UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 904

September Term, 2015

LISA M. McGINNIES

v.

PLYMOUTH MUSE, LLC

Berger,
*Krauser,
Zarnoch, Robert A.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Krauser, J.

Filed: July 12, 2017

*Krauser, Peter B., J., now retired, participated in the hearing of this case while an active member of this Court and as its Chief Judge; after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and the preparation of this opinion.

**This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Lisa M. McGinnies, appellant, and Plymouth Muse, LLC, appellee, own residential properties, adjacent to each other, in Takoma Park, Maryland. Ms. McGinnies's property was purchased by her parents, Elliott M. McGinnies and Bessie P.C. McGinnies, in 1967, two years before her birth, in 1969. The McGinnies family continued to reside at their Takoma Park property until 2005, when her by-then widowed father transferred ownership of the property to her.[1] Ms. McGinnies claims that the Takoma Park property has been her principal residence for the past forty-eight years.

After the McGinnieses purchased their property, they laid a gravel driveway on what they believed to be a part of their lot so that they could gain access to their home from Wabash Drive, the public road that bordered their property. And, sometime after that, they built a carport on that driveway. Unfortunately, the parcel of land upon which they laid a driveway and upon which they ultimately built a carport, fell, unbeknownst to them, within the boundary of an adjoining property, which was later purchased by Plymouth Muse in 1995. When, eighteen years after that purchase, Plymouth Muse learned of this fact from a recent survey of its property, it notified Ms. McGinnies of this purported encroachment, whereupon Ms. McGinnies filed suit, in the Circuit for Montgomery County, seeking a declaration from that court that she had either obtained ownership of the parcel of land in dispute by adverse possession or, alternatively, had acquired a prescriptive easement, for purposes of egress and ingress, over it. At the conclusion of the bench trial that ensued,

[1] It is unclear from the record when Mrs. McGinnies died, or whether Mr. McGinnies continued to reside at the Takoma Park residence after he transferred ownership to his daughter.

the Montgomery County circuit court, invoking the so-called "woodlands exception," declined to grant either form of relief and entered judgment in favor of Plymouth Muse. This appeal followed.

The primary issue presented by this appeal is the applicability of that exception to the parcel of land at issue. Or, to be more precise, the principal question, before us, is whether the circuit court erred, in denying Ms. McGinnies the relief she requested, on the grounds that the woodlands exception applied to the disputed parcel and, consequently, the use of that parcel of land by the McGinnies was not "hostile" (an essential element of both of the alternative remedies she sought), but "permissive."

For the reasons that follow, we hold that that the trial court erred in holding that the "woodlands exception" applied to the parcel of land at issue and therefore shall reverse the circuit court's judgment and remand this case to that court for further proceedings not inconsistent with this opinion.

Background

On March 9, 1967, the residence at 8321 Sligo Creek Parkway, in Takoma Park, Maryland (the "McGinnies property"), was conveyed, by deed, to Elliott M. McGinnies and Bessie P.C. McGinnies, the parents of Lisa M. McGinnies, appellant, as tenants by the entirety. Two years later, on March 26, 1969, Ms. McGinnies was born and has allegedly resided at that residence ever since. On September 21, 2005, Ms. McGinnies's father, Elliott M. McGinnies, who had been residing at the McGinnies property, with his daughter, since the death of his wife, conveyed that property to his daughter, Ms. McGinnies, in fee

simple. According to Ms. McGinnies, both she and her parents regularly entered the McGinnies property, from Wabash Avenue, by means of a driveway that the McGinnies had installed after purchasing their property.

On August 4, 1995, Plymouth Muse acquired title to a lot, at 8326 Roanoke Avenue, which was adjacent to the McGinnies property. About eighteen years later, in April of 2013, Plymouth Muse had a survey conducted of its property, which disclosed that it owned the parcel of land, on which Ms. McGinnies's driveway lay. Subsequently, an attorney, representing Plymouth Muse, sent a letter to Ms. McGinnies, notifying her of this intrusion, with a copy of the survey attached.[2]

After obtaining counsel, Ms. McGinnies, on March 20, 2014, filed a complaint to quiet title and for a declaratory judgment, in the Montgomery County circuit court, claiming that she was entitled to a prescriptive easement over the approximately 297-square-foot piece of property in dispute or, in the alternative, that she had obtained ownership of that property by adverse possession.[3] Plymouth Muse then responded with a counterclaim, requesting a declaratory judgment, avowing that it, not Ms. McGinnies, was the owner of the property at issue, or, in the alternative, if Ms. McGinnies were granted

[2] Although the letter was not submitted into evidence, and the exact date that the letter was sent is not clear from the record, the record does reflect that it was sent sometime between when the survey was completed, on April 16, 2013, and May 14, 2013, when Ms. McGinnies sent an e-mail to the attorney representing Plymouth Muse, in which she informed him that she was seeking legal representation regarding the property dispute.

