

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Pennsylvania Fish and Boat Commission	:	
	:	
v.	:	No. 165 C.D. 2012
	:	Argued: September 11, 2012
Nicholas Demaree,	:	
Appellant	:	

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, Judge  
HONORABLE PATRICIA A. McCULLOUGH, Judge  
HONORABLE JAMES GARDNER COLINS, Senior Judge**

**OPINION NOT REPORTED**

**MEMORANDUM OPINION BY  
JUDGE LEADBETTER**

**FILED: October 11, 2012**

In this action involving a property dispute between the Pennsylvania Fish and Boat Commission (Commission) and Nicholas Demaree, adjoining land owners, the Court of Common Pleas of Susquehanna County awarded the Commission title to a small area of real property bordering Quaker Lake and a portion of the adjoining lake bed, as well as prescriptive easement for public access to the lake from that area. Prior to the underlying judgment in favor of the Commission, Demaree held record title to the disputed area of property. In this appeal, Demaree raises the following issues: (1) whether common pleas erred in concluding that the Commission acquired title to the subject property through

adverse possession; and (2) whether the Commission demonstrated a use sufficient to entitle it and the general public to a prescriptive easement over the lake bed. After review, we affirm.

Common pleas' unchallenged factual findings demonstrate that the Commission purchased property bordering Quaker Lake in 1968 for the purpose of creating a public boat access to the lake. The Commission's deed describes its property boundary as "along the said lake;" the Commission's deed does not provide title to the lake bed in front of the Commission's property. Following its purchase, the Commission made various improvements to the property consistent with developing a public access to the lake; it constructed a paved parking area, added bathroom facilities, posted signs detailing rules and regulations, placed a floating dock in the water that was removed annually for the winter months, and installed and maintained a paved launch approach or launch pad that extended into the lake.<sup>1</sup>

When the Commission purchased the property at Quaker Lake, it believed that the lake bottom was not owned by anyone and that, therefore, it could legally use the lake bed for its dock and launch pad. If the Commission had conducted a more thorough title search, it would have discovered that the area of lake bed impacted by its activities was actually owned by Demaree's predecessors-in-title. However, "an unrecorded deed . . . contributed to [the Commission's] inability to find [that ownership] information." Common pleas' Decision, Finding

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<sup>1</sup> According to the amended complaint, the floating dock is 6 feet wide by 38 feet long and it extends into the lake over a portion of the lake bottom that Demaree claims title to. The launching ramp/concrete pad is 24 feet wide and "extends 20 feet into the lake over the bottom during high water." Amended Complaint, ¶¶ 36 and 38. While described more fully later, the launching pad also encompasses an area of property to which Demaree claims title.

of Fact No. 2h. Commission employees patrolled the public access area and lake year-round although the frequency and length of patrols varied. At times, a Commission employee would patrol three times a week and stay out on the water all night if fishing activities were heavy.<sup>2</sup> The public used the access area and lake year-round for a variety of fishing, boating and other winter activities. Most individuals were required to have licenses, registrations or permits to fish and boat on the lake.

In 2006, Demaree acquired the real property adjoining the Commission's property from his parents. Unlike the Commission's property, Demaree's property extends into the lake such that his title includes a portion of the lake bed "to the edge of the Lake." Common pleas' Decision, Finding of Fact No. 2n. *See also* Amended Complaint, ¶ 6; Reproduced Record (R.R.) at 12a. There appears to be no dispute that Demaree's deed grants title to that portion of the lake bed under the Commission's floating dock and concrete ramp as well as a part of the area traversed by the public entering the lake from the public access. In addition, because the location of the lake is a reference or boundary line in both deeds, it is important to note that since 1968, the lake's shoreline has substantially grown as the lake's waterline or low water mark has receded, raising a question

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<sup>2</sup> Richard Roberts, a former Fish Warden who retired in 1994, testified that the public access area was the only access the Commission used for the lake. Roberts monitored fishing and boating activity while on patrol, as well as ensuring that no one parked in the access area, blocking others from the launch pad. He also inspected the area for needed maintenance and intervened on occasion if teenagers got a bit too rowdy and complaints ensued. Roberts further testified that in the summer, a maintenance crew would mow the property and clean the facilities.

regarding where the deed boundaries “along said lake” and “to the edge of the Lake” are properly located.<sup>3</sup>

After Demaree acquired his property in 2006, he erected a fence blocking access to the Commission’s dock and launch pad. As a result, the Commission filed the underlying action, seeking, *inter alia*, ejectment of Demaree’s fence, a declaratory judgment that its property extends to the “low water mark shoreline,” title to the area of property impacted by its dock and launch pad on the basis of adverse possession, and a prescriptive easement in favor of the public to use the waters of the lake over Demaree’s property, including the dock and launch area.<sup>4</sup> Following responsive pleadings and dispositive motions, common pleas held a non-jury trial and eventually entered a verdict in favor of the Commission, holding in pertinent part, that: (1) the “water mark” or “common boundary line” referenced in the parties’ various deeds is the May 2006 shoreline

