Circuit Court for Montgomery County
Case No. 475099V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0012

September Term, 2021

TAKAMI OKA, ET AL.

V.

CATHERINE SCHULZ, ET AL.

Kehoe,
Arthur,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: August 25, 2022

This appeal is about a fence that invokes the question: do fences make good neighbors?[1] Appellants, Takami and Keiko Oka, and appellees, Catherine and Stephan Schulz, have been neighbors since 1992. On November 8, 2019, the Schulzes sued the Okas in the Circuit Court for Montgomery County to quiet title to land that they claimed to have acquired through adverse possession. After a three-day Zoom bench trial, the circuit court ruled in favor of the Schulzes and this timely appeal followed.

The Okas present two questions on appeal,[2] which we have reworded:

I. Can property be acquired by adverse possession, if the acquisition would render the property from which it was acquired to be in violation of applicable zoning laws?

II. Did the evidence regarding the location and purpose of the fence in 1992 support the circuit court's adverse possession finding?

FACTUAL AND PROCEEDURAL BACKGROUND

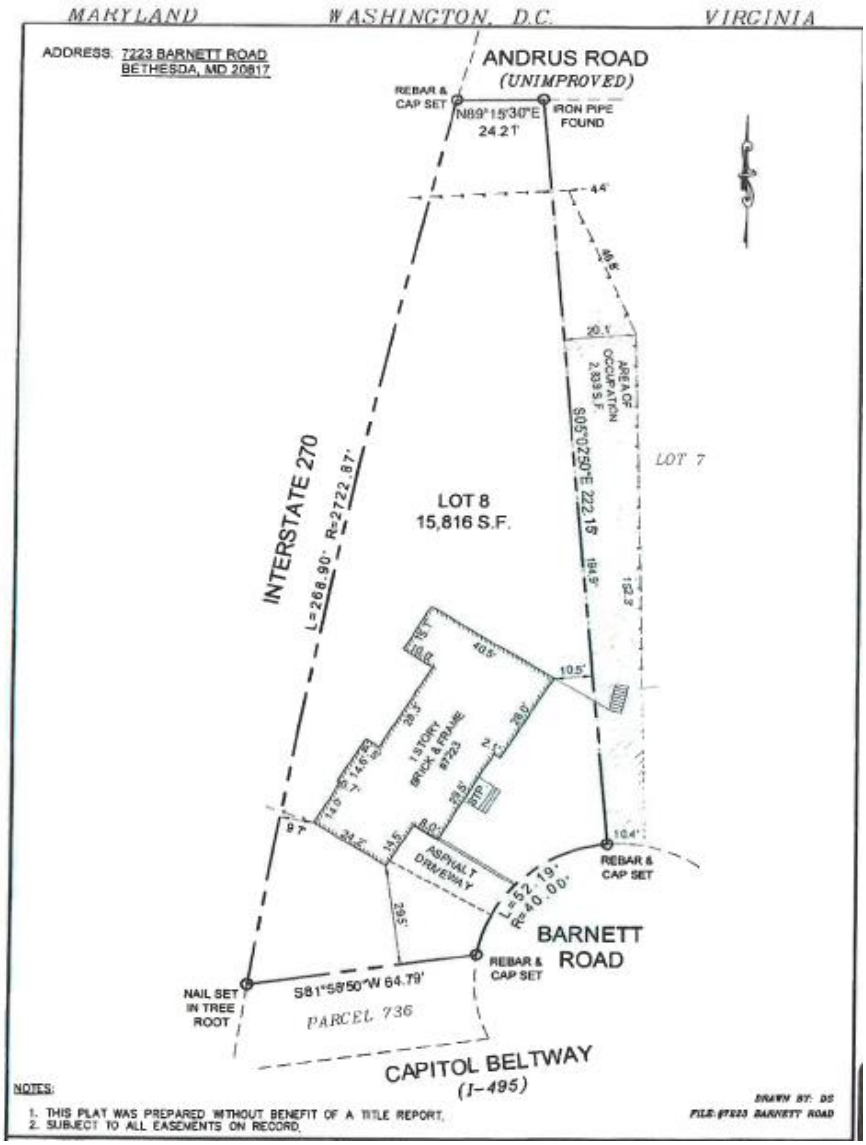
[1] Robert Frost, *Mending Wall* (1914).

