

Circuit Court for Charles County  
Case No. C-08-CV-20-000140

UNREPORTED\*

IN THE APPELLATE COURT

OF MARYLAND

No. 1651

September Term, 2022

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KIRBY CARPENTER, *ET AL.*

v.

RICHARD W. JENKINS, JR., *ET AL.*

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Arthur,  
Reed,  
Tang,

JJ.

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Opinion by Tang, J.

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Filed: February 14, 2024

\*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

This appeal involves a claim of adverse possession. To prove adverse possession, a claimant must establish that their possession of the disputed land satisfied three elements for a period of 20 years: (1) actual, open and notorious, and exclusive; (2) continuous or uninterrupted for the requisite period; and (3) hostile, under claim of title or ownership. The claim will be defeated entirely if any of these elements are not met.

In 2020, appellants Kirby and Deborah Carpenter (the “Carpenters”) sued their neighbors, appellees Richard and Mary Jenkins (the “Jenkinses”). The Carpenters claimed they had acquired a triangular piece of the Jenkinses’ land measuring 433 square feet by adverse possession. We have included an image of the disputed area shaded in yellow for reference.<sup>1</sup>



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<sup>1</sup> The image is based on an excerpt of an exhibit admitted in evidence at trial. We modified it for clarity purposes.

Following a bench trial, the Circuit Court for Charles County concluded there was insufficient evidence to support the first and third elements of adverse possession. As a result, the Carpenters' complaint was dismissed with prejudice. Within ten days, the Carpenters filed a motion to alter and amend the court's decision, which the court denied.<sup>2</sup>

On appeal, the Carpenters challenge the court's decision on the merits and raise three issues, which we quote below. The first issue relates to the first element of actual, open and notorious, and exclusive use. The remaining issues concern the element of hostility.

1) Whether it was clearly erroneous for the trial court to ignore undisputed evidence of [the Carpenters'] use of [the Jenkinses'] property, including construction and maintenance of the bulkhead and jetty and recreational activities on [the Jenkinses'] land, and focus only on testimony regarding the mow-line historically used by [the Carpenters] and their predecessors and the predecessors of [the Jenkinses].

2) Whether it was clearly erroneous for the trial court to hold that the presumption of adverse use did not apply because it found that the claimants' use of the disputed property/servient estate was "explained" when there is no evidence of [the Carpenters] or their predecessors ever asking for or receiving permission from the record owner of the servient estate.

3) Whether it is proper to consider indirect evidence of a deceased landowners' subjective intention installing a jetty and regularly maintaining, possessing and enjoying the servient landowners' property to find that claimants' claim to neighbors' land was not hostile for the purposes of defeating adverse possession.

We conclude that the court did not err in finding insufficient evidence to establish actual, open and notorious, and exclusive use of the disputed land. In light of our holding on the first element, and since the claim of adverse possession requires showing all

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<sup>2</sup> The court's denial of the motion to alter and amend is not challenged on appeal.

necessary elements, we need not address the remaining issues about the element of hostility.

### **BACKGROUND<sup>3</sup>**

The Carpenters and Jenkinses own adjacent waterfront properties on Banks O’Dee Road in Newburg, Maryland. The Carpenters’ property (Lot 22) is located west of the Jenkinses’ property (Lot 23). The two share a boundary line that begins at Banks O’Dee Road at the front of the lots and ends at the shoreline of Cuckold Creek at the back. There is no dispute about the location of the boundary line as described in the deeds (“title boundary”). The title boundary tracks the retaining wall (located to the right of the bench in the exhibit) installed by the Jenkinses during the underlying proceedings.

In 1955, Mrs. Carpenter’s grandparents, W.L. and Annie Simms (the “Simmses”), acquired Lot 22. Mrs. Carpenter visited the lot weekly during the summers and periodically during the winters. After getting married, the Carpenters lived on the property for two years, between 1972 and 1974. In 2008, the Carpenters came to own Lot 22 and have used it as a vacation or temporary home.