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<sup>3</sup> According to the Amended Complaint, “[b]oth [parties’] deeds trace back to a common grantor and all refer to the common boundary between the properties as the low water shoreline of Quaker Lake.” Amended Complaint, ¶ 7; R.R. at 13a. Common pleas’ comment better illustrates the problem with the moving low water mark:

[T]here is an area that has been developed by [the Commission] and it is not clear if [the Commission] owns that property. This property was once within the lake and [Demaree] claims that he owns the property because the property line was drawn in 1968 and should not move as the lake moves. . . . Additionally, [the Commission] has maintained that [public] access on the property, which was once under the lake, for many years. This was without objection from the prior owners of [Demaree’s] property.

Common pleas’ Decision at 8.

<sup>4</sup> Apparently, in an effort to control water run-off from the Commission’s property on to their own, Demaree’s parents installed a driveway and drainage system on the Commission’s tract. Consequently, the Commission also sought removal of the driveway and French drain as well as restoration of the property to its original condition. The fence was ultimately removed prior to trial.

of Quaker Lake, thereby providing the Commission with title to the water front; (2) notwithstanding the aforesaid holding, the Commission acquired title to the property, including the lake bed, through adverse possession; and (3) Demaree did not need to remove the drainage system and driveway installed on the Commission's property. On reconsideration, common pleas also granted the Commission and the general public a prescriptive easement over Demaree's lake bottom property for access to the lake. Post-trial motions were denied and the instant appeal followed.

Prior to addressing Demaree's first argument that common pleas erred in awarding title to the Commission through adverse possession, it is helpful to note the legal principles involved.<sup>5</sup> Historically, as a general rule, an entity having the power of eminent domain could not acquire title to property through adverse possession. *See generally Hoover v. Jackson*, 524 A.2d 1367, 1369 n.2 (Pa. Super 1987); *Ontelaunee Orchards, Inc. v. Rothermel*, 11 A.2d 543 (Pa. Super 1940). *See also Sayre Land Co. v. Borough of Sayre*, 384 Pa. 534, \_\_\_, 121 A.2d 579, 582 (1956) (affirming on basis of trial court opinion); *Carter v. Ridge Turnpike Co.*, 208 Pa. 565, 57 A. 988 (1904). In *Hoover*, the court noted that this legal premise is based upon the presumption that when the entity possessed with the power of condemnation enters land and uses it for its own purposes, it is presumed that the action was taken under the entity's right of eminent domain and not as a willful

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<sup>5</sup> We also note that Demaree has not challenged common pleas' declaration that the boundary line described in the deeds as "along said lake" and "to the edge of the Lake" is "the current (May 2006) lake shore [water] line and thus [the Commission] owns property to the waterfront." Common pleas' Decision at 8; *see also* Decision at 24. Therefore, he has waived appellate review of common pleas' decision in that regard. As a result, the only areas at issue are the adjoining lake bed and the prescriptive easement granted to the public for access to the lake from that area.

trespasser whose trespass may grow into title. 524 A.2d at 1369 n.2. The presumption can be rebutted, however, by demonstrating that the entry was made other than through the exercise of the power of eminent domain. *Id.* In the instant case, looking to *Hoover* and *Ontelaunee Orchards*, common pleas concluded that the Commission had rebutted the general presumption by demonstrating that its actions regarding the disputed area of property were more akin to those of a trespasser rather than of an entity acting under its power of condemnation.<sup>6</sup>

On appeal, Demaree first contends that common pleas erred in applying the exception in *Hoover* and *Ontelaunee Orchards* because unlike the entities in the aforesaid cases, the Commission knew that it did not hold title to the property at issue, *i.e.*, the lake bed exposed by the receding water line and the lake bed below the dock and launch pad.<sup>7</sup> We do not believe the exception is so limited.

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<sup>6</sup> Common pleas opined:

[The Commission] purchased property at Quaker Lake with the intention of building a public boat access point. [Demaree] points out that [the Commission] could have learned that a portion of property under the lake, upon which [the Commission's] boat launch would rest, was held in fee simple title by another. However, the deed showing this was not recorded and extensive title searching was not completed. [The Commission] believed the property was unowned, as most of the other property under the lake was, and believed it could use that land in connection with its lakeside property for a public boat launch. As lake waters receded over the years, [the Commission] believed it continued to own the property and subsequently used it for many purposes. Again, the question is whether this use of what [the Commission] believed to be –unowned land– was as a trespasser or through the power of eminent domain.