[2] The questions as presented by the appellant are:

"I. Whether the circuit court's ordered transfer of the strip of land lying along the common boundary between two adjacent Montgomery County residential lots in a subdivision subject to zoning requiring minimum side yard setbacks, and which left the diminished lot without any side yard nearest the newly-created common boundary, in violation of applicable zoning law, is precluded as a matter of law irrespective of any claim of arrogation of the strip by virtue of adverse possession.

II. Whether the circuit court's finding that 'there is no evidence that the adverse possession area is different today in size and location than it was in [June] 1992 when … [lot 8 owners] purchased the property' is clearly erroneous, precluding the conclusion that the 20-year occupation period for adverse possession has been satisfied, given that in March 2012 the fence the trial court determined now constitutes the putative eastern boundary of lot 8 owners' so-called adverse possession area was significantly extended and reconfigured, substantially changing and extending the area now claimed as a 20-year area of occupation."

The Okas bought 7219 Barnett Road, Bethesda, Maryland ("Lot 7"), in 1978. The Schulzes bought 7223 Barnett Road, Bethesda, Maryland ("Lot 8"), in June of 1992. Plaintiff's Exhibit 2 at trial, a cut-out of which is pictured below, shows the recorded boundary between Lot 8, the Schulzes' lot, and Lot 7, the Okas' lot, and the area of the Schulzes' alleged occupation:



The Schulzes filed a verified complaint to quiet title to 2,839 square-feet of land between the two lots that they claim they have acquired through adverse possession. The

Schulzes base their claim on the location of a decades-old chain-link fence, which we will refer to as the "Old Fence," and a row of hedges and trees running in a southernly direction between the two properties. The Old Fence was replaced and extended by, what we will refer to as, the "New Fence" in 2012. Whether the unextended portion of the New Fence is in the same location as the Old Fence is disputed. The Schulzes claim that it was and that the Old Fence and the hedge and tree line from the Old Fence have been considered the boundary between Lot 7 and Lot 8 for over twenty years, and that they have used property west of the fence and the line of the hedges and trees as their own since purchasing Lot 8. The Old Fence was in place when the Okas purchased Lot 7 in 1978. As shown on Plaintiff's Exhibit 2, that fence was not erected near or in line with the recorded boundary line between Lot 7 and Lot 8. It began approximately 10 feet inside the lot line, and, running at an angle different than the recorded property line, it ended approximately 20 feet inside the recorded lot line.[3]

Mr. Murray, the Schulzes' predecessor in title, testified that he had assumed that the Old Fence and the trees and bushes[4] which ran "almost in a straight line" from the fence toward "the front" of Lot 8, was the property line and he had treated the property up to the trees and the hedges in the front and up to the Old Fence line in the back as his own. He

[3] The entire length of the recorded property line is 222.5 feet. The Old Fence ran roughly 150 feet. The complaint indicates that the land on the Schulzes' side of the Old Fence is sloped and that the Schulzes extended a retaining wall and replaced steps. It appears that the Old Fence was erected at the bottom of the slope as was the New Fence.

[4] The "bushes" in the line of "trees and bushes" is sometimes used interchangeably with a "hedge" or "shrubs" in the testimony and findings. We understand either term to be referring to the same things.

testified that the Old Fence was the type of fence you would use to enclose a dog, but he did not know its purpose.

Mrs. Schulz testified that she had also used the land up to the Old Fence since purchasing the property in 1992—cleaning it up, planting trees and flowers, building a patio, extending the retention wall, and replacing the stairs on the slope of a hill. She allowed her children to play in and use the maintained areas in the back yard of her home, as well as the entirety of the front yard.

According to the Okas, the Old Fence was one of three sides of an enclosure of part of their backyard and was not intended to delineate the boundary between the two lots. The back of the Okas' house was most of the fourth side of the enclosure. Other evidence introduced at trial supports that testimony.

