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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2016-381

APRIL TERM, 2017

Alan and Judith Davis	}	APPEALED FROM:
	}	
	}	Superior Court, Orleans Unit,
v.	}	Civil Division
	}	
	}	
Margaret Maxwell and Town of Charleston	}	DOCKET NO. 76-3-12 Oscv
		Trial Judge: Robert R. Bent

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

This case concerns a boundary dispute between adjoining property owners. Defendant Margaret Maxwell appeals the superior court's decision, following a two-day evidentiary hearing, in favor of plaintiffs Alan and Judith Davis. We affirm.

The facts are undisputed. The land owned by both parties was previously owned by Edward and Thelma Bly, who operated a farm. The Blys' farm was divided by a dirt farm road, town highway 26 (also called Bly Farm Road), over which the Town of Charleston had a fifty-foot right of way. In 1973, the Blys conveyed most of their farm to Dale and Margaret Maxwell, but reserved three parcels for themselves, including a one-acre lot containing their residence. As part of the deal, the Blys gave the Maxwells a right of first refusal to purchase the one-acre lot. The 1973 warranty deed, which was based on a contemporaneous survey done by Charles Drown, described the eastern boundary of the one-acre lot as running along the westerly edge of the fifty-foot right of way. The deed used the survey lines to place the metes and bounds description of the boundary along the western edge of the road.

In 1996, the Maxwells sold most of the Bly Farm to plaintiffs. The Maxwells retained their right of first refusal on the one-acre lot, where the Blys still lived. When the Blys moved away, they sold the one-acre lot to defendant, who took advantage of her right of first refusal.[1] Defendant then rented the one-acre parcel to her daughter and son-in-law, who resided there. Thereafter, a dispute arose between the parties over a strip of land situated within the town right of way adjoining the one-acre lot. Alan Davis began driving farm equipment across what defendant believed was part of her front lawn. In response, defendant's tenants installed boulders and other obstacles to block vehicular traffic. The Town of Charleston originally agreed to placement of the obstacles within the right of way but then asked defendant to have them removed. In 2011, plaintiffs obtained a survey that, like the Drown survey, placed the boundary line for the Maxwell property along the westerly edge of the right of way.

[1] Dale Maxwell died in 2005. Defendant exercised her right of first refusal as a surviving tenant by the entirety.

In March 2012, plaintiffs filed a quiet title action against defendant. In July 2015, the superior court denied plaintiffs' motion for summary judgment, but focused the issues for trial. The court stated that the 1973 deed unambiguously established the eastern boundary of the one-acre lot as the western edge of the town right of way, as claimed by plaintiffs. The court ruled that the deed could not be interpreted as requested by defendant. Further, the court rejected defendant's reliance on the presumption that, absent evidence to the contrary, the boundary of land abutting a town highway is the highway's centerline, see Elliott v. Jenkins, 69 Vt. 134, 139 (1896), pointing out that the presumption does not apply when, as in this case, "language used in so referring to [the highway] shows clearly that a side line, instead of the center, was intended." Maynard v. Weeks, 41 Vt. 617, 619 (1869). The court stated that defendant could prevail based on deed interpretation only if she could obtain reformation of the deed by showing beyond a reasonable doubt that there was a valid preexisting agreement between the parties to the deed representing their true intent. The court declined to enter summary judgment on that question. The court also denied summary judgment on the issue of adverse possession, ruling that the Blys' and Maxwells' claimed use of the disputed land, when viewed most favorably to defendant, could support a claim of adverse possession.

An evidentiary hearing without a jury was held over two days in June 2016. Following the hearing, in a September 27, 2016, decision, the superior court ruled in favor of plaintiffs. First, the court stated the defendant could not benefit from 19 V.S.A. § 775, which provides that a discontinued town highway located between lands of two different owners "shall be returned to the lots to which it originally belonged, if they can be determined; if not, it shall be equally divided between the owners of the lands on each side." The court ruled that because the Blys owned all of the lands on both sides of the town right of way and sold a specific lot that excluded ownership beyond the western edge of the right of way, the Blys had no rights to the land underlying the right of way except a right of access. The court also rejected defendant's adverse possession claim, ruling as follows:

> [C]onsidering the evidence presented at trial, the Court concludes Ms. Maxwell has failed to establish the requisite elements of adverse possession because she has not demonstrated any demonstrated claim of right to the disputed property by either herself or the Blys against the reversionary interest of the Davis' which could, added together, equal 15 years. Her own words, when selling the land owned by Davis to Davis, that he was to own all the way to the west side of [Bly Farm Road] undercuts any claim she might make now or that she believed the Blys were making some sort of claim to the unused portion of the right of way. The use made by the Blys was simply too insignificant to constitute adverse use sufficient to show their flag was unfurled in the land at issue.

Defendant appeals, arguing that: (1) the evidence supports her claim of adverse possession, based on her and the Blys' use of the disputed land; and (2) she should be presumed to have legal ownership of the land to the centerline of the town right of way.