This Court has ruled that the use was that of a trespasser, and not through the power of eminent domain.

Common pleas' Decision at 12-13.

<sup>7</sup> Notably, Demaree does not challenge the validity of the Superior Court's decisions in *Hoover* and *Ontelaunee Orchards* nor argue that the exception violates constitutional principles.

In *Hoover*, the municipal authority used the land in dispute under the mistaken belief that it had acquired title to the parcel when it acquired the adjoining tract of land from the borough. The Superior Court held that such facts were sufficient to rebut the presumption that the municipal authority was acting under its power of eminent domain when it used the parcel in dispute. In *Ontelaunee Orchards*, a school district purchased what it believed was a fee simple title from one who had authority to convey only a life estate. The school district used the property for over sixty years as a school and then conveyed a purported fee simple interest in the property to another, who was subsequently sued in an ejectment action. Common pleas concluded that the school district had established fee simple title through adverse possession and the Superior Court affirmed, stating:

Here the corporation possessing the power of eminent domain, originally took title as a purchaser, under a deed containing works purporting to convey the fee. It also, from the beginning, exercised acts of dominion over the land tending to show absolute ownership. Under such circumstances there is no room for the presumption that the school district entered or continued to hold under its power of eminent domain.

11 A.2d at 547.

The critical inquiry is whether the facts demonstrate that the public entity was acting pursuant to or in connection with its power to condemn when it used the property, not whether it mistakenly believed it already had lawful title to the property. Here, the facts found by common pleas support the conclusion that the Commission was not acting under its power of eminent domain. Specifically, it took title to the lakefront property by purchase, not condemnation, and language in the parties' deeds created ambiguity regarding ownership of the recently exposed

lake bed along the shoreline. Moreover, at the time of purchase and installation of the dock and launch pad, the Commission believed that the lake bed impacted by its activities was not owned as was the case with the remainder of the lake bed and, thus, could be used in connection with its endeavors. Clearly, these facts support the finding that the Commission was not acting within its power of eminent domain when it used the property and, therefore, are sufficient to rebut the presumption.

Demaree also argues that common pleas erred in awarding title to the Commission because the Commission failed to demonstrate that the dock and launch pad were fenced-in or regularly staffed by Commission employees. Rather, according to Demaree, the access area was open at all times to the general public and “[t]he only evidence of activity by the Commission on or about the property throughout the relevant time period was that boaters and fishermen who may have used the dock or launch pad to access were sometimes cited by the Commission if they lacked the required . . . licenses.” Appellant’s brief at 18. We disagree.

In order to claim title by adverse possession, a party must demonstrate that it had “actual, continuous, exclusive, visible, notorious, distinct and hostile possession of the land for twenty-one years.” *Conneaut Lake Park, Inc. v. Klingensmith*, 362 Pa. 592, 594, 66 A.2d 828, 829 (1949). *Accord Brennan v. Manchester Crossings, Inc.*, 708 A.2d 815, 817 (Pa. Super. 1998) (discussing each element of burden). “An adverse possessor must intend to hold the land for himself, and that intention must be made manifest by his acts . . . . He must keep his flag flying and present a hostile front to all adverse pretensions.” *Brennan*, 708 A.2d at 817 (internal quotations and citations omitted).



Demaree's arguments appear to address the elements of "actual possession" and "visible and notorious possession." "Actual possession" requires dominion over the land, not occupancy. *Id.* Moreover, a determination of what constitutes "actual possession" for purposes of adverse possession is case specific and depends in large part on the character of the premises. *Id.* at 818. "Visible and notorious possession," for purposes of establishing title through adverse possession, requires evidence of conduct that is sufficient to "place a reasonable person on notice that his or her land is being held by the claimant as his own." *Id.*

As found by common pleas, the Commission's actions demonstrated a use sufficient to put others on notice that it was exercising dominion and control over the area and holding it out as its own – it: (1) posted rules and regulations pertaining to public access and use of the area; (2) installed a permanent ramp; (3) installed and removed the floating dock annually; (4) routinely accessed the greater lake waters from that access point; (5) maintained the dock, launch pad and surrounding area; and (6) routinely patrolled the area and monitored public activities with respect thereto. While fencing an area is one way of showing open, exclusive, hostile and distinct use, fencing is not required to successfully acquire title. Moreover, in this case, fencing would be completely inconsistent with the public character of the premises and its intended use. Indeed, fencing or enclosing the area would preclude public access and deter public use.

Demaree also contends that the Commission's failure to demonstrate that it complied with the statutory requirements governing the Commission's acquisition of real property preclude it from acquiring ownership through adverse possession. Specifically, Demaree points to the statutory provisions set forth in the

Fish and Boat Code<sup>8</sup> at Sections 721(b) (consent required for acquisition of property), 724 (certification of title or title insurance), and 725 (price paid for acquisitions), 30 Pa. C.S. §§ 721(b), 724 and 725.<sup>9</sup> This contention was initially raised in Demaree's amended answer and new matter. Assuming for the sake of argument that these provisions governed the Commission's purchase of the lakefront property in 1968,<sup>10</sup> we discern no merit to the contention.

