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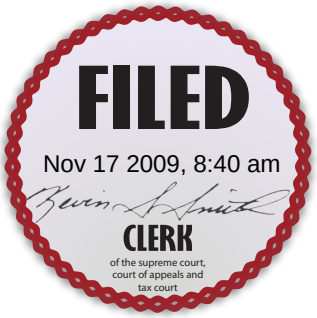

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IN THE
COURT OF APPEALS OF INDIANA

THERESA KOPCHIK and WILLIAM KOPCHIK, Husband and Wife; THERESA KOPCHIK as Trustee under the provisions of a Trust Agreement known as the Theresa M. Kopchik Trust dated June 12, 2006,	)	
Appellants-Defendants,	)	
vs.	)	No. 75A03-0904-CV-160
MARY ANN F. DYBALA, as Trustee of the Mary Ann F. Dybala 1997 Trust Agreement dated February 24, 1997 and RAYMOND W. DYBALA, as Trustee of the Raymond W. Dybala 1997 Trust Agreement dated February 24, 1997; GERALD ROGERS; NANCY ROGERS; ESTEVAN	)	

ZAMORA; and IRMA ZAMORA,)
)
Appellees-Plaintiffs.)

APPEAL FROM THE STARKE CIRCUIT COURT
The Honorable Kim Hall, Judge
Cause No. 75C01-0708-PL-31

November 17, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Theresa Kopchik and William Kopchik, husband and wife, and Theresa Kopchik as trustee of the Theresa M. Kopchik Trust ("the Kopchiks"), appeal the trial court's order, after a bench trial, in the action brought by Mary Ann F. Dybala, as trustee of the Mary Ann F. Dybala Trust, and Raymond W. Dybala, as trustee of the Raymond W. Dybala Trust ("the Dybalas"), to quiet title to property in the area to the water's edge of Bass Lake.

We affirm.

ISSUE

Whether the trial court erred in finding that the Dybalas had proven their ownership, by adverse possession, of property between lines extending from certain fences on either side of lots #17 and #18 to the water's edge on Bass Lake.

FACTS

The properties involved lie within Mussleman's Highland Grove Addition to Winona, platted in 1900 and consisting of twenty-six lots. The plat reflects property lot lines that angle from northwest to southeast, with Bass Lake to the southeast.

Lots #16 and #17 as shown by the original plat have a combined width of seventy-four feet and were obtained by the Dybalas in the fall of 1990. At that time, a fence stood on the northeast side of #16; it had been there since 1973, and was recognized by the then-owners as the property line between #16 and adjacent lot #15; the fence still remained in 2009. There also was a fence between #17 and adjacent lot #18 to the southwest. This fence, also existing since 1973, was apparently recognized by the then-owners as the property line between the parties, and it too remained, in the same location in 2009. Both fences stopped several feet northwest of County Road 210, which parallels Bass Lake. On the south side of the road, there is a grassy strip of land extending to the water's edge. In 1991, the Dybalas built a seventy-four-foot long concrete seawall, which joined already existing rock seawalls at either end. The seawall ends appear to correspond to lines drawn from the fences in existence since 1973 to the water's edge.

In April of 2006, the Kopchiks obtained ownership of lots #18 and #19, to the southwest of the Dybalas' property. The Kopchiks subsequently ordered a survey. The June 2, 2006 survey indicated that the original plat line between #18 and #17 did not extend to either the county road or the water's edge but rather stopped several feet northwest of the road, <u>and</u> did not exactly correspond to the end locations of the fence

between those two lots.[1] Thereafter, in the area between the road and the water's edge, the Kopchiks installed a wrought iron fence located so as to correspond to the extension of the original plat line between #18 and #17 pursuant to their survey. The end of this wrought iron fence was then anchored into the Dybalas' seawall at a point several feet from its southern end.