In 2012, the parties agreed to replace the Old Fence, and together Mrs. Schulz and Mrs. Oka chose the type of fence and the materials. The Okas paid for the portion that replaced the Old Fence, and the Schulzes paid for the extension added on at the northern end of the Old Fence, as shown on Plaintiff's Exhibit 2. That extension added approximately forty-six feet of fence running north-west toward the Schulzes' recorded property line, and from that point across the Schulzes' property to their eastern property line. The purpose of the extension was to keep wildlife out of the Schulzes' yard.

At trial, the Schulzes contended that the New Fence, except for the extension, was in the same position as the Old Fence; the Okas contended that it was not. The trial court

found that the Okas had not shown that the New Fence was not in the same location as the Old Fence, and that "the [new] fence does not destroy the continuity of the [Schulzes'] possession of the area" claimed.

The trial court found that the Schulzes used the Area of Occupation[5] as shown on Plaintiff's Exhibit 2 above by "allowing their children to play in the area, openly mowing the lawn, removing debris, raking leaves, weeding the area, planting ground cover, planting bushes, trimming trees, [replacing old steps with] concrete steps, erecting a shed, laying fill dirt, extending a stone retaining wall, [establishing a patio area in the front with] a grill, table, chairs, and numerous planters . . . which [they] have used regularly." In addition the court found that they had "planted a row of trees and larger bushes along the plane that extended out from the fence to the street to demarcate a visible boundary between the properties at the street front." Some of these plants and bushes were there when the Schulzes bought the property in 1992, but Mrs. Schulz testified that she planted new trees and bushes throughout their time owning their property. Mrs. Schulz asserted at trial that the Okas had recognized that the Schulzes owned that property because they had asked her to trim certain trees on the Schulzes' side of the fence that were in the Area of Occupation.

[5] We will use that term to refer to the property that the Schulzes claim they acquired through adverse possession.

I. Adverse Possession and Applicable Land Use Laws

Contentions

The Okas contend that adverse possession cannot force an involuntary transfer of title that will result in a violation of the applicable zoning laws. As they see it, that would be a judicial resubdivision of a subdivided lot. They assert that "the Area of Adverse Possession claimed by [the Schulzes] extends to and literally touches a corner of [the Okas'] existing carport and home, leaving no side yard whatsoever[.]" Citing Chapter 59 of the Montgomery County Zoning Ordinances, Article 59-4, § 4.1.7(B)(5) Setback Encroachments, which provides that "[a]ny building or structure must be located at or behind the required building setback line," and § 4.4.8, Residential-90 Zone (R-90), which provides that the minimum side yard setbacks for Zone R-90 are eight feet, they argue that their lot will "instantly violate applicable R-90 zoning regulations[.]" Therefore, they contend that the court cannot award the Schulzes title to the Area of Occupation because the

> regulations would forbid a voluntary conveyance from Lot 7 Owners to Lot 8 Owners of the narrow strip of land claimed as the Adverse Possession Area, without prior formal approval by the Montgomery County Planning Board, and arrogation of the same area by adverse possession therefore would amount to an acquisition by a transferee of property the transferor has no legal right to transfer, not to mention the inadvertent creation of an unauthorized re-subdivision.

Citing *Remes v. Montgomery County*, 387 Md. 52, 67 (2005), they assert that an equitable action's result must comply with "*both* zoning and subdivision requirements."

The Schulzes contend that the trial court can quiet title to the Area of Occupation in their favor. Noting that *Remes* involves "the merger for zoning purposes of two or more lots held in common ownership where one lot is used in service to one or more of the other common lots solely to meet zoning requirements[,]" they argue that this is not a zoning merger case because Lot 7 and Lot 8 are not held in common ownership and there is no transfer involved. *Remes*, 387 Md. at 64. Moreover, they assert that they acquired title to the Area of Occupation in 2012 and that there was no zoning violation until the Okas constructed their carport in 2013. For that reason, they contend that the Okas should be precluded from complaining about a resulting zoning violation.

Standard of Review

In an action tried without a jury, Maryland Rule 8-131(c) states that an 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.