First, common pleas found that the Commission complied with the statutory provisions regarding the parcels that it actually purchased.<sup>11</sup> Notwithstanding that fact, the Commission's compliance or lack of compliance in connection with the property it purchased has no bearing on whether it could acquire title to the adjoining lake-bed area through adverse possession. The statutory provisions govern acquisitions through purchase, eminent domain or gift and serve to insure that the Commission acquires good title. Not only is it illogical

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<sup>8</sup> 30 Pa. C.S. §§ 101 – 7314.

<sup>9</sup> To begin, Section 721(a), 30 Pa. C.S. § 721(a), provides, *inter alia*, that the Commission may acquire title to or control of lands, waters and buildings by purchase, gift, lease, eminent domain or otherwise. Section 721(b) provides, in turn, that land acquisitions may be made only with the consent of the majority of the members of the Commission; Section 724 provides in part that the title records of land to be acquired must first be carefully searched to insure that a valid title can be acquired and a certificate of title or title insurance must also be obtained; and Section 725 provides that fair and reasonable consideration must be paid for an acquisition.

<sup>10</sup> We note that these statutory provisions were enacted in 1980, well after the Commission acquired the property and created the public access to the lake. *See* Act of October 16, 1980, P.L. 996. Demaree does not direct our attention to any prior statutory provisions imposing the same or similar requirements.

<sup>11</sup> Contrary to Demaree's suggestion, because the alleged lack of compliance was raised as an affirmative defense, Demaree bore the burden of proof at trial. *See generally, In re Est. of Trowbridge*, 920 A.2d 901 (Pa. Cmwlth. 2007); *Phila. Housing Auth. v. Snyder*, 816 A.2d 377 (Pa. Cmwlth. 2003). Detailed testimony regarding the history and mechanics of the property acquisition was not elicited at trial but historical documents admitted into evidence suggest that the Commission as a body approved the purchase and paid consideration therefor. This evidence was not controverted. Moreover, it is clear that a title search was performed.

to apply them to circumstances where title is acquired by adverse possession but they cannot be applied from a practical standpoint either. Title through adverse possession results from continuous, open, adverse, and distinct actions over property owned by another – title certificates and insurance, approval of the Board and compensation are neither necessary nor implicated in such circumstances.

Finally, Demaree argues that the Commission and general public were not entitled to a prescriptive easement because: (1) the power of eminent domain precludes obtaining an easement by prescription; (2) the Commission failed to follow the statutory requirements regarding acquisition of property; and (3) the Commission did not use the dock and launch pad area in an adverse, open, notorious, continuous, visible and hostile manner for a period of 21 years. No authority is cited for the first proposition and the latter two arguments are not developed in any way. Accordingly, we dispose of this argument summarily.

It is well settled that both a public body and the general public can acquire a prescriptive easement over the property of another. *See Gehres v. Falls Township*, 948 A.2d 249 (Pa. Cmwlth. 2008) (holding township acquired prescriptive easement to use another’s property for storm water drainage; drainage pipes and channels were clearly visible and employees periodically cleaned pipes and ditches). *See also Wampler v. Shenk*, 404 Pa. 395, 172 A.2d 313 (1961) (holding public acquired prescriptive easement to use roadway where it had been continuously and adversely used by general public for fifty years). Similar to the requirements for adverse possession, a prescriptive easement is created by “adverse, open, notorious, continuous and uninterrupted use of land for a period of 21 years.” *Gehres*, 948 A.2d at 252.

A review of the record and common pleas' findings demonstrate sufficient use of the lake by the Commission and the general public to support the grant of a prescriptive easement over the lake bed near the public access. The testimony of Commission employees and lake patrons demonstrated that the general public had been accessing the lake from that very location for a variety of water activities for more than 21 years. As to the alleged lack of compliance with the statutory provisions regarding acquisition of property, a prescriptive easement is not acquired through a transaction but with visible, continuous and adverse use and, therefore, as with adverse possession, the statutory requirements pertaining to land acquisitions are simply inapplicable.<sup>12</sup>

Based on the foregoing, we affirm the judgment of the court of common pleas.

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**BONNIE BRIGANCE LEADBETTER,**  
Judge

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<sup>12</sup> Demaree also contends that common pleas erred in denying his motion to disqualify the Commission's counsel, the Law Offices of Michael Giangrieco, on the basis of an appearance of impropriety. According to Demaree, Attorney Giangrieco is a Susquehanna County Commