet.

In considering the evidence presented by Plaintiffs, it cannot be said that they showed, by clear and convincing evidence, the existence of a mutual mistake between the Catlins and Bucks regarding the Lou Avenue boundary line. Other than the discrepancy in the deed between the length of the boundary line and the angles of the southwestern and southeastern corners, Plaintiffs have proffered no other substantive evidence to

support their theory. Indeed, it is just as plausible that the corner angles and length of the southern boundary were the scrivener's errors, and not the western boundary line.

In sum, Plaintiffs have not produced such evidence that “the mind has no difficulty in reaching a point of decision.” Vanderford, 75 R.I. at 142, 64 A.2d at 489. Therefore, this Court must deny Plaintiffs’ request to reform the deed and enter judgment in favor of Defendants on Count VII.

B

Adverse Possession

With regard to the Plaintiffs’ argument that they obtained title to the Disputed Area through adverse possession, the law regarding adverse possession is well settled in this State. “[O]btaining title by adverse possession requires actual, open, notorious, hostile, continuous, and exclusive use of the property under a claim of right for at least a period of ten years.” Cahill, 11 A.3d at 88 (R.I. 2011) (citing Corrigan v. Nanian, 950 A.2d 1179, 1179 (R.I. 2008)). The party who asserts that adverse possession has occurred must establish the required elements by clear and convincing evidence. Id. (citing Corrigan, 950 A.2d at 1179).

The elements of adverse possession that are at issue here have been discussed by the Rhode Island Supreme Court over the years. “Open and notorious” connotes a use that would put a reasonable property owner on notice of the adverse claim. Tavares v. Beck, 814 A.2d 346, 352 (R.I. 2003). The use is hostile if “the adverse possessor . . . establish[es] a use ‘inconsistent with the right of the owner, without permission asked or given[.]’” Id. at 351 (quoting Real Property, § 91.05[1] at 91-23 (2000)). Finally, the element of exclusivity is demonstrated by showing that only the claimant has put the

subject area to continuous and substantial use. Gammons v. Caswell, 447 A.2d 361, 368 (R.I. 1982). A claimant's use is not exclusive where the record owner "has made improvements to the land, or at the very least, has used the land in a more significant fashion than merely walking across it." Id.

Plaintiffs assert that they, and their predecessors in title, have used the Disputed Area as their own, uninterrupted, and exclusively for the statutory period. Plaintiffs' reliance on the Conklins, Clapham and Murdock falls short, for the reasons set forth in Section II, supra, and, importantly, in light of Defendants' assertion of their interest in the Disputed Area on Labor Day weekend of 2007 and thereafter, before the expiration of the ten year statutory period. Additionally, Defendants presented credible evidence to rebut Plaintiffs' claim that their use of the Disputed Area was exclusive. Chet Jr., Cheryl and Linda testified that they maintained the triangular tract of land from 1975, when the hemlocks were first planted, to the present, by mowing the grass and maintaining the hedgerow. Most damaging to Plaintiffs' case, however, is that on October 3, 2007, just three days shy of the ten years from the time the Brooks took title, the Atkins filed the Notice to Prevent Adverse Possession in the Charlestown Land Evidence Records, effectively cutting off the Brooks' adverse possession claim.

While Plaintiffs allege they should be allowed to tack on the time of their predecessors in interest, the evidence presented by Defendants establishes that the Fells did not exclusively possess the Disputed Area either, nor does it show that the Fells' use was hostile. Chet Jr. testified that he informed Fell that the hedgerow was on the Atkins' property, and Fell agreed that he was aware that the hedgerow belonged to the Atkins based upon his own lay measurements. Chet Jr. and Greenhalgh testified that they kept

boat trailers and automobiles in the westernmost part of the Disputed Area in the early to mid-1990s. While there was no evidence that Fell actually did use the Disputed Area to store his own boat, the evidence was uncontradicted that Chet Jr. had expressly given Fell permission to do so. Thus, this Court is satisfied that the evidence shows that any use of the Disputed Area was neither exclusive nor hostile and, therefore, Plaintiffs may not tack on the Fells' time of possession to their own to meet the statutory period for adverse possession.

Accordingly, Plaintiffs have not shown, by clear and convincing evidence, that they, or their predecessors in interest, exclusively used the Disputed Area for the statutory period. Therefore, Plaintiffs' adverse possession claim fails and judgment shall enter in favor of Defendants on Count IV.