We first address defendant's second claim of error—that, apart from her claim of adverse possession, she had a legal right to the land up to the centerline of the town right of way. She argues that she and the drafter of the 1973 deed had mistakenly assumed that the Town had fee title to the land underlying the right of way and that, if and when the town highway were to be

discontinued, she would obtain land up to the centerline of the right of way.[2] We find no merit to this argument. At trial, defendant acknowledged, as the superior court ruled in its earlier decision denying plaintiffs summary judgment, that the 1973 deed unambiguously established the eastern boundary of the one-acre lot at the western edge of the town right of way.

She also relies on the legal presumption that when a highway is referenced as a boundary in the conveyance of real estate, the grant is presumed to extend to the center of the highway. As the trial court rightly recognized, this presumption applies "unless a different intention is clearly expressed in the deed." Marsh v. Burt, 34 Vt. 289, 293 (1861). In this case, the deed clearly expresses a different intention.

Further, defendant conceded at trial that she could not satisfy the high standard of demonstrating that she was entitled to reformation of the deed. Accordingly, we discern no legal basis to support defendant's argument that, apart from her claim of adverse possession of the disputed land, she has a legal right to the land. See Brault v. Welch, 2014 VT 44, ¶ 14, 196 Vt. 459 (citing prior case law for proposition that deed reformation is appropriate when mistaken language results in unintended conveyance).

Defendant also argues, however, that the the trial court erred in rejecting her claim of adverse possession. "Adverse possession is a mixed question of law and fact." MacDonough-Webster Lodge No. 26 v. Wells, 2003 VT 70, ¶ 17, 175 Vt. 382. We view the trial court's findings most favorably to the prevailing party and will not set them aside unless they are clearly erroneous; however, our review of the court's conclusions of law is nondeferential and plenary. Id.

"To achieve title through adverse possession, a claimant must demonstrate that possession of the land was open, notorious, hostile and continuous throughout the statutory period of fifteen years." N.A.S. Holdings, Inc. v. Pafundi, 169 Vt. 437, 440 (1999). Title cannot be attained by adverse possession if the use of the land is permissive. MacDonough-Webster Lodge No. 26, 2003 VT 70, ¶ 27. In this case, the testimony presented by defendant did not demonstrate a hostile use and was generally vague as to duration, scope, and location of the claimed uses. In her brief, defendant describes her testimony as explaining "that she and her husband acquiesced to Blys' use of their front lawn during the years they owned the farm" and that plaintiffs "acquiesced to her family's . . . use of the front lawn" for recreation and planting a garden. But "the theory of adverse possession is the antithesis of peaceful acquiescence." Harlow v. Miller, 147 Vt. 480, 483 (1986). Defendant testified that there was never a controversy about who owned the disputed land. She also acknowledged that the Maxwells and Blys "were on very close terms"—that, as her daughter stated, they were "family to us." Cf. id. at 484 ("Where a family relationship between claimants is involved, proof of adverse possession must be established by stronger evidence than is required in other cases."). There was also testimony that a pattern of neighborliness with the Blys continued after defendant sold the farm to plaintiffs. "A claim of adverse possession will succeed only where there is some clear, definite, and unequivocal notice of the adverse claimant's intention to assert exclusive ownership of the property." Id. The trial court's findings that defendant failed to show that the Blys and the Maxwells asserted a claim of right to the disputed property for a period of fifteen years was not clearly erroneous, and its analysis was consistent with law.

[2] The parties stipulated before trial that the Town of Charleston did not own fee title to the right of way. Defendant's expert also acknowledged in his testimony at trial that town highway 26 had not been discontinued.

Moreover, defendant's evidence was vague as to the duration and scope of the claimed uses. There was evidence that the Blys mowed the lawn and planted a garden over the years on the disputed land, but also that the garden shrunk in size over the years as the Blys got older. It was unclear how far the garden extended into the disputed strip of land and for how long, and defendant acknowledged that Mr. Bly would mow outside the boundaries of the Blys' property. There was evidence of a burn barrel placed in the disputed area between the travelled portion of the town highway and the western edge of the right of way, but, again, the extent, duration, and exact location of the use was unclear. There was evidence that a portion of the Blys' paved driveway extended into the disputed area, but it appeared to be only a few feet.[3] The evidence concerning the planting of trees, the stacking of firewood, and the erection of a picket fence was also vague as to origin, duration, or location of the use. In short, the trial court did not err in concluding that defendant failed to demonstrate an open, notorious, hostile, and continuous use throughout the fifteen-year statutory period.

Affirmed.

BY THE COURT:

_____
Marilyn S. Skoglund, Associate Justice

_____
Beth Robinson, Associate Justice

_____
Karen R. Carroll, Superior Judge,
Specially Assigned

[3] At trial, plaintiffs stated that they had "no issue" with a longstanding easement for defendant's driveway, and they were willing to accept the survey of defendant's surveyor depicting fifteen feet of land between her house and defendant's property—in effect, allowing defendant to maintain a ten-foot-wide swath of lawn between the house and the road.