See also Hillsmere Shores Improvement Ass'n, Inc. v. Singleton, 182 Md. App. 667, 690 (2008) (quoting Maryland Rule 8-131(c)). We review, however, legal conclusions de novo without deference to the trial court. *Hoang v. Hewitt Ave. Assocs., LLC,* 177 Md. App. 562, 576 (2007).

Analysis

Adverse possession law is rooted in a "statute[] of limitations that fix[es] the period of time beyond which the owner of land can no longer bring an action, or undertake self-help, for the recovery of land from another person in possession." *Hillsmere*, 182 Md. App. at 728 (quoting Richard R. Powell & Michael Allan Wolf, 16 Powell on Real Property § 91.01 at 91-94 (2000, 2007 Supp.)). It is "complemented and amplified by a large body of case law that elaborates on the kind of possession by another that is sufficient to cause the statutory period to begin to run, and to continue running, against the true owner." *Id.* (quotation marks and citation omitted). In other words, adverse possession law is a "synthesis of statutory and decisional law," but at root it is "a matter of State statute." *Id.* at 728-29 (quotation marks and citation omitted). For that reason, "whether a County ordinance could affect the operation of adverse possession" is questionable. *Id.* at 728.

Md. Code Ann., Cts. & Jud. Proc. § 5-103(a) requires a person, "[w]ithin 20 years from the date the cause of action accrues," to file "an action for recovery of possession of a corporeal freehold or leasehold estate in land" or to "[e]nter on the land[,]" and Md. Code Ann., Real Prop. § 14-108(a) provides the adverse possessor with a cause of action:

> Any person in actual peaceable possession of property, or, if the property is vacant and unoccupied, in constructive and peaceable possession of it, either under color of title or claim of right by reason of the person or the person's predecessor's adverse possession for the statutory period, when the person's title to the property is denied or disputed, or when any other person claims, of record or otherwise to own the property, or any part of it, or to hold any lien encumbrance on it, regardless of whether or not the hostile outstanding claim is being actively asserted, and if an action at law or proceeding in equity is not pending to enforce or test the validity of the title, lien, encumbrance, or other adverse claim, the person may maintain a suit in accordance with Subtitle 6 of this title in the circuit court for the county

> where the property or any part of the property is located to quiet or remove any cloud from the title, or determine any adverse claim.

Our review of statutory and case law does not reveal a local zoning ordinance exception to an adverse possession claim. And, as the *Hillsmere* Court observed, if a local zoning ordinance expressly sought to exempt recorded, subdivided lots from adverse possession claims, the question to be answered would be whether the authorization of counties to "enact local laws . . . related to zoning and planning" under the Express Powers Act authorized counties to supplant state statutory law. *Hillsmere*, 182 Md. App. at 729-30 (quotation marks and citation omitted). But that question is not presented here because we have not found or been directed to a Montgomery County ordinance exempting subdivided lots from the operation of Maryland adverse possession law.

Insofar as the Okas rely on *Remes* to support their position that equitable actions "must comply with *both* zoning and subdivision requirements[,]" *Remes* involved the voluntary merging of two lots by the owner of both lots. *Remes*, 387 Md. at 67-68. The facts in this case and those in *Remes* could not be more different. The Okas characterize an adverse possession claim as a "proposed transaction," but "transaction" implies a negotiated agreement or exchange among two or more parties. *See* Black's Law Dictionary 1503 (7th ed. 1999). Acquisition by adverse possession, on the other hand, involves occupation by one party and inaction by the other. The resulting transfer of title is a matter of law. A confirmatory quiet title action is in no way a voluntary exchange of property. In

short, we are not persuaded that a resulting violation of a local zoning ordinance precludes the application of adverse possession law.