[3] Ms. McGinnies's complaint stated that the property in dispute was approximately 303 square feet in area. However, at the hearing before the circuit court, her counsel clarified that the property in dispute is approximately 297 square feet in area. The latter figure is consistent with the survey conducted on behalf of Plymouth Muse.

ownership of the property via adverse possession, that she be ordered to pay all back taxes and costs incurred by that property.

At the bench trial of this matter that ensued, before the Montgomery County circuit court, Ms. McGinnies presented her case, which consisted principally of her testimony and a stipulation, by the parties, that her sister would offer the same testimony. During her testimony, Ms. McGinnies identified copies of the deeds showing that her parents had acquired the McGinnies property in 1967 and that she became the sole owner of the property in 2005. The 297-square-foot area in dispute was, she asserted, a "little piece" of the driveway that she and members of her family drove across regularly, as it was the only means by which they could access the McGinnies property from Wabash Avenue.

That driveway, according to Ms. McGinnies, had "always" been paved with gravel, and the family regularly placed its trash receptacles there. Moreover, it was used, she recalled, by members of her family dating back to at least when she was "5 or 6 years old," that is, 1974-1975. There, they customarily parked their cars, before entering the house. Furthermore, she said that she and her father had "always" maintained the driveway by shoveling snow, removing sticks and branches that had accumulated on its surface, and by ensuring that it was properly paved.

Ms. McGinnies further testified, during direct examination, that, sometime in 1993, a "carport," a structure with a roof supported by beams, was built on the driveway. That structure, it was later disclosed by Plymouth Muse's survey, was situated partly on land claimed by Plymouth Muse and partly on the McGinnies property. Moreover, during that testimony, Ms. McGinnies identified a photograph, subsequently admitted into evidence,

depicting a mailbox, attached to one of the carport's supporting columns, which, she averred, the "mailman" regularly used. Asked by her counsel if she was familiar with Plymouth Muse's adjoining property, she stated that she knew that it contained an apartment building. And, finally, during cross-examination, an e-mail Ms. McGinnies had written to Plymouth Muse's counsel was introduced as evidence, which contained the following statement: "[M]y family has used and parked our cars in what we have always believed to be our driveway for over forty years."

At the conclusion of Ms. McGinnies's case, the parties presented cross-motions for judgment. The principal issue raised and addressed by those motions was whether Ms. McGinnies had established that her use and possession of the disputed property was "hostile," an essential element of both her adverse possession and prescriptive easement claims. The circuit court ruled that she had not and granted judgment in favor of Plymouth Muse, explaining:

> I've had the opportunity to review the cases that were submitted by both parties, and took a look at a recent decision from the Court of Special Appeals, [*Senez v. Collins*, 182 Md. App. 300 (2008)] . . . which sets forth the elements of adverse possession, and reestablishes what's well-settled law, that the time period to show possession is a period of 20 years; that possession must be actual, open, notorious, exclusive, hostile, under claim of title or ownership, and continuous or uninterrupted.
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> The issue before the [c]ourt is whether [Ms. McGinnies] has established the element of hostility, and in that regard, I've taken a look at [*Clickner v. Magothy River Ass'n Inc.*, 424 Md. 253 (2012)]. . . . And I've taken a look, in particular, at the language which distinguishes between whether there is a presumption of hostility, or whether there is a presumption of permissive use by the owner.
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> In the [c]ourt's view, the matter before the [c]ourt is more in the, more like a situation where the woodlands exception would apply, and that would

> provide a presumption of permissiveness by the landowner in this case. And as [*Clickner*, 424 Md. 253] makes clear, that Maryland law does not want to punish a landowner who quietly acquiesces in the use of a path or road across his uncultivated land resulting in no injury to him but in great convenience to his neighbor. And the [C]ourt [in *Clickner*, 424 Md. 253] indicates that that landowner ought not to have thereby lost his rights.
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> In the [c]ourt's view, this is in the nature of the actual owner having the open land that he has permitted Ms. McGinnies and her family to use with his permission. So I'm going to be granting [Plymouth Muse's] motion. [Ms. McGinnies] has the burden of proof with respect to proving adverse possession.

