

*Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2003-285

FEBRUARY TERM, 2004

	} APPEALED FROM:
	}
Jeanette and Gene Champagne	} Grand Isle Superior Court
	}
v.	}
	} DOCKET NO. 2-1-99 Giev
Una Gardner and David and Carol Gardner	} Trial Judge: Ben W. Joseph
	}
	}

In the above-entitled cause, the Clerk will enter:

Plaintiffs Jeanette and Gene Champagne appeal from the trial court's order resolving a boundary dispute in favor of defendants and cross-plaintiffs Una, David, and Carol Gardner. Plaintiffs argue that the trial court erred in: (1) establishing the southern boundary of their property; and (2) concluding that Una Gardner had acquired a twenty-foot strip of property through adverse possession. We affirm in part, and reverse in part.

Una Gardner owns real property along Keeler Bay Road (also referred to as A Town Road@ ) in South Hero, Vermont. Her son, David Gardner, and his wife Carol, own property directly to the east. The two Gardner properties are separated by a strip of land twenty-feet wide that runs from Keeler Bay Road to a larger property to the south owned by the Champagnes. The Champagnes hold record title to the twenty-foot strip of property between the Gardner lots, subject to Una Gardner's claim of adverse possession.

The record shows that Una Gardner and her husband purchased two adjacent parcels of land along Keeler Bay Road from Joseph and Lillian Langlois in 1976. The Langlois had acquired the property from Oreste and Frances Montani in 1965. In 1987, Una and her husband sold the eastern parcel (Lot #1) to their son David. The Lot #1 deed describes the property as follows:

Beginning at a point one hundred twenty (120) feet easterly of the northwest boundary of land now or formerly owned by Oreste Montani and Frances Montani in South Hero, Vermont; thence running southerly for a distance of one hundred fifty (150) feet to a point; thence running easterly seventy-five (75) feet to a point; thence running one hundred fifty (150) feet to a point; thence running westerly eighty-five (85) feet to the point of beginning. Said northerly boundary of the land herein conveyed runs parallel to the so-called A Town Road@ .

Una's deed to Lot #2 provides:

Beginning at a point which is the northwest point or boundary of land now or formerly owned by Oreste Montani and Frances Montani in South Hero, Vermont; thence running southerly for a distance of one hundred fifty (150) feet; thence running easterly a distance of one hundred (100) feet to a point; thence running northerly one hundred [sic] (150) feet to a point; thence running westerly one hundred (100) feet to the point of beginning. Said northerly boundary of the land herein conveyed runs paralld [sic] to the so-called A Town Road@ .

The Champagnes, who are relatives of the Gardners, purchased their lot in 1996 from Oreste Montani.

In the late 1990s, a dispute arose between the Champagnes and Gardners regarding the southern boundary of the Gardner properties. The parties hired surveyors who reached conflicting results. The Gardner= surveyor, Norman Rice, interpreted the phrase A parallel to@ in the Gardner= deeds to mean that the northern line of the Gardner lots ran along the edge of Keeler Bay Road right-of-way, rather than along the road= s center line. Because the layout of Keeler Bay Road was either not recorded or the record was not preserved, Rice presumed that the southern edge of the road= s right-of-way was one and one-half rods from the center line of the traveled way. Relying on the only monument called for in the deed, Keeler Bay Road, Rice established the southern line by locating the edge of the road at the northwest corner and measuring 150 feet to the south. Rice found various markers on the property but discounted them because they were not called for in the deeds, and because they conflicted substantially with the lines set forth in the deed descriptions.

The Champagnes= surveyor, Warren Robenstein, measured the Gardner= southern line by starting at a pipe that he found in the rear of Una= s property and measuring north 150 feet. His measurement put the northwest corner of Una= s lot between the edge of the Keeler Bay Road right-of-way and the center of the road. Robenstein= s depiction of the northern line is crooked at various points with respect to Keeler Bay Road.

In 1998, the Champagnes filed suit against the Gardners, asking the court to settle the boundary dispute. The Champagnes also claimed that Una Gardner committed trespass and encroachment by A placing and allowing@ a leach field and a cellar drain to pass under the twenty-foot strip between the Gardner lots. The Gardners counterclaimed on the boundary line issue, and defended the trespass claim asserting that they had gained ownership of the twenty-foot strip through adverse possession. After a two-day trial, the court concluded that the Rice survey accurately depicted the boundaries of the Gardner properties. The court rejected the Robenstein survey because it conflicted with the descriptions of the Gardner lots in the deeds. Specifically, the court found that the jagged line along the northern boundaries of the Gardner lots called for by the Robenstein survey was not A parallel to the Keller Bay Road@ as required by the deeds. For this reason, the court explained, it found the Rice survey credible and it rejected the Robenstein survey. The court also found that Una Gardner had acquired title to the twenty-foot strip of land between the Gardner properties through adverse possession. The court explained that from 1976 to 1999, Una and her husband used the twenty-foot strip of land as a side yard for their home. The court found that the drainage pipe and leach field pipe had been installed under the twenty-foot strip by the Langlois before 1976, and were later replaced by Una and her husband in 1984-85 without permission from Mr. Montani. Because Una= s use of the property had been open, notorious and hostile for at least fifteen years, the court concluded that she had satisfied the requirements of adverse possession. This appeal followed.