The Dybalas proceeded to have a survey conducted of the respective properties later in 2006. Thereafter, on August 7, 2007, the Dybalas filed an action to quiet title.[2]

The amended complaint of September 24, 2007, alleged that the Dybalas had

> made claim of ownership through open, adverse and hostile ownership as against all claims of any others to Lots 16 and 17 extended to the water's edge which is delineated by a seawall that is 74 Feet long and have paid all real estate taxes assessed against said parcel for a period in excess of 16 years.

(Kopchik App. 9). The complaint alleged that the Kopchiks had "erected a fence from County Road 210 to the water's edge that encroache[d] onto [the Dybalas]' property and seawall." *Id.* The Dybalas' complaint also named as defendants the owners of adjacent lot fifteen (#15) -- Gerald Rogers, Nancy Rogers, Estevan Zamora, and Irma Salgado Zamora ("Rogers")[3]; and the Board of Commissioners of Starke County ("the County"). As to the County, the complaint alleged that the County had "never had title to the

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[1] The survey appears to indicate that the center of the fence is on the plat line, but that the fence is slightly angled such that it is slightly southwest of the plat line on the end nearest the lake and slightly northeast of the plat line on the other end.

[2] The complaint is not included in the Kopchiks' appendix. As a separate matter, we remind counsel that in the Statement of Case, "[p]age references" to the appellants' brief "are required." Ind. Appellate Rule 46(A)(5).

[3] It alleged the owners of #15 had "erected a fence that encroache[d] on [Dybalas'] property between County Road 210 and the water's [sic] of Bass Lake." *Id.*

'Meander Land,'"[4] and was "not in the chain of title with respect to the 'Meander Land'" or any portion of #16 and #17, and that the Commissioners were "made parties as to any interest they may claim or assert with respect to the Meander Land." *Id.*

On October 5, 2007, the Kopchiks filed a counterclaim, also seeking to quiet title.[5] On July 7, 2008, the parties filed a partial consent judgment, which the trial court entered. It noted that although County Road 210 intersected "all" of the parties' lots, and the complaint had alleged the County's "possible interest in that portion of the real estate between the road and the lake"; however, the County has disclaimed "any interest in the land between the road and the lake"; and the trial court ordered the County "divested of any interest" therein. (Kopchik App. 60). The order held that "the other outstanding boundary line issues among the parties remain[ed] to be determined." *Id.* at 61.

The trial court held a bench trial on February 9, 2009, and evidence of the foregoing was presented. The parties stipulated to the admission of fourteen exhibits, including several survey documents and numerous photographs.[6] A Surveyor's Location Report of #17 and #16, dated September 1, 1986, noted that it was "based on existing possessionary fence lines." (Stip. Ex. 7). In his opening statement, counsel for the Kopchiks conceded, "The fence lines that have existed have been recognized as boundary lines. We're not going to argue about them." (Tr. 18). Counsel asserted, however, that

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[4] A "meander line" is a "survey line (not a boundary line) on a portion of land, usu[ally]. Following the course of a river or stream." BLACK'S LAW DICTIONARY 1001 (8th ed. 2004).

[5] Rogers also filed a counterclaim.

[6] The appellants submitted a transcript of the bench trial but without an accompanying complete set of the exhibits admitted. *See* Ind. App. R. 29(A). Some of the exhibits are included in their appendix.

such a boundary line pursuant to the existing fence lines did not apply to "the property between the road and the lake." (Tr. 19).

Patricia VonBampus lived in the residence on #18 and #19 from 1987 (when she married the late Mr. VonBampus, who had already been living there for several years) until 2005, and had sold the property to the Kopchiks in 2006. She testified to the long-term existence of the fence between #18 and #17.

Evidence was presented of the Dybalas' application to the Indiana Department of Natural Resources ("DNR"), and notice to adjoining property owners of, their request for a permit to build the seawall, and its approval for and oversight of the seawall construction. There were no objections by the adjoining property owners. Specifically, Mrs. VonBampus testified that she received notice from the DNR of the Dybalas' application for a permit to build the seawall and made no objection. The permit was admitted into evidence, and it depicts the exact location for the seawall. The survey prepared for the Dybalas was admitted into evidence, and it indicates that a straight line from the long-standing fence between #18 and #17 would extend to the point where the Dybala seawall ended.