II. Factual Findings

Contentions

The Okas contend that the circuit court's factual findings were clearly erroneous and that the court "inexplicably disregarded the preponderance of documentary evidence and testimony[.]" In support of that contention, they argue that the New Fence "materially altered and expanded the area between the fence and the western boundary of Lot 7," and because it has not existed for the statutory period, it cannot be used as evidence of adverse possession. More particularly, they argue that the circuit court's finding that "there is no evidence the Adverse Possession Area is different today in size and location than it was in 1992 when [the Schulzes] purchased the property" is clearly erroneous. In addition, they assert that Mrs. Schulz recognized that the Old Fence was one side of an enclosure of a portion of the Okas' backyard and that fences have many other purposes than delineating boundaries between properties. They assert that a trial court must take into account the purpose for which the fence was erected in considering whether the fence was evidence of a putative boundary. In their view, the record is devoid of any evidence that the Old Fence was meant to be a boundary, and it should not have been treated "as evidence supporting Lot 8 Owners' claim of adverse possession."

The Schulzes contend that the circuit court's factual findings are supported by the evidence and not clearly erroneous. More specifically, they argue that the documentary evidence, testimony, and exhibits all support that, other than the extension, the New Fence is essentially in the same place as the Old Fence.

Standard of Review

"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." Md. Rule 8-131(c). "A factual finding is clearly erroneous if there is no competent and material evidence in the record to support it." *Hoang*, 177 Md. App. at 576. The clearly erroneous standard, however, does not apply to questions of law. *White v. Pines Cmty. Improvement Ass'n, Inc.*, 403 Md. 13, 31 (2008). "When the trial court's [decision] involves an interpretation and application of Maryland statutory and case law, [the appellate court] must determine whether the [trial] court's conclusions are legally correct." *Id.* (quotation marks and citation omitted).

Analysis

In an adverse possession action, the claimants have the evidentiary burden to show their possession of the land claimed for the statutory period of 20 years, and that it was '"actual, open, notorious, exclusive, hostile, under claim of title or ownership, and continuous or uninterrupted."' *Id.* at 36 (quoting *Costello v. Staubitz*, 300 Md. 60, 67

(1984)); Md. Code Ann., Cts. & Jud. Proc. § 5-103(a). A "claim of title or ownership" reflects "an intention to assert ownership over the property and claim it as one's own[.]" Herbert T. Tiffany & Basil Jones, *Tiffany Real Property*, Adverse Possession of Land § 1147.

Whether a claimant is in actual possession of the land claimed is a fact intensive inquiry into the character, location, uses, and purposes of the land. *Senez v. Collins*, 182 Md. App. 300, 323-24 (2008). "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 [it does], it furnishes satisfactory evidence of adverse possession." *Blickenstaff v. Bromley*, 243 Md. 164, 171 (1966) (quotation marks and citatio omitted).

1. Purpose of the Fence

Citing *Costello*, the Okas argue that the court had to consider the purpose of the Old Fence in its adverse possession analysis. In *Costello*, the circuit court found that the fence between two lots had been erected as a "boundary between lots 232 and 233" and was "intended, and did serve as the boundary of the two lots." *Costello*, 300 Md. at 65 (quotation marks and emphasis omitted). The Court of Appeals reversed and explained that "[t]he existence of a fence, erected by the record owner within the record owner's land for the record owner's own purposes, does not support an inference that the fence is a

visible boundary delineating the extent of a claimant's adverse possession." *Id.* at 69. In other words, the appropriate inference to be drawn from the existence of a fence "is dependent upon the purpose for which the fence was erected." *Id.* at 71.

From its previous decisions involving visible lines of demarcation, such as a fence, the *Costello* Court distilled the following general principles:

> 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*, *Storr*[*v. James*], 84 Md. [282,] 290-91 [(1896)]; 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, *Tamburo*[*v. Miller*], 203 Md. [329,] 336 [(1953)].
>
> 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 between delineating the extent of the claimed adverse possession, *Tamburo*, 203 Md. at 336; or
>
> b) *there is no evidence to show by whom and for what purpose the line of demarcation was created*, *Ridgely*[*v. Lewis*], 204 Md. [563,] 566-67 [(1954)].

Id. at 72-73 (emphasis added). Because the fence in *Costello* was erected for the purpose of keeping the record owner's predecessor-in-interest's cattle on his property and not to delineate a boundary, the Court held that it was erroneous to use it as evidence of adverse possession. *Id.* at 74. The Court 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).