Immediately following the foregoing ruling, counsel for McGinnies asserted that "there was testimony that there was no permission granted to use that property," to which the trial court replied, permission was "presumed." When counsel for McGinnies then raised her additional claim of a prescriptive easement, the circuit court stated that its ruling "would be the same decision with respect to a prescriptive easement," whereupon Plymouth Muse withdrew its counterclaim. Then, after the court denied Ms. McGinnies's subsequent motion for reconsideration, Ms. McGinnies noted this appeal.[4]

[4] On July 1, 2015, Ms. McGinnies filed a second motion for reconsideration. The circuit court also denied this motion but did so on July 30, 2015, well after Ms. McGinnies had noted her appeal. Because the circuit court did not rule on the second motion for reconsideration until after Ms. McGinnies noted her appeal, that ruling is neither part of the record before this Court nor part of this appeal.

Discussion

I.

Ms. McGinnies contends that the circuit court erred in rejecting her claims on the grounds that the "woodlands exception" applied to the parcel of property in dispute and, therefore, her use of that parcel was presumptively "permissive" and not hostile.[5]

A party, claiming adverse possession of another's property, must show its "possession of the claimed property for the statutory period of 20 years,"[6] and that

[5] Ms. McGinnies also makes the specious claim that the circuit court erred in granting judgment in favor of Plymouth Muse, as she "had proven a prima facie case" by invoking the standard that applies when a motion for judgment is made after the plaintiff has rested, during a jury trial, rather than the standard that applies when such a motion is made, during a bench trial, as happened here. Maryland Rule 2-519(b) provides:

> When a defendant moves for judgment at the close of the evidence offered by the plaintiff in an action **tried by the court**, the court may proceed, as the trier of fact, to determine the facts and to render judgment against the plaintiff or may decline to render judgment until the close of all the evidence. When a motion for judgment is made under any other circumstances, the court shall consider all evidence and inferences in the light most favorable to the party against whom the motion is made.

(Emphasis added.) Consequently, the issue of whether she "had proven a prima facie case" of adverse possession was irrelevant.

[6] When "no single adverse possessor has held the property in question for the statutory twenty-year period, the court must consider whether successive periods of adverse possession may be tacked together to meet the requisite duration." *Senez v. Collins*, 182 Md. App. 300, 332 (2008). "Tacking will only be permitted where there is privity of estate between the successive adverse possessors." *Id.* Tacking could arise as an issue on remand, as the circuit court made no findings as to when Ms. McGinnies's possession of the disputed property began or when Plymouth Muse first contested it, although the latter time appears to have been clearly established when, sometime in April or May of 2013, Plymouth Muse notified Ms. McGinnies of its claim to the disputed property, along with a copy of the survey supporting that claim. (cont.)

"possession must be actual, open, notorious, exclusive, hostile, under claim of title or ownership, and continuous or uninterrupted." *Senez v. Collins*, 182 Md. App. 300, 323-24 (2008) (internal quotations and citations omitted). The element of hostility, however, "does not necessarily import enmity or ill will" but rather refers to the possession of another's land that is "without license or permission[ ] and unaccompanied by any recognition of . . . the real owner's right to the land." *Id.* at 339-40 (internal quotations and citations omitted). In fact, when a party has shown that his or her use of the property was open and notorious, as well as continuous for the statutory period of twenty years, then courts generally presume that the use was "hostile," and "[t]he burden then shifts to the landowner to show that the use was permissive." *Id.* at 340 (internal quotations and citations omitted).

But there is an exception to that rule known as the "woodlands exception." Under that exception, if the property at issue "is unimproved or in a general state of nature," then "a legal presumption that the use is by permission of the owner" is to be applied. *Breeding v. Koste*, 443 Md. 15, 29, 34-35 (2015). To determine whether the "woodlands exception" appertained to the property at issue, as the circuit court ruled, we conduct a *de novo* review to ascertain whether the court was legally correct in doing so. *Senez*, 182 Md. App. at 322 n.14. *See White v. Pines Cmty. Improvement Ass'n*, 403 Md. 13, 31 (2008) (observing that,

See Miceli v. Foley, 83 Md. App. 541, 556-57 (1990) (noting that a survey conducted on behalf of a title owner, combined with the owner taking an action to assert ownership, may be deemed an entry on the land sufficient to interrupt the period of adverse possession); *see also Montieth v. Twin Falls United Methodist Church, Inc.*, 428 N.E.2d 870, 875 (Ohio Ct. App. 1980) (holding that an adverse possession period was interrupted when a survey was made on behalf of the true owners, and the true owners' agent informed the claimants that the land belonged to the true owner).