Mary Ann Dybala testified that after their purchase of #17 and #16, she and her husband maintained the area between the water's edge and the county road: they planted two trees, dug a fire-pit, mowed the area, and maintained a border of painted rocks, approximately twelve to fourteen inches in diameter, near the lake-side edge of the roadway. She testified that their rocks ended in a location "consistent with the fence had the fence been extended all the way to the water," and that from that point, there were

much larger rocks bordering #18 and #19. (Tr. 84). Mrs. VonBampus confirmed that the larger-sized rocks edged the lake-side edge of the roadway bordering #18 and #19. Both Mrs. VonBampus and Mrs. Dybala testified that the smaller rocks were already in place along the roadway when the Dybalas obtained #17 and #16.

Mrs. VonBampus further testified that she "never thought [the Dybalas] were trying to take property from" her and her husband. (Tr. 112). Mrs. Dybala also testified that from 1990 until April of 2006, there had been no claim of ownership by the VonBampuses to "any portion of the area" between the Dybala seawall and the roadway. (Tr. 58). She further testified that the VonBampuses sought permission and "asked if they could put their tires there when it was coming time in the winter to put it on the seawall, which we said was fine." *Id.* Mrs. Dybala testified that when the Kopchik iron fence was installed in 2006, at least one of the Dybala rocks was removed. Mr. Dybala testified that two of the Dybala rocks were removed.

On March 26, 2009, the trial court issued its findings of fact, conclusions of law, and order.[7] It found that "[b]y acknowledgment of Kopchik in opening statement," and "the evidence submitted," the long-standing fence "separating" #18 and #17 "constituted the legally enforceable property line" between them as of "at least" 2000. (Kopchik App. 74). Its more than forty findings also noted that despite the "clearly visible and observable" existence of the Dybala concrete seawall, the Kopchiks proceeded to purchase #18 and #19 "without having a survey or without regard to the fence line

[7] We remind counsel for the Kopchiks that the appellant's brief "shall include" the order appealed. Ind. App. R. 46(A)(10).

dividing" #18 and #17. *Id.* It found that after acquiring ownership of #17 and #16 in 1990, the Dybalas had "constantly maintained the area between" the water's edge and the county road, "as encompassed within the width of the seventy-four (74) foot concrete" seawall, maintaining the decorative rocks so as to prevent parking on the grassy area "and to generally control the use of said land"; that those smaller rocks, "distinguishable from the VonBampus rocks," were placed such that they "stopped, and the larger rocks began, in a location consistent with the boundary line long-recognized by the two parties, that being a straight line from the fenceline to the edge of the seawall." (*Id.* at 72, 73). It further found,

> After purchasing the property in 2006, and prior to installing a wrought iron fence in the disputed area, the Kopchiks removed several of the smaller rocks from the disputed area. The rocks, which likely had not been moved by anyone for decades prior to being removed by the Kopchiks, are evidence of control, intent, notice, and duration.

Id. at 73. It found that the Dybalas had paid all real estate taxes associated with their ownership of #17 and #16; had planted trees and constructed a fire-pit in the area between the roadway and the seawall; had openly claimed ownership of that area; controlled it "with the requisite intent to claim ownership, provided proper notice of their claim of ownership," and that "such claim of ownership ha[d] been continuous since 1991." *Id.* Thereafter, it concluded that the Dybalas had established control, intent, and notice for the ten-year period of adverse possession with regard to the area lying between the roadway and their concrete seawall, the southwestern boundary of which was "a

straight line to the water's edge of Bass Lake" from the long-standing fence between #17 and #18. *Id.* at 78. It ordered that "title" thereto was "quieted in" the Dybalas. *Id.* at 77.[8]