Dr. Thomas Kelleher (“Kelleher”) acquired Lot 23 in the late 1940’s. After he died in 1990, the property was inherited by his nephew, Thomas Hopkins (“Hopkins”), who owned it for 28 years. In 2018, Hopkins sold the property to the Jenkinses.

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<sup>3</sup> The pertinent facts, as summarized in the body of this section, are derived from the evidence adduced at trial, viewed in the light most favorable to the Jenkinses, the prevailing party below. *See Green v. McClintock*, 218 Md. App. 336, 341 (2014).

The Carpenter-Simms and Hopkins-Kelleher families were amicable neighbors who had an understanding that they could access each other's properties without asking.

### **Jetty**

In 1958, Mrs. Carpenter's grandfather built a wooden jetty<sup>4</sup> to safeguard the shoreline of Lot 22 after Hurricane Hazel, and he did so with Kelleher's "blessing." The jetty was attached to the bulkhead<sup>5</sup> on Lot 23, about five feet from the title boundary. The length of this five-foot encroachment serves as the lower contour of the triangular piece of disputed land shown in the exhibit. To the left of the jetty is a small, sandy beach where Mrs. Carpenter played and fished as a child. It is also where her grandchildren now play and fish.

In 2009, the Carpenters replaced the jetty her grandfather originally installed and placed it in the same location. They also added a bulkhead on the left side of the new jetty. Hopkins did not object to the work or the encroachment on Lot 23. In 2011, Hopkins installed a bulkhead on the side of Lot 23 and extended it to the jetty.

### **Sight Line**

The Carpenters and Simmses used a sight line marked by a utility pole at the front of the lots and the jetty at the back as the boundary line between Lots 22 and 23. In the exhibit, a solid yellow line delineates this sight line. The sight line is not coincident with

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<sup>4</sup> The parties have used "jetty" and "groin" interchangeably, though they have distinct meanings. The parties have primarily used the term "jetty" to describe the wooden structure that protrudes into the creek. These types of structures generally protect the shoreline from currents, tides, and erosion.

<sup>5</sup> A bulkhead, also known as a seawall, is a retaining wall along a shoreline.

the title boundary; it is at an angle over a part of Lot 23. When Hopkins inherited Lot 23 in 1990, he did not complete a land survey, and he, too, assumed that the boundary line “went from the white pole at the road, down to the angle between the bulkhead and the jetty.”

Over the years, Mrs. Carpenter’s grandfather and father mowed the grass on Lot 22 and the disputed land. During her visits, Mrs. Carpenter witnessed the grass being cut along the sight line. When the Carpenters lived at the property between 1972 and 1974, Mr. Carpenter also mowed along the sight line. The grass was mowed about once a week during the mowing season, which lasted from late March or early April to late October.

Hopkins hired a grasscutter to mow his lawn on Lot 23. He instructed the grasscutter to “follow the boundaries,” which referred to the Carpenters’ mow line at any given time. Since the Carpenters cut their grass at different times than Hopkins, he used the height difference as a guide.

The mow line was not visible in the photographs of the lots admitted into evidence. When he bought Lot 23, Mr. Jenkins did not see any visible line of demarcation between the lots. No physical markings, such as plantings, fencing, or barriers, showed where the boundary was.

### **Circuit Court’s Decision**

After the bench trial, the parties submitted proposed findings of fact and conclusions of law. The Carpenters argued that they had satisfied the elements of adverse possession. They maintained, among other things, that the Carpenters and Simmses had mowed the lawn along the sight line and constructed and maintained the jetty and bulkhead, which

gave their former neighbors (Hopkins-Kelleher) constructive notice of the adverse claim to the disputed land. The Carpenters acknowledged that these activities were not aimed at establishing a boundary demarcation. But they had treated the disputed land as their own, and their former neighbors considered the sight line the boundary line between the lots. They also asserted that mowing could satisfy the elements of adverse possession.