Here, there was no testimonial evidence establishing the exact purpose of the Old Fence. Dr. Oka testified that the fence was there when they had purchased the house, but there was no testimony as to who their predecessors-in-interest were, or why the fence was erected. But, according to the Schulzes' Exhibit 2 (the boundary survey at the beginning of the opinion that showed Lot 8 and the area of occupation), the Old Fence was approximately 20 feet off the recorded property line between Lot 8 and Lot 7 at the northern end and approximately 13 feet at the southern end, and it ran at a different angle than the property line, and it did not extend to either the front or the back of the lot. Instead, according to the Schulzes' Exhibit 50, it turned eastward and ran to the western corner of the back of the Okas' house. That same exhibit indicates that the fence enclosed a portion of the Okas' backyard and was not coincident with the property lines on either side of the fence. We recognize that both Defendant's Exhibit 23.2 and Plaintiff's Exhibit 50 are location drawings that cannot be used to determine exact locations, but both indicate an enclosed area well inside the recorded property lines.

We are not persuaded that "the record is devoid of any evidence[,]" as the trial court found, that the Old Fence served to enclose a portion of the Okas' backyard or "of such an enclosed structure in the rear of Lot 7." And there are many reasons one might choose to enclose a portion of a yard inside the property lines besides a tennis court, swimming pool,

or a pet. For example, Ms. Schulz indicated that she extended the New Fence across a portion of her yard to keep deer out.

To be sure, the exact purpose of the Old Fence when it was erected is unknown. But we do know that it was not "coincident with the actual boundary" between Lot 7 and Lot 8 and did not run the length of the property line. As we see it, the Old Fence could be considered, at most, as "some evidence" of adverse possession in the area where it is located but, at best, it serves as "a visible boundary delineating the extent of the claim[ed] adverse possession" area, but not as evidence of the property line or possession itself. *Id.* at 73-74. Therefore, as we will explain, the circuit court's treatment of the Old Fence in its determination of the Schulzes' occupation up to the southern terminus of the Old Fence was not erroneous.

2. Adverse Possession Area and Fence Location

The Okas argue that the circuit court's finding that the adverse possession area had not materially changed after the New Fence was installed was clearly erroneous. They assert that the New Fence is in a materially different location than the Old Fence. As to the extension of the Old Fence when the New Fence was installed in 2012, the circuit court, relying on testimony and exhibits, found that the claimed area did not materially change.

The Okas assert that a comparison between the admitted Defendant's Exhibit 23.2, which is a location drawing, and Defendant's Exhibit 24, an unadmitted survey, shows that the location of the fence is different. We, of course, cannot consider the unadmitted survey, but even if we could, a comparison between a survey and a location drawing would be an

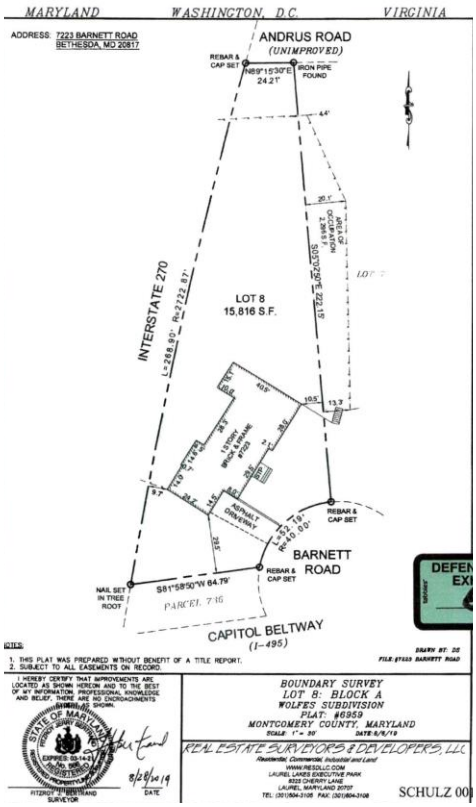
apples and oranges comparison. As the only expert surveyor to testify stated, a location drawing cannot be used to determine the exact location of the Old Fence. Moreover, the circuit court clearly credited the testimony of Mrs. Schulz, Mr. Murray, and Mr. Wixom, that the New Fence, up to the extension, was materially in the same location as the Old Fence. Mr. Murray was the Schulzes' predecessor-in-interest, and Mr. Wixom was a Home Depot employee who frequently assisted Mrs. Schulz in her extensive gardening activities. The trial court's finding that, other than the extension, the location of the New Fence was substantially the same as the Old Fence was not clearly erroneous, nor was its finding that "[a]ny minor change in the placement of the fence does not destroy the continuity of the [Schulzes'] possession of the area."

