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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2004-494

MAY TERM, 2005

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

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

Jeanette and Gene Champagne appeal from the trial court's order, on remand, denying their claim that they had acquired title to property owned by the Gardners through adverse possession and acquiescence. We affirm.

The underlying facts in this ongoing boundary dispute are set forth in our previous entry order. See Champagne v. Gardner, Docket No. 2003-285 (Vt. Feb. 13, 2004). In that case, we affirmed the trial court's interpretation of the Gardners' deeds as to the southern boundaries of their property, but we reversed and remanded for additional findings on the Champagnes' claim that they had acquired title to certain portions of the Gardners' property though acquiescence and adverse possession. We explained that the trial court failed to address the Champagnes' claim that from 1965 to the present, they and their predecessors in title had openly, notoriously, and continuously claimed and occupied property up to the southern rear line of the Gardner lots, a line established by pins placed by the original owner, Mr. Montani, and reflected on a survey conducted by Mr. Robenstein (hereinafter referred to as the "Robenstein line").

On remand, the trial court made the following findings. Mr. Montani previously owned the property currently owned by the Champagnes and the Gardners. He sold the Gardner lots in 1965. At that time, he placed pins along the lots' southern boundaries. Almost all of these pins are now missing. The only pin along the southern boundaries of the Gardner lots that is still in place is located near the southwest corner of the lot now owned by Una Gardner. Mr. Montani believed that the southern boundaries of the Gardner lots were those boundaries later depicted on the Robenstein survey. The Champagnes purchased property immediately south of the Gardner lots in 1996. The disputed property lies along the southern boundaries of the Gardner lots, and it varies in width from approximately four to eleven feet, running east to west.

Between 1930 and 1996, Mr. Montani operated a vegetable farm on his property. Between 1965 and 1996, he sometimes planted vegetables close to the southern boundaries of the present Gardner lots. There were some years in which Mr. Montani did not plant anything close to the Robenstein boundaries because the ground along the southern sides of the Gardner lots was too wet for spring planting. Mr. Montani never planted crops right up to the Robenstein boundaries because he needed room to turn his tractor around on his side of the lines while he was plowing. There were some years when Mr. Montani cut the grass along the Robenstein boundaries and some years in which he did not. In 1995, there was a pipe that marked the southeast corner of the David Gardner lot in a spot consistent with the deed description for this property and with a survey that had been prepared for the Gardners by Rice. After the Robenstein survey was conducted in April 1996, the pipe was moved north into the middle of a ditch that David Gardner had dug along the southern edge of his lot. There are a large number of trees that stand in the disputed strip behind the David Gardner property.

In June 1996, most of the parties in this case executed an agreement entitled "Notice of Continued Permission to

Utilize Land" that pertained to certain "strips of land" between the lots that the parties own. The Champagnes drafted the agreement and presented it to the Gardners. Una Gardner signed the agreement on behalf of her husband but she refused to sign the document herself. **PC 2.** The trial court found that Una Gardner was not bound by this agreement.

Based on its findings, the court concluded that the Champagnes had not demonstrated that they had acquired title to the disputed property through adverse possession or acquiescence. The court stated that the Champagnes' adverse possession claim was based on an allegation that Mr. Montani had actually used the disputed strips of land for the required fifteen year-period. It found that there were grown trees inside the disputed strip of land, which showed that there were certainly some years before 1996 when Mr. Montani did not plow or plant right up to the Robenstein boundaries. The court also pointed to Mr. Montani's testimony that he had not always used the land. The court thus concluded that the Champagnes had not produced sufficient evidence to establish title by adverse possession. The court also rejected the Champagnes' assertion that Una Gardner had acquiesced to the Robenstein boundaries because her husband had signed the 1996 Notice. The court reiterated that Una Gardner was not bound by the 1996 Notice. The Champagnes appealed.

The Champagnes first challenge the trial court's adverse possession conclusion. With respect to property behind Una Gardner's lot, they argue that the court erred in concluding that Mr. Montani had not actually used or possessed the land up to the Robenstein line because he had not plowed or planted the ground right up to the Robenstein line. The Champagnes maintain that the portion of the farmland used by Mr. Montani to turn his tractor was as "possessed" by him as the portion of farmland that he used to plant vegetables. The Champagnes also assert that the court erred in concluding that because there were years in which the land was too wet for spring planting, Mr. Montani did not make "continuous" use of the disputed land for fifteen years. They argue that to be "continuous," Mr. Montani did not need to use the property constantly, he needed only to make such use of the land as would an average owner, taking into account the nature and condition of the property.

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) (mem.); 12 V.S.A. § 501. The party claiming adverse possession bears the burden of establishing that these requirements are satisfied. Lysak, 174 Vt. at 526. "Adverse possession is a mixed question of law and fact." MacDonough-Webster Lodge No. 26 v. Wells, 2003 VT 70, ¶ 17, 175 Vt. 382, 834 A.2d 25. 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.

We find the Champagnes' arguments without merit. We stated in N.A.S. Holdings, Inc. v. Pafundi that "[a] claim of adverse possession that proceeds under bare claim of right extends only to that property which the claimant has actually occupied." 169 Vt. 437, 441 (1999) (discussing difference between adverse possession claims based on "actual possession" and those based on "constructive possession," and stating that "such categorization is a threshold inquiry necessary to the assessment of the claimant's possessory acts"); see also Cmty. Feed Store, Inc. v. Northeastern Culvert Corp., 151 Vt. 152, 156 (1989) ("In the absence of color of title . . . and where a lot has no definite boundary marks, adverse possession can only extend as far as claimant has actually occupied and possessed the land in dispute."). The trial court found that Mr. Montani had not actually used the disputed property throughout the fifteen-year period, and this finding is supported by the record.[1]

With respect to the Una Gardner lot, the court found that Mr. Montani had never plowed "right up to" the Robenstein boundaries, nor had he used the ground close to the boundaries every year. The court also found no indication as to how often Mr. Montani had actually farmed in the disputed strip. The court did state that Mr. Montani never planted crops right up to the Robenstein boundaries because he needed room to turn his tractor around on his side of the line. We do not agree, however, with the Champagnes' contention that this demonstrates that Mr. Montani openly "occupied" this portion of the property. See Darling v. Ennis, 138 Vt. 311, 313 (1980) ("The tenant must unfurl his flag on the land, and keep it flying so that the owner may see, if he will, that an enemy has invaded his dominions and planted his standard of conquest.") (citation and ellipses omitted). The unreported out-of-state decision cited by the Champagnes does not persuade us otherwise. See Dreselinski v. Bugary, 1992 WL 190162, *1 (Ohio Ct. App. 1992)

("possession" established where evidence showed that fence had initially been in place, and majority of fence was still standing and fence line had been openly established and maintained as a tractor path). The trial court's findings support its conclusion that the Champagnes failed to demonstrate adverse possession.

The Champagnes next argue that the trial court did not properly consider their acquiescence claim. They assert that acquiescence can be shown in one of two ways: through a writing that satisfies the statute of frauds or through passive compliance or acceptance for a fifteen-year period. The Champagnes argue that the 1996 Notice established David Gardner's acquiescence in the Robenstein line,[2] and they maintain that the court overlooked their argument that they had established acquiescence though passive compliance.

We reject these arguments. To establish a boundary line by acquiescence, the Champagnes needed to meet the requirements of the statute of frauds or adverse possession.[3] Hadlock v. Poutre, 139 Vt. 124, 127 (1980); see also Haklits v. Oldenburg, 124 Vt. 199, 204 (1964) ("[A]cquiescence in a wrong line will not establish it as the true boundary unless the demands of the statute of frauds or adverse possession are met."). Neither requirement was met here.

As previously discussed, the Champagnes failed to show that they acquired title to the disputed property through adverse possession. They similarly failed to show acquiescence through a written document that complied with the statute of frauds. The 1996 Notice, which David Gardner signed, does not demonstrate his acquiescence to the Robenstein line as the boundary of his property. As we have explained, "[t]o be effective the acquiescence of the adjoining owners must be mutual, with each party recognizing the line adopted by the other. And the concurrence of the party against whom the recognized line operates must be clear and definite." Amey v. Hall, 123 Vt. 62, 68 (1962). The 1996 Notice does not manifest David Gardner's "clear and definite" concurrence to the Robenstein line as the parties' mutual boundary. The Notice primarily addresses the use of a twenty-foot strip of land between the Gardner lots. While the Notice states that the Gardners agreed to "keep all survey pins or markers clear and unobstructed," this sentence does not manifest David Garner's agreement that the Robenstein line is the parties' true boundary line. We find no error in the court's rejection of the Champagnes' acquiescence claim.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice

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[1] The Champagnes do not directly challenge the court's denial of their adverse possession claim to portions of the David Gardner lot. Instead, they maintain that David Gardner acquiesced to the Robenstein line by signing the 1996 Notice. We note that the trial court's denial of the Champagnes' adverse possession claim as to the David Gardner lot is supported by the record. As the court found, there were grown trees in the disputed area, which demonstrated that there were some years before 1996 when Mr. Montani did not plow or plant right up the Robenstein boundaries.

[2] The Champagnes concede that the Notice does not bind Una Gardner, and thus it does not establish that she acquiesced to the Robenstein line as the southern boundary of her lot.

[3] We reject the Champagnes' assertion that they need only show a party's "passive compliance" with a boundary line to demonstrate acquiescence. We do not read Pafundi, 169 Vt. at 446, cited by the Champagnes, to negate the specific requirements for acquiescence set forth in the cases cited above, i.e., either satisfaction of the requirements of adverse possession or a writing that satisfies the statute of frauds.