DECISION

"In the appellate review of claims tried without a jury, the findings and judgment are not to be set aside unless clearly erroneous, and due regard is to be given to the trial court's ability to assess the credibility of witnesses." *Fraley v. Minger*, 829 N.E.2d 476, 482 (Ind. 2005) (citing Ind. Trial Rule 52(A)). A judgment is clearly erroneous when there is no evidence supporting the findings or the findings fail to support the judgment, and when the trial court applies the wrong legal standard to properly found facts. *Id.* "In order to determine that a finding is clearly erroneous, an appellate court's review of the evidence must leave it with the firm conviction that a mistake has been made." *Id.*

The doctrine of adverse possession entitles a person without title to obtain ownership to a parcel of land upon clear and convincing proof of control, intent, and notice for a continuous ten-year period. *Id.* at 486. Title by adverse possession passes to the claimant by law at the end of the ten-year possessory period. *Id.* at 487.

The Kopchiks first argue that that the Dybalas' claim for adverse possession must fail because they "failed to prove when the interest of Starke County . . . terminated" with respect to the area from the southeastern terminus of the plat lines (which do not extend as far as the roadway) and the water's edge. Kopchiks' Br. at 5. They cite *Gorby v. McEndarfer*, 135 Ind. App. 74, 191 N.E.2d 786, 796 (1963), for the proposition that

[8] The trial court's order held that its resolution rendered moot claims between the Dybalas and Rogers as to the property line between #16 and #15, and there is no challenge to that holding in this appeal.

generally, the vacating or abandonment of a street or highway results in title to the land reverting to the abutting property owners. Here, however, there was no evidence that the county had vacated or abandoned the road; in fact, various witnesses referred to the public's current use of the road. Further, as to the area between the terminus of the plat lines and the roadway, that those property lines were consistent with "[t[he fence lines that have existed" was conceded by the Kopchiks' counsel in his opening statement. (Tr. 18).

The Kopchiks also direct us to the following proposition:

> As a general rule, property held by municipal and quasi municipal corporations cannot be acquired by adverse possession, at least in so far as such property is held for the public; and this is true even thought the property has not been irrevocably dedicated to public use. This rule has been applied to the property of counties . . . .

3 AM. JUR. 2d § 270 (2002). In this case, there was no evidence that the County "held" the land at the water's edge of Bass Lake; nor was there evidence that the property at the water's edge was "held for the public." *Id.* The Dybalas' complaint alleged that "the Auditor of Starke County, Indiana records indicate a Key Number for the 'Meander Land,' with a note indicating that it is owned by the Commissioners." (Kopchik App. 9). At trial, however, no evidence of such ownership was presented to the trial court, and the County expressly disclaimed "any interest in the land between the road and the lake." (Kopchik App. 60).

Because the trial court did not find the Dybalas' adverse possession of the areas on either side of the roadway devolved from the County's abandonment or vacating of the road or from the County's disclaimer of interest in the property at the water's edge, but

rather from their having established the elements of adverse possession therein, the Kopchiks' first argument fails.

The Kopchiks next argue that the Dybalas failed to establish the requirements for adverse possession. In this argument, they focus on the lack of evidence or specific factual findings as to the several feet involved (the quantity is not made clear by the record but may be inferred to be perhaps eight feet) at the southwestern edge of #17. Thus, they would have the trial court (and reviewing court) discount all testimony about mowing, trees planted, the fire-pit, or bordering rocks that were not in the narrow southwestern area that lies between straight lines drawn from the fence-line and the plat line respectively. Their argument fails to recognize the evidence of and trial court findings that (1) some distinctive bordering rocks marked that area near the roadway, and (2) the seawall extended in that area.