As to whether the claimed Area of Occupation changed when the New Fence was extended by the Schulzes beyond the northern terminus of the Old Fence, the trial court credited Mrs. Schulz's testimony that she and her family had used the area north of the Old Fence, as shown on Plaintiff's Exhibit 2, as their own since 1992. More specifically, the circuit court found that the Schulzes undertook "numerous unmistakable and unequivocal acts of ownership" and treated the area of occupation "in the same manner as the adjacent land they own by title." The court set out specific activities of the Schulzes that established open, notorious, and continuous acts of ownership: allowing children to play in the area, mowing the lawn, removing debris, raking leaves, weeding the area, planting ground cover and bushes, trimming trees, erecting concrete steps and a shed, bringing in truckloads of dirt to grade the slope of the land, and extending a stone retaining wall. The trial court

credited Mrs. Schulz's testimony that they had been using the Area of Occupation north of the Old Fence as their own since they had moved in. According to Mrs. Schulz, when they moved in there were "[b]roken bottles, an old refrigerator, old tires from cars[,]" and "[i]nvasive plants like poison ivy and underbrush that we had to clear up and fallen trees." In her words, that area "was a mess" and it took them "a while to be able to clean it up before [they] could plant anything." Mrs. Schulz also described the extensive landscaping, planting, and maintenance that she had undertaken in the area north of the Old Fence since purchasing her property.

The burden fell on the Schulzes to establish actual possession of the property reflected as the Area of Occupation on Plaintiff's Exhibit 2. The circuit court made factual findings supported by the evidence as to the Schulzes' acts of ownership in the Area of Occupation. As for their use of the backyard, Mrs. Schulz testified that they had used all the land on the western side of the New Fence line since moving into the property in 1992. She let her children play in all of the area, cleaned the property up to ensure that it was safe for them, extended a retaining wall, planted and maintained plenty of plants throughout the entirety of the yard, and regraded parts of the backyard. The court's finding that the

Schulzes adversely possessed the area actually bordered by the New Fence, as depicted in Defendant's Exhibit 6 below, including the extension, was not clearly erroneous.



For what is sometimes referred to as the Schulzes' "front yard," which is the Area of Occupation between the southwestern corner of the New Fence and Barnett Road, the circuit court found that "at the time [the Schulzes] moved into their home in 1992[,] there was a large hedge of Japanese Hollies and several other large trees in the front of the house between the properties at the street front. These were within the [Area of Occupation] and served to mark the boundary. [Mrs. Schulz] testified she planted additional Hollies to fill in gaps in the hedge at various times in order to keep the boundary in place." The court also found that the Schulzes acted in an open and notorious manner when they planted

more trees to define the boundary in the front yard after the Okas built their carport and took down some of the trees. According to the court, the front yard was "constantly maintained" by the Schulzes and "routinely occupied by [them] for meals, and included a grill, table, and chairs, all in keeping with the character and location of the land and the uses and purposes for which it is adapted."

When asked to "explain where the barrier" demarcating the supposed boundary in the front yard was, Mrs. Schulz stated it was a line of hedges and trees:

> If you look to the left behind the Oka[s'] green shed, those are the little—the Green Giants that I had planted. Before that, we had Holly trees that were like 10 or 15 feet high. The reason that I took those trees down was because every time I tried to walk on, you know, the—what do you call it? The walkway to the backyard it was scratching us. That's why the Holly trees there that we planted it was gone.