On June 15, 2022, the circuit court issued an opinion and order that denied the Carpenters' adverse possession claim.<sup>6</sup> The court found that the Carpenters failed to establish the first and third elements of the claim. As to the first element, the court determined that the grass-cutting, under the circumstances presented, was insufficient to demonstrate actual, open and notorious, and exclusive possession of the disputed land. It explained that the evidence showed no other acts of land management in that area, such as installing a fence or plantings that would indicate possession. In contrast, the Jenkinses' subsequent installations of plantings and the retaining wall were the kind of actions that demonstrate possession.

The court found that since the lots were similar in size, appearance, and character, it was inconceivable that anyone would rely on where a person might cut grass to establish the boundary line. The evidence only established the understanding between the Carpenters

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<sup>6</sup> We note that the opinion was not followed by the entry of a separate order as required by Maryland Rule 2-601, which mandates that each judgment shall be set forth on a separate document. Neither party objected to the absence of the separate order; thus, we deem the separate document requirement to be waived. *URS Corp. v. Fort Myer Constr. Corp.*, 452 Md. 48, 68 (2017) (concluding that the separate document requirement can be waived when “the trial court intended the docket entries made by the court clerk to be a final judgment and where no party objected to the absence of a separate document after the appeal was noted.”).

and Hopkins regarding the grass-cutting along the sight line. It was not to establish a boundary. “Given the factors in this case, cutting the grass is not sufficient to establish the elements of actual, open and notorious, and exclusive possession.”

Regarding the third element, the court concluded that the Carpenters failed to show that their use of the disputed area was hostile. The court found that the Carpenter-Simms and Hopkins-Kelleher families had cooperated regarding using their lots and had permission to use each other’s lots. The court found that the jetty had been constructed to protect the Carpenters’ land after Hurricane Hazel with Kelleher’s “blessing.” Based on the evidence presented, the court determined that the Carpenters’ entry onto Lot 23 was permissive and, therefore, not hostile. Since the Carpenters failed to produce sufficient evidence satisfying the elements of adverse possession, the court dismissed their complaint with prejudice.

### **STANDARD OF REVIEW**

Under Maryland Rule 8-131(c), we apply the clearly erroneous standard of review to factual findings and review the trial court’s decision for legal error:

When an action has been tried without a jury, [the] appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

“[W]e must assume the truth of all the evidence, and of all the favorable inferences fairly deducible therefrom, tending to support the factual conclusions of the lower court.” *Porter v. Schaffer*, 126 Md. App. 237, 259 (1999) (citations omitted). “A factual finding is clearly erroneous if there is no competent and material evidence in the record to support



it.” *Hoang v. Hewitt Ave. Assocs., LLC*, 177 Md. App. 562, 576 (2007) (citation omitted). In making this determination, “we may not substitute our judgment for that of the fact finder, even if we might have reached a different result.” *Oliver v. Hays*, 121 Md. App. 292, 306 (1998). Instead, “we must assume the truth of all the evidence, and of all the favorable inferences fairly deducible therefrom, tending to support the factual conclusions of the lower court.” *Id.*

## DISCUSSION

As mentioned, a party claiming to have adversely possessed property bears the burden of establishing that their possession satisfied the necessary elements for a period of 20 years: “(1) actual, open and notorious, and exclusive; (2) continuous or uninterrupted for the requisite period; and (3) hostile, under claim of title or ownership.” *Senez v. Collins*, 182 Md. App. 300, 324 (2008). We analyze these categories based on the adverse claimant’s “objective manifestation” of adverse use rather than the claimant’s subjective intent to claim the land. *Id.*

As to the first element, the Carpenters argue that the court erred in finding that they did not prove actual, open and notorious, and exclusive use of the disputed land. They emphasize that the activities along the sight line and the jetty/bulkhead established a visual boundary that outlined the disputed land and were objective manifestations of adverse use that placed the Jenkinses’ predecessors on notice of their claim over that area.

## A.

### **Purported Visual Boundary Outlining the Disputed Land**

“Generally, adverse possession without color of title extends only to the land *actually occupied.*” *Costello v. Staubitz*, 300 Md. 60, 68 (1984) (emphasis added). “However, where visible boundaries have existed for the statutory period of limitations, *if there is evidence of unequivocal acts of ownership*, title will vest in the claimant, not only to land actually occupied, but rather to all of the land delineated by the visible boundary.” *Id.* (emphasis added).