C

Acquiescence

In the alternative, Plaintiffs claim title to the Disputed Area under the doctrine of acquiescence. Plaintiffs assert, based on all of the evidence presented at trial, that they have proven that a boundary line consisting of the hemlock hedgerow existed. Thus, Plaintiffs argue that a new boundary line in accordance with the hedgerow should be established.

Where there exists no evidence of an express agreement between the parties, a claimant 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, 610 A.2d at 556. However, before this Court may identify the boundary, it must first determine “whether there has been the required acquiescence.” Essex v. Lukas, 90 R.I. 457, 469, 159 A.2d 612, 613 (1960). This requires a showing that the party charged with acquiescence had actual notice of the conditions to which it is claimed they have acquiesced. Acampora v. Pearson, 899 A.2d 459, 465 (R.I. 2006). The existence of acquiescence is a question of fact that depends on the circumstances of the case. Essex, 90 R.I. at 459-60, 159 A.2d at 613. As with a claim of adverse possession, a party must prove acquiescence by clear and convincing evidence. See Corrigan, 950 A.2d at 1179-80.

Because there is no evidence of an express agreement between the Atkins and the Brooks regarding the boundary line of the Disputed Area, Plaintiffs must show some conduct that demonstrates that both Plaintiffs and the Atkins were aware of the new boundary. While Plaintiffs have proffered credible evidence that they always believed the property line was the hemlock hedge, there is no evidence that the Atkins also believed the hedgerow marked the property line. In fact, the credible testimony presented by Defendants at trial tends to support the conclusion that the hedgerow’s intended purpose dating back to 1975 was only to create a privacy screen, rather than to delineate a boundary. It stands to reason, then, that if Defendants had believed the hedgerow delineated their property line, they would not have felt the need to maintain both sides of it, nor to mow the lawn on the other side. Further, the uncontradicted evidence that Chet Jr. gave Walter Fell permission to store his boat in the Disputed Area supports the conclusion that Defendants did not believe the hedgerow to be the boundary line. Such

intentional conduct on the part of the Atkins tends to disprove Plaintiffs' contention that Defendants were aware the hedgerow created a new boundary.

By failing to show the Atkins had actual notice of the conditions to which it is claimed they had acquiesced, Plaintiffs' third argument must fail and judgment shall enter for Defendants on Count III.

D

Slander of Title

Plaintiffs contend that Defendants slandered their title when they filed the Notice to Prevent Adverse Possession in the Town of Charlestown Land Evidence Records on October 3, 2007. "A slander of title action requires a plaintiff to prove (1) that the alleged wrongdoer uttered or published a false statement about the plaintiff's ownership of real estate, (2) that the uttering or publishing was malicious, and (3) that the plaintiff suffered a pecuniary loss as a result." Beauregard v. Gouin, 66 A.3d 489, 494 (R.I. 2013). In this context, malice "is established by showing that a party made a false statement, with full knowledge of its falsity, for the purpose of injuring the complainant(s)." Arnold Road Realty Assoc., LLC v. Tiogue Fire Dist., 873 A.2d 119, 126 (R.I. 2005) (quoting Montecalvo v. Mandarelli, 682 A.2d 918, 923 (R.I. 1996)).

Here, Plaintiffs have made neither a showing that Defendants made a false statement, nor that they incurred any damages due to the alleged slander. For these reasons, the Brooks' slander of title claim lacks merit, and judgment shall enter for Defendants on Count VI.

E

Trespass

Finally, Plaintiffs contend that Defendants trespassed by parking their boat trailers in the Disputed Area. Having found that Defendants are the rightful owners of the Disputed Area, judgment shall enter for Defendants on Count V.

F

Defendants' Counterclaims

Having found that there was no scrivener's error that warrants reformation, see Section IV(A), supra, the Court finds that Defendants are the rightful owners of the Disputed Area. Accordingly, Defendants' counterclaims for adverse possession and an easement by prescription need not be addressed.

V

CONCLUSION

For all these reasons, this Court finds that Linda, Chester, and Douglas Atkins are the rightful owners of the Disputed Area and that Plaintiffs have failed to satisfy their burden of proof on each count of their Complaint. Accordingly, judgment shall enter for Defendants on each count of Plaintiffs' Complaint. In light of this finding, Defendants' Counterclaims are moot.

Counsel for the Atkins shall prepare a judgment consistent with this Decision.



RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: G. Allen Brooks, et al. v. Linda F. Atkins, et al.

CASE NO: C.A. No. WC 09-0810

COURT: Washington County Superior Court

DATE DECISION FILED: November 27, 2013

JUSTICE/MAGISTRATE: Kristin E. Rodgers, J.

ATTORNEYS:

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