She was cross-examined as to the fencepost at the southwestern terminus of the Old Fence and the claimed area extending from it to Barnett Road:

> [Mr. Maxwell:] Okay. Now, on the left of this picture[, Plaintiff's Exhibit 9,] is actually the end of the fence that encloses the Oka[s'] rear yard. Correct?
>
> [Mrs. Schulz:] Yes.
>
> [Mr. Maxwell:] And you're saying that you had some way of determining the position that the post and a line that would determine with precision somehow the boundaries as it ended on Barnett Road through that thicket of trees?
>
> [Mrs. Schulz:] Well, what I am—what I testified to is you should take the post line you know and go straight[6] it will end at the corner of Barnett Road.
>
> [Mr. Maxwell:] Well, that's a nice theory, but what I'm asking you is did you ever walk that with a tape down? How did you determine exactly which side

[6] Mr. Murray testified that the trees and bushes ran "*almost* in a straight line" from the Old Fence.

> of that so-called boundary seeds were planted or trees were growing? How did you do that?
>
> [Mrs. Schulz:] I was just following the boundary line that we (unintelligible) you know and down there there was a hedge that we had. That was my point of reference. And also the shed and the fence in the backyard.
>
> * * *
>
> [Mrs. Schulz:] As I testified before, our point of reference was always the shed and the fence in the backyard. That's where we said it was (unintelligible) to both properties. So if you look (unintelligible) view you can see that the plantings follow that way. You know. I did not go to the fence to measure. If I measured (unintelligible) so I just followed the fence line and the shrub line.

Mrs. Schulz explained that she viewed the fence line, seemingly in the backyard, and the shrub line in the front yard as the boundary. And although an extension of a plane from the southwestern terminus of the New Fence to Barnett Road through the shrub line may be similar to the Area of Occupation, there is no clear evidence establishing that the actual Area of Occupation precisely follows the line shown on Plaintiff's Exhibit 2.

The trial court found that "the facts support [the Schulzes'] ownership of the [Area of Occupation and the plane that extends out from the fence to the street[.]" But an adverse possessor can only claim the land that they have actually possessed, and the evidence does not necessarily support occupation of all the land to the east of the extended plane as shown on Plaintiff's Exhibit 2. And that exhibit does not show the shrub and tree line in relation to the extended plane.

Mr. Bertrand, the Schulzes' surveyor, was asked about the "visible indication of rights" and "evidence of adverse possession" when conducting a boundary survey. In

relation to Plaintiff's Exhibit 2, he testified that the stairs shown were the only physical evidence of adverse possession observed by his field crew. He acknowledged that lawn and grass having been cut in an area could be evidence of adverse occupation, but field crews ordinarily rely on being told where the lines of occupation are, and they would then include them in the survey. He testified that "trees and shrubs" are not "typically" shown on a boundary survey "unless it is on the property line[,]" but that they will be when requested.

Mr. Bertrand was not sure who asked to have the Area of Occupation extended in a straight line from the end of the New Fence to Barnett Road, but Mrs. Schulz stated that it would have been her lawyer after she told him that the first survey (Defendant's Exhibit 6 above) did not show the area from the end of the fence to Barnett Road as an area of occupation. Afterwards, the field crew returned to the site to determine the metes and bounds of that line and included the area within the Area of Occupation. Notably, no trees are shown as being on the claimed property line.

In short, the eastern boundary of the Area of Occupation shown on Plaintiff's Exhibit 2 reflects what the surveyor was directed to do. Although the evidence introduced at trial might support the Schulzes' possession up to the tree and shrub line,[7] it does not establish that the tree and shrub line is in fact a perfectly straight line that is coincident with

[7] To be sure, the proposed new boundary reflects Mrs. Schulz's subjective intent but we question whether planting landscaping in the general vicinity of a perceived common boundary to supplement existing landscaping is sufficient to show exclusive possession.

the extended plane from the New Fence as shown on Plaintiff's Exhibit 2. For that reason, we are not persuaded that the trial court's finding that the boundary of the Area of Occupation in this area is the extended plane of the New Fence is supported by the evidence presented.

THE JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY IS AFFIRMED IN PART AND REVERSED IN PART. COSTS TO BE PAID ONE-HALF BY APPELLANT AND ONE-HALF BY APPELLEE.