The Supreme Court of Maryland in *Costello v. Staubitz*, 300 Md. 60 (1984), summarized the law applicable to adverse possession claims involving a visible demarcation line. *See id.* at 68–73. It focused on the trial court’s treatment of a fence as a visible boundary, delineating the extent of land the claimant had possessed adversely. *See id.* at 73–74. In that case, the prior record owner, a farmer, erected a fence within his property, extending from the road to the creek for over 20 years before the underlying suit for adverse possession. *Id.* at 63–64. The adverse claimant believed that he owned all the land up to the fence, which included a portion of the record owner’s land. *Id.* at 64. In the disputed area, the claimant had planted trees, placed a concrete fire pit, built a boathouse and temporary boat railway, and buried a pet. *Id.* at 64–65. The trial court found that the adverse claimant satisfied the elements of adverse possession, and the fence constituted a boundary to delineate the extent of the claimant’s possession over the disputed area. *Id.* at 65–66. We affirmed, but the Supreme Court reversed. *Id.* at 67.

The Court enunciated the principles below that apply in adverse possession cases in which a visible line of demarcation is a factor:

- 1) The existence of a visible line of demarcation ordinarily *does not* constitute evidence of adverse possession when:
  - a) it was created by a record owner, for the record owner's own purposes, within the record owner's land; or
  - b) it was created by a party claiming title by adverse possession for the purpose of claiming the visible line of demarcation as a boundary only if it is in fact coincident with the actual boundary.
- 2) The existence of a visible line of demarcation ordinarily constitutes *some evidence* of adverse possession when:
  - a) it was created by a party claiming title by adverse possession for the purpose of claiming the visible line of demarcation as a visible boundary delineating the extent of the claimed adverse possession; or
  - b) there is no evidence to show by whom and for what purpose the line of demarcation was created.

*Id.* at 72–73 (internal citations omitted and emphasis added).

In *Costello*, criterion (1)(a) applied to the facts. The “only evidence presented relating to the fence was that it was erected by a farmer who was the record owners’ predecessor in interest. The farmer’s sole purpose for erecting the fence was to confine his cattle to his own property . . . and to prevent them from straying onto the adjoining property[.]” *Id.* at 73. “[T]he existing fence was not a visible boundary delineating the extent of the claimant’s adverse possession” because it “was erected by the record owners’ predecessor within the predecessor’s own boundaries and for the predecessor’s own purposes.” *Id.* at 73–74. The fence, “therefore, did not constitute evidence of adverse

possession and was not an appropriate factor to be taken into account in determining the extent of the claimant's adverse possession." *Id.* at 74.

The Court further explained:

Because the fence, although visible, did not constitute a boundary, the principle that unequivocal acts of ownership vest title in a claimant to all of the land delineated by a visible boundary is inapplicable. Rather, the applicable principle is that the claimant, who was without color of title, is entitled to acquire title by adverse possession only to land *actually occupied*.

*Id.* (emphasis added). In other words, "a claimant could not rely on the existence of a fence erected by the record owners or previous record owners to establish the extent of his claim of adverse possession." *Peters v. Staubitz*, 64 Md. App. 639, 644 (1985) (citing *Costello*, 300 Md. at 72–73). "Rather, he is required to demonstrate his acts of dominion over the disputed land for the required statutory period." *Id.* "If he does so, the court need not totally ignore the fact that there is a fence in existence because it is evidence of the outer limit of physical property over which he could reasonably have exercised dominion." *Id.*

Here, the Carpenters seem to interpret the caselaw to mean that evidence about the sight line and jetty/bulkhead that contoured the disputed land was enough to prove adverse possession of the entire 443 square feet within it. The Carpenters do not contend that such evidence satisfied the *Costello* criteria under (2)(a) or (b), the prerequisite for a visual boundary to be considered as "some evidence" of adverse possession. Even if one of those criteria were met, the sight line and jetty/bulkhead would serve as the boundary delineating the *extent* of the area claimed adversely but not as evidence of possession itself. In other words, evidence of the purported visual boundary would not excuse the Carpenters from

demonstrating acts of dominion over the disputed area for the statutory period. *See Peters*, 64 Md. App. at 644.