"[w]hen the trial court's [decision] involves an interpretation and application of Maryland statutory and case law, [we] must determine whether the lower court's conclusions are legally correct[,]" by applying a *de novo* standard of review) (citation and internal quotations omitted).

II.

The "woodlands exception" was originally applied, by our courts, to just prescriptive easements. *See*, *e.g.*, *Clickner v. Magothy River Ass'n*, 424 Md. 253, 285 (2012) (observing that, "[w]hen an easement is claimed on land that is unimproved or in a general state of nature, there is a legal presumption that the use is by permission of the owner"). But, recently, in *Breeding v. Koste*, 443 Md. 15, the Court of Appeals extended that exception to adverse possession claims, where the land at issue "is unimproved or otherwise in a general state of nature," *id.* at 35, because, as the Court put it, "adverse possession and prescriptive easements share substantially the same elements," that is, that the possession or use of another's land must be "adverse, exclusive, and uninterrupted" throughout a twenty-year period. *Id.* at 36.[7] As no previous Maryland appellate decision, in applying the "woodlands exception," had as yet defined the terms "improved" and

[7] In its brief, Plymouth Muse contends that *Breeding v. Koste*, 443 Md. 15 (2015), "should not be part of this Court's review at all," because it was issued on May 22, 2015, after the trial court issued its judgment in favor of Plymouth Muse on April 23, 2015. Plymouth Muse is incorrect, as the *Breeding* Court stated that it was merely "extending the 'woodlands exception' to adverse possession cases." *Id.* at 36. Accordingly, the "ordinary" rule, that, "where a decision has applied settled precedent to new and different factual situations, the decision always applies retroactively," fully applies. *Am. Trucking Ass'ns v. Goldstein*, 312 Md. 583, 591 (1988) (citation and quotation omitted).

"unimproved," the Court decided to take the opportunity, presented by that case, to do precisely that, whereupon it defined "unimproved land" as "undeveloped land that lacks additions that increase the land's value or utility or enhance the land's appearance" and "improved land" as land that "does not necessarily have a building or a structure on it" but has, upon it, "human-created additions, such as structures and paving, that make the land more useful for humans." *Id.* at 39-40. Because the parcel at issue, in *Breeding*, was improved by human-created additions, including an unpaved road, a storage box, duck blinds, a floating dock, stakes, and "no trespassing" signs marking the borders of the property, *id.* at 41, and, furthermore, was adjoined to the claimant's property, which had been improved by houses for more than fifty years, the Court of Appeals held that the "woodlands exception" "[did] not apply" there. *Id.* at 44-45.

It is thus clear, from *Breeding*, that in determining whether the "woodlands exception" applies, we must consider, not only whether the property at issue is unimproved or in a general state of nature but whether the surrounding properties are unimproved or in a general state of nature, *id.* at 44 (noting that, "alone, a land's state of being wooded does not result in automatic application of the 'woodlands exception,' **particularly where the surrounding property—even property that is improved by houses—is also wooded**") (emphasis added), a standard consistent with earlier Maryland decisions, where the "woodlands exception" was employed as to easement claims. In those cases, our appellate courts looked at the nature of the property surrounding the easement, including both the dominant estate served by the easement and the servient estate on which the easement lay, as well as nearby properties. *See Clickner*, 424 Md. at 285 (holding that the "woodlands

exception" applied to a beach that was "in a general state of nature" but that not "every" beach should be so characterized, and that "the consideration of other factors, such as the nature of the surrounding area, should enter into the determination"); *Leekley v. Dewing*, 217 Md. 54, 55-56, 59 (1958) (holding that the "woodlands exception" did not apply to a fifteen-foot road across "woodland" where there was a mailbox at the juncture of the fifteen-foot road and a public road, and the fifteen-foot road ran to a clearing with an inhabited dwelling that was visible from the main road); *Turner v. Bouchard*, 202 Md. App. 428, 447 (2011) (upholding a trial court's determination that the "woodlands exception" did not apply to a prescriptive easement claim where, although portions of the servient estate had "steep terrain" and "un-trimmed vegetation," both the dominant and servient estate were improved with houses and driveways and were "located in a subdivision with hundreds of other similar sized parcels"); *Forrester v. Kiler*, 98 Md. App. 481, 487 (1993) (affirming the trial court's application of the "woodlands exception" to a road that "passed through [the Kilers'] wooded, unenclosed land").