The Champagnes first argue that the court erred by adopting the Rice survey and rejecting their survey. According to the Champagnes, the court relied on false legal and factual assumptions in finding the Rice survey more credible. More specifically, the Champagnes maintain that the court erred as a matter of law by concluding that the northerly boundary of the Gardner= property was the southerly edge of Keeler Bay Road, rather than the middle of the road. The Champagnes also argue that the deeds= reference to A parallel to@ Town Road refers to Town Road as it existed in 1965, not as it currently exists. Thus, they assert that the court should not have rejected the Robenstein survey because its northern boundary did not run parallel to the current road. Assuming these arguments fail, the Champagnes assert that the court erred in determining that they had not rebutted the statutory presumption that the Keeler Bay Road right-of-way was three rods wide. Finally, the Champagnes argue that, even assuming that the Rice survey is accurate, the court erred by failing to address their assertion that the southern boundary line had been altered through acquiescence and adverse possession.

The court= s determination of a boundary line is a question of fact to be determined on the evidence. Monet v. Merritt, 136 Vt. 261, 265 (1978). The discrepancy between the two surveys in this case presented A a question of fact requiring the court to weigh the credibility of two expert witnesses.@ MacDonough-Webster Lodge No. 26 v. Wells, 2003 VT 70, & 22, 834 A.2d 25. Thus, we review the court= s factual findings to determine if they are A supported by the record and whether those findings reasonably support its conclusion.@ Id. As we have stated,

When evidence conflicts, the credibility of witnesses, the weight and sufficiency of evidence, and its persuasive effect are matters accorded to the exclusive determination of the trier of fact. If the record contains any credible evidence that fairly and reasonably supports the findings, the trial court's ruling must stand even though inconsistencies or substantial evidence to the contrary may exist.

Id. (citing Lawrence v. Pelletier, 154 Vt. 29, 33 (1990)).

In construing a deed, A [t]he intention of the parties, as gathered from the language used when applied to the premises, controls. @ Parrow v. Proulx, 111 Vt. 274, 277 (1940). When a deed is ambiguous, the court applies well-established rules of construction to establish the intent of the parties to the deed. Monet, 136 Vt. at 264. An inconsistent metes and bounds description yields to a description by monument. Id.; Marshall v. Bruce, 149 Vt. 351, 352 (1988). Accordingly, distances must be lengthened or shortened and courses varied so as to conform to the monument description. Monet, 136 Vt. at 265.

The trial court found that the Gardners' southerly boundary was the line established in the Rice survey. This finding is supported by the evidence. As the court explained, the only monument described in the deeds was Keeler Bay Road (A Town Road @ ), which was considered a highway under Vermont law. See 19 V.S.A. ' 1(12). Because a proper survey of the road had not been recorded, the law provided a presumption that the roadway width was one and one-half rods on each side of the center of the existing traveled way. See 19 V.S.A. ' 32, 702. Accordingly, the court concluded that Keeler Bay Road had a three rod right-of-way. The court found that the only reference point mentioned in the Gardner deeds was the northwest point of the land formerly owned by the Montanis that was conveyed to the Langlois in 1965. That point is shown on the Rice survey as the intersection of the east side of the former Rutland Railroad right-of-way and the south side of the Keeler Bay Road right-of-way. Using that intersection as the starting point, the Rice survey used the southern edge of the Keeler Bay Road three-rod right-of-way to fix the northern boundaries of the Gardner lots in a straight line. The court concluded that A [t]his is a correct interpretation of the deed descriptions that call for the northern boundaries to run parallel to the road. @ Having fixed the northern boundaries for the lots according to the deed description, Rice set the southern boundaries by using the distance measurements for the eastern and western boundaries given in the deeds.