## B.

### **Actual, Open and Notorious, and Exclusive Possession**

The elements of actual, open and notorious, and exclusive possession “essentially collapse into the requirement of actual use.” *Senez*, 182 Md. App. at 324–25. “The element of ‘open and notorious’ pertains to the concept of constructive notice to the title owner.” *Id.* at 325. “Possession ‘must be visible and notorious, so that the owner may be presumed to have notice of it.’” *Id.* (actual notice to the owner is not required). “Possessory acts of dominion over land may be sufficient to charge the record owner with knowledge that the land is adversely possessed.” *Id.* (cleaned up and citation omitted).

“Exclusive possession means that the claimant must possess the land as his own and not for another.” *Id.* (cleaned up and citation omitted). “[E]xclusive possession simply means that the disseisor must show an exclusive dominion over the land and an appropriation of it to his own use and benefit. An adverse claimant’s possession need not be absolutely exclusive, however; it need only be a type of possession which would characterize an owner’s use.” *Blickenstaff v. Bromley*, 243 Md. 164, 173 (1966) (cleaned up and citation omitted).

“Determination of whether a claimant is in actual possession of the claimed land is a fact-intensive inquiry.” *Senez*, 182 Md. App. at 325. “[S]omething more than ‘mere occasional use of land’ is needed.” *Porter*, 126 Md. App. at 277 (citation omitted); *see, e.g., Barchowsky v. Silver Farms, Inc.*, 105 Md. App. 228, 241 (1995) (claimant’s

occasional use of the land—by walking, horseback riding, picking up branches, and chasing off trespassers—did not constitute regular, exclusive, open, and notorious use).

Courts also consider “the character and location of the land and the uses and purposes for which the land is naturally adapted.” *Orfanos Contractors, Inc. v. Schaefer*, 85 Md. App. 123, 129 (1990) (citation omitted). “[T]he character, location, and use of lands vary, and the type of possessory acts necessary to constitute actual possession in one case may not be essential in another.” *Blickenstaff*, 243 Md. at 171. For instance, “acts sufficient to demonstrate possession of wild, undeveloped forest may fall short of the activity needed to establish possession of developed property.” *Porter*, 126 Md. App. at 277. As the Supreme Court explained:

It is sufficient if the acts of ownership are of such a character as to openly and publicly indicate an assumed control or use such as is consistent with the character of the premises in question. The standard to be applied to any particular tract of land is whether the possession comports with the ordinary management of similar lands by their owners, and if so, it furnishes satisfactory evidence of adverse possession.

*Blickenstaff*, 243 Md. at 171 (citations omitted).

The Carpenters argue that the court ignored evidence of the construction and maintenance of the jetty and bulkhead and the recreational use of the beach. They also claim that the court improperly focused on the Carpenters’ grass-cutting and placed undue weight on the lack of fencing, plantings, or other physical installation in the disputed area. We disagree.

The court’s focus on the activities within the disputed area was appropriate because the area accounted for the 443 square feet of land that the Carpenters sought to claim

adversely. It properly considered evidence of the mowing, as the Carpenters relied on it to argue that there was sufficient evidence to establish adverse possession of the disputed land.

The court did not ignore the evidence regarding the activities at the jetty, bulkhead, and beach. In the court's opinion, testimony about these activities was recounted. In stating that there were no other acts of land management on the disputed land besides grass-cutting, the court implied that the jetty/bulkhead and beach activities did not occur in the disputed area. *See Miklasz v. G.W. Stone, Inc.*, 60 Md. App. 438, 443 (1984) ("In order to ripen into title, the adverse possession must be continuous, notorious, actual, hostile and *embrace all of the disputed area.*") (emphasis added); *see, e.g., Porter*, 126 Md. App. at 276 (evidence failed to establish adverse possession where claimant proved that use affected only some of the land he claimed by adverse possession); *Peters*, 64 Md. App. at 647–48 (although evidence constituted acts of ownership as to a part of the disputed land, there was insufficient evidence to establish acts of ownership as to the other part of the disputed land where it was allowed to grow wild).