The Kopchiks argue that pursuant to *Carter v. Malone*, 545 N.E.2d 5 (Ind. Ct. App. 1989), the presence of the painted rocks is insufficient to establish a property line because there are "gaps where people could walk back and forth." *Id.* at 7. In *Carter*, a "row of trees and bushes" were argued to "establish a possession or use line which support[ed] open and continuous possession of a strip of property." *Id.* In reversing the trial court's award of adverse possession to "the mid-line of trees and bushes," we noted *inter alia* that these "trees and bushes grew wild, were noncontinuous and had gaps where people could walk back and forth." *Id*. As our Supreme Court stated in *McCarty v. Sheets*, 423 N.E.2d 297, 300 (Ind. 1981), however, adverse possession cases must "be decided on a case by case basis, for what constitutes possession of a 'wild' land may not

constitute possession of a residential lot . . . ." We do not find *Carter* dispositive, given the location and character of the respective properties here.

As to the seawall, the Kopchiks simply assert that it "controls the sea . . . not . . . the use of the land at issue." Kopchiks' Br. at 17. Be that as it may, its placement certainly marked for all to see the exact location of the seventy-four-foot width of #17 and #16 claimed by the Dybalas at the water's edge.

To establish the element of "notice," the claimant must "exercise a degree of use and control over the parcel that is normal and customary considering the characteristics of the land (reflecting the former elements of 'actual,' and in some ways 'exclusive,' possession)." *Fraley*, 829 N.E.2d at 486. As the trial court properly found, the concrete seawall was "clearly visible and observable." (Kopchik App. 74). Between lines from the longstanding fences, in addition to this obvious seawall built in 1991, the Dybalas maintained the entire area from the roadway to the water's edge – mowing, planting trees, digging a fire-pit, and keeping distinctive rocks at the roadside to control access to the grassy area they claimed. Such is evidence that they used and controlled that total area in a manner normal and customary for lakeside property. Furthermore, the VonBampuses, the former owners of the Kopchiks' lots, recognized and/or accepted that the Dybalas owned the disputed area.

To establish the element of "intent," the claimant must demonstrate "intent to claim full ownership of the tract superior to the rights of all others, . . . (reflecting the former elements of 'claim of right,' 'exclusive,' 'hostile,' and 'adverse')." *Id.* The Dybalas' application to the DNR, along with notice to adjoining property owners, of their

intent to build a seawall across the entire seventy-four-foot width of the area – with its southwestern end meeting a line extended from the longstanding fence – demonstrated their claim of ownership of the area. Moreover, they built the seawall in that location. Further, their distinctive rocks to the point where the existing fence line would extend also demonstrated their intent to claim ownership to that point.

The element of "notice" requires actions by the claimant with respect to the land that "give actual or constructive notice to the legal owner of the claimant's intent and exclusive control (reflecting the former 'visible,' 'open,' 'notorious,' and in some ways, the 'hostile,' elements)." *Id.* Numerous photographs in the record reflect that the Dybalas' area of the lakeside was apparent – corresponding to the location of the seawall and with the fence separating #18 and #17 visible in what appears to be a straight line therefrom. Further, Mrs. VonBampus testified that she and her husband had received notice of the DNR application by the Dybalas, which included details as to the exact placement of the seawall, and that they had not objected. Mrs. Dybala testified that the VonBampuses had subsequently requested permission from them to use the seawall for winter storage, further evidence that the VonBampuses made no claim to that property or disputed ownership. More evidence in that regard is Mrs. VonBampus' testimony that she "never thought [the Dybalas] were trying to take property from" her and her husband. (Tr. 112).

Finally, the claimant must satisfy each of the above elements for ten years. *Fraley*, 829 N.E.2d at 486. The concrete seawall was built to the point where the southeastern fence line would extend to the water's edge in 1991. By the time the

Dybalas filed their action to quiet title in 2007, their control, intent, and notice had existed for more than ten years.

As noted above, adverse possession cases must be decided on a case by case basis, applying the evidence to the circumstances of the land involved. *McCarty*, 423 N.E.2d at 300. Considering the issues of law and the facts found by the trial court, and the inferences reasonably drawn therefrom, we find that a reasonable trier of fact could conclude that the elements of adverse possession were established by clear and convincing evidence. *Fraley*, 829 N.E.2d at 488.

Affirmed.

ROBB, J., and MATHIAS, J., concur.