The court rejected the Robenstein survey because it fixed the northern boundaries of the Gardner lots in a jagged line that was not parallel to Keeler Bay Road. The court found that the Robenstein survey relied on pins that Robenstein had found and on Mr. Montani's account about the location of the now-missing pins. The court acknowledged Mr. Montani's trial testimony regarding markers that he had placed to identify the boundaries of Lots #1 and #2. However, the court concluded that this testimony was parole evidence that carried no weight in its interpretation of the deed descriptions because the deeds did not mention these markers. See Haklits v. Oldenburg, 124 Vt. 199, 202 (1964) (A When the language of a deed is clear and unambiguous the court is not at liberty to look at extraneous circumstances for reasons to ascertain its intent @ ; A the intent expressed in the description cannot be altered by evidence or findings of extrinsic facts. @ ). The court acted within its wide discretion in rejecting the Robenstein survey, and instead relying on the Rice survey.

The court's finding that the phrase A parallel to @ in the Gardner deeds meant along the edge of the existing highway right-of-way is not clearly erroneous. In Abraham v. Dougherty, 115 Vt. 71, 74 (1947), we stated that in the absence of evidence showing otherwise, there is a legal presumption that one who owns land abutting a highway owns to the middle of the highway. We explained that this presumption does not apply if the language used by the grantor in his deed shows a clear intent to limit his conveyance to the side of the highway. Id. The court did not err in interpreting the word A parallel @ to mean a line running on the edge of the road, and its conclusion is consistent with our holding in Dougherty. Moreover, we note that while the Champagnes assert that they are entitled to the benefit of this presumption, they did not rely on this argument below. See In re White, 172 Vt. 335, 343 (2001) (internal quotation marks and citation omitted) (A [T]o properly preserve an issue for appeal a party must present the issue with specificity and clarity in a manner [that] gives the trial court a fair opportunity to rule on it. @ ). At trial, the Champagnes urged the court to adopt the Robenstein survey, which ascertained the boundaries of the Gardner lots by relying on a pin in the rear of the Gardners' property, and measuring north from that pin. The Robenstein survey placed the northern line of the Gardners' lots in the middle of the existing highway right-of-way. This claim of error is therefore without merit.

Finally, we reject the Champagnes' assertion that the trial court erroneously adopted the Rice survey based on its conclusion that the three-rod statutory presumption found in 19 V.S.A. ' ' 32 and 702 was irrebuttable. The Champagnes argue that they rebutted the presumption because Robenstein testified that there were buildings located less than one-and-one half rods from the centerline of Keeler Bay Road and there were two maps showing road widths of twenty-two and twenty-four feet. The Champagnes did not rely on this argument below, however, and we therefore consider it waived. See *In re White*, 172 Vt. 335, 343 (2001) (To preserve issue for appeal, party must A present the issue with specificity and clarity in a manner which gives the trial court a fair opportunity to rule on it.@ ) (internal quotations and citation omitted). At trial, the Champagnes argued that the statutory presumption should not apply because Keeler Bay Road was not a roadway within the meaning of 19 V.S.A. ' ' 32 and 702. Although Robenstein testified that there was a camp and another structure along Keeler Bay Road that appeared to encroach on the three-rod right-of-way, this testimony was offered to show that the property lines along Keeler Bay Road extended to the middle of the road, rather than to the road= s edge, and that the use of the road had been acquired through a prescriptive easement, rather than a dedication and acceptance process. The trial court rejected this argument, and found that Keeler Bay Road was a highway for purposes of 19 V.S.A. ' ' 32 and 702, and the presumption therefore applied. The Champagnes do not show how they preserved their claim of error for our review, and we find no error in the trial court= s adoption of the Rice survey.

Although we agree that the trial court= s interpretation of the Gardners= deeds is supported by the evidence, we conclude that the court erred by failing to make any findings regarding the Champagnes= claim that they had acquired title up to the Robenstein line through acquiescence and adverse possession. This claim was squarely raised in the Champagnes= complaint. The Champagnes alleged that from 1965 to the present, they and their predecessors in title had openly, notoriously and continuously claimed and occupied their property up to the southern rear line established by pins originally placed by Mr. Montani, i.e., the line drawn by Robenstein in his survey. They presented evidence consistent with this theory at trial. While the trial court found that the pins should not be given any weight in interpreting the deeds, it did not make any findings as to whether the parties had recognized the pins as marking their common boundary line. The court= s finding that the Gardners held record title south to the Rice line does not necessarily negate the Champagnes= claim that they had acquired title north to the Robenstein line through acquiescence or adverse possession. See *N.A.S. Holdings, Inc. v. Pafundi*, 169 Vt. 437, 447 (1999) (A adverse possession claim . . . seeks to triumph over record title@ ). A The trial court has a fundamental duty to make all findings necessary to support its conclusions, resolve the issues before it, and provide an adequate basis for appellate review.@ See *Secretary v. Irish*, 169 Vt. 407, 419 (1999). The court= s failure to address this argument affects the Champagnes= substantive rights, and we must therefore reverse and remand to the trial court for additional findings. See *id.* (where trial court failed to make finding essential to its conclusion, matter was reversed and remanded for additional findings).