III.

We now turn to the central issue of this appeal, and that is, whether the circuit court's conclusion—that the "woodlands exception" applied to Ms. McGinnies's adverse possession claim—was in error. For the reasons that follow, we conclude that it was.

The evidence was uncontroverted that the property at issue, a 297-square-foot parcel of land lying between Ms. McGinnies's property and a public way, Wabash Avenue, but located within the property line of Plymouth Muse's adjacent residential lot, contained

man-made additions to the land that increased its utility and thus was improved. *Breeding*, 443 Md. at 40 (defining "improved land" as "developed land, which is land with human-created additions, such as structures and paving, that make the land more useful for humans"). First of all, there is no dispute that a driveway ran across the disputed parcel of Plymouth Muse's land and that it was paved with gravel. Ms. McGinnies testified that the gravel had been added to the driveway and thereafter maintained so that it could be used by family vehicles. The gravel driveway clearly constituted an addition to the land that improved its utility. Furthermore, a "carport," with a roof supported by beams, to which a mailbox was attached, was erected on Ms. McGinnies's driveway, and that carport also improved the parcel's utility, though whether that structure satisfied the statutory twenty-year requirement, which must be met by an adverse possession or prescriptive easement claim, is yet to be determined.

Moreover, it appears that it was undisputed below that the properties adjacent to the contested parcel—Ms. McGinnies's and Plymouth Muse's properties—were improved. Although photographs presented at trial show that the area surrounding the disputed property was "wooded," with some trees, brush and other vegetation, Ms. McGinnies's property was improved by a home and a driveway that crossed over the disputed area to nearby Wabash Avenue. As the Court of Appeals instructed in *Breeding*, the fact that land is "wooded" does not automatically trigger the application of the "woodlands exception," and, in fact, it declined to apply the exception in that case, where surrounding property contained some wooded areas but was also improved by houses and driveways. *See Breeding*, 443 Md. at 44 (holding that the "woodlands exception" did not apply in part

because the property at issue was attached to the [claimant's] property, which had been improved by houses for over 50 years); *accord Turner*, 202 Md. App. at 447 (holding that the circuit court did not err in declining to apply the "woodlands exception," where there was evidence that the dominant and servient lot were improved with houses and driveways). It is also undisputed that Plymouth Muse's lot contained a two-story apartment building. Because the properties of the claimant, Ms. McGinnies, and of the defendant, Plymouth Muse, were adjacent to the disputed parcel and improved by buildings, we could conclude, on this ground alone, that the "woodlands exception" does not apply here.

In addition, the Court of Appeals' decision in *Leekley v. Dewing*, 217 Md. 54, lends further support to this conclusion. There, the easement alleged "ran from a main public road and was clearly and manifestly a regularly traveled way that ran for much of the time to a clearing on which stood an inhabited dwelling which was visible from the main road." *Id.* at 59. Furthermore, there was a mailbox at the juncture of the easement and the public road. *Id.* The Court of Appeals concluded that, based on those facts, "[h]ardly can it be said that it would fall in the classification of a way over wild or unoccupied territory," and thus the "woodlands exception" did not apply. *Id.*

The instant case presents a similar set of facts. Ms. McGinnies testified that she and her parents had regularly accessed the McGinnies property, where they resided, by means of a driveway which ran from a public road, Wabash Avenue, crossed the property at issue, and continued onto the McGinnies property, which contained, as in *Leekley*, "an inhabited dwelling which was visible from the main road." *Id.* at 59. Furthermore, as in *Leekley*, a

mailbox, affixed to one of the supporting columns of the carport, was present on the driveway, next to the disputed area.

In sum, the evidence established that the property at issue, as well as the adjacent properties of both Ms. McGinnies and Plymouth Muse, were all "improved land." *Breeding*, 443 Md. at 40. We therefore conclude that the circuit court's holding that the "woodlands exception" applied, to the parcel at issue, was error. *Id.* at 44.[8] Because the circuit court erroneously applied that exception to both Ms. McGinnies's adverse possession claim as well as her prescriptive easement claim, we shall reverse as to both claims and remand for further proceedings.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY REVERSED AND THE CASE IS REMANDED FOR PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEE.

[8] The parties do not agree as to either the starting time or the ending time of the twenty-year statutory period, and the circuit court made no findings as to that issue, which remains open on remand.