The Carpenters cite to *Senez v. Collins*, 182 Md. App. 300 (2008) to support their argument that the combination of regular mowing and construction and maintenance of the jetty/bulkhead was more than enough to establish actual use of the disputed area. *Senez*, however, does not support their argument. In *Senez*, the dispute was between two adjacent waterfront property owners over a 291-square-foot sliver of land bordering their properties. *Id.* at 307. When the owners purchased their properties, they were separated by a 115-foot-long concrete retaining wall that did not precisely track the property line. *Id.* at 308. The

claimant had maintained the property on the disputed land, constructed a boat ramp on the land, maintained the waterfront north of the ramp by installing the wooden bulkhead, and erected a privacy fence bordering the disputed area. *Id.* at 326–27. Based on the evidence presented, we concluded that the claimant demonstrated actual use, explaining that the claimant’s “maintenance of the disputed area and the boat ramp was a paradigmatic example of the type of use that the cases have recognized as establishing actual possession.” *See id.* at 328.

In this case, the possessory acts of dominion on the disputed land were not as pronounced as those in *Senex*. There was no fence, boat ramp, plantings, or other indicator of actual use of the disputed area. As the court implied, the Carpenters did not establish the type of possessory acts of dominion that our appellate courts have recognized as sufficient. *See, e.g., Peters*, 64 Md. App. at 641, 646 (as to a part of the disputed land, claimant installed a fence, planted trees, constructed a boathouse, and placed a fire pit); *Miceli v. Foley*, 83 Md. App. 541, 562 (1990) (added plantings, pruned plants, maintained greenery, sprayed brambles and poison ivy, mowed grass, and raked leaves on disputed land); *Miklasz*, 60 Md. App. at 444 (filled in a swamp that covered about one acre of land, planted grass and shrubs in the area, pastured horses, made a parking lot, filled wells, tore down two dwellings, constructed road, and fenced in separate area); *Blickenstaff*, 243 Md. at 172 (cleared brush, cut bean poles, felled large trees, and planted flower bed on disputed land); *E. Washington Ry. Co. v. Brooke*, 244 Md. 287, 292 (1966) (installed fence, maintained pasture, cut trees, planted tobacco seed beds, posted “No Hunting” sign, dug drainage ditches, and removed cinders on disputed land).



The Carpenters claim that the court misunderstood the testimony about the significance of the jetty and the utility pole. These objects served as visible markers for what the former neighbors understood was the boundary line. The evidence about the mow line was not presented to prove that it created the boundary but rather to demonstrate that the parties had followed the boundary markers in that manner.

The court did not misconstrue the testimony presented. It recognized that the mowing was not done to establish a boundary but to maintain the lawn. It also acknowledged that the grass was cut in the same area the owners of the two lots had previously established. Hopkins had thought the boundary line went from the jetty to the road based on where the Carpenters and their predecessors had cut the grass, and the neighbors had assumed that was the boundary line. The court understood that the Carpenters and Hopkins shared an understanding about the grass-cutting along the sight line. But it concluded that this evidence was insufficient to prove an unequivocal act of ownership under the circumstances.

We are satisfied that the court did not err when it concluded that the evidence adduced at trial was insufficient to support a finding that the Carpenters' use of the disputed land was actual, open and notorious, and exclusive. Because we uphold the court's finding on the first element, we need not address the Carpenters' arguments about the hostility element of adverse possession. *See Hungerford v. Hungerford*, 234 Md. 338, 340 (1964) ("Every element of adverse possession must be shown and if it is not, the possession will not confer title.").

**JUDGMENT OF THE CIRCUIT COURT  
FOR CHARLES COUNTY AFFIRMED.  
COSTS TO BE PAID BY APPELLANTS.**