The Champagnes next argue that the court erred in concluding that Una had acquired title to the twenty-foot strip of property between the Gardner lots through adverse possession. They assert that the court committed legal and factual errors in arriving at its conclusion. Specifically, they contend that the court= s finding regarding the presence of the drainage pipe is clearly erroneous. The undisputed evidence, they claim, was that the drainage pipe was within the town road= s right-of-way, and under such circumstances, acquisition by adverse possession is impossible. The Champagnes also assert that the evidence establishes that the Gardners first installed a pipe to the leach field in 1984 or 1985 with Mr. Montani= s permission. The Champagnes argue that there was not a fifteen year period between acknowledgments by the Gardners that Mr. Montani, and later the Champagnes, owned the twenty-foot strip. Finally, the Champagnes assert that the trial court erred in concluding that a document that they offered, in which several of the Gardners recognized the Champagnes= ownership of the twenty-foot parcel, did not have any probative value.

A Adverse possession is a mixed question of law and fact.@ *MacDonough-Webster Lodge No. 26*, 2003 VT 70, at & 17. To acquire title to a piece of property through adverse possession, a party must establish open, notorious, hostile, and continuous possession of the property throughout the statutory period of fifteen years. *Lysak v. Grull*, 174 Vt. 523, 526 (2002); 12 V.S.A. ' 501. The party claiming adverse possession bears the burden of establishing that these requirements are satisfied. *Id.* We view the trial court= s factual findings in the light most favorable to the prevailing party below and we will not set aside the findings unless they are clearly erroneous. *Id.* Our review of the trial court= s legal conclusions is nondeferential and plenary. *Id.*

The trial court found that before 1976, the Gardners= predecessors in title, the Langlois, had installed a drainpipe and a

pipe to a leach field that ran from their house on Lot #1 under the twenty-foot strip between the two Gardner properties. The Gardners replaced these pipes in 1984 or 1985. These pipes were in place under the twenty-foot strip for more than twenty years. The court found that Mr. Montani had not given the Gardners permission to install a drainage pipe and a leach field pipe under the twenty-foot strip when they replaced the existing lines. The court also found that between 1976 and 1999, Una Gardner and her husband used the twenty-foot strip as a side yard to their home. They maintained the lawn and frequently crossed the strip to get to the other lot. Based on these findings, the court concluded that Una's use of the property had been open, notorious, and hostile for at least fifteen years, and she had therefore acquired title to the strip by adverse possession.

In reaching its conclusion, the court considered and rejected a 1996 A Notice of Continued Permission to Utilize Lands, offered by the Champagnes, that had been signed by several of the parties. The notice stated that the Gardners had only a revocable right to use the twenty-foot strip and that their rights to use the property could be terminated by the Champagnes at any time. The court found the Champagnes' reliance on this document misplaced because Una Gardner had not been a party to the agreement. She had signed the document on behalf of her husband, for whom she held power of attorney, but she had not signed it in her individual capacity. Therefore, the court concluded, the Champagnes could not invoke the authority of the notice to argue that Una had only a revocable right to use the twenty-foot strip.

The court's findings are supported by the evidence. Una testified at trial that a drainage pipe had been in place under the twenty-foot strip of land since the Langlois owned the property. She stated that when she and her husband replaced the pipe, they did not ask Mr. Montani's permission to do so. She also indicated that there was a solid line pipe going across the twenty-foot strip, and her husband had put in a leach line on the other side of the parcel in 1984 or 1985. Una testified that she and her husband had always used the strip of property as their own. They walked across it, tried to grow a garden on it, mowed it, and generally took care of it. The Champagnes point to various statements made by Una's husband to support their claim that the Gardners recognized their ownership of the parcel. They do not identify any compelling evidence that Una recognized their ownership of the parcel, however, and given the testimony cited above, they have not established that the trial court's findings are clearly erroneous.

As to the probative value of the 1996 notice, Una testified that she had signed the document on behalf of her husband, who was ill, but had not signed it on her own behalf. The trial court acted within its discretion in finding this document unpersuasive on this basis, and we will not disturb the court's assessment of the weight of this evidence on appeal. See MacDonough-Webster Lodge No. 26, 2003 VT 70, at & 22. Reviewing the trial court's factual findings in the light most favorable to the prevailing party below, and disregarding the effects of modifying evidence, we conclude that the court's conclusion that Una had acquired title through adverse possession is supported by the evidence.

Affirmed in part, and reversed and remanded in part.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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John A. Dooley, Associate Justice

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Paul L. Reiber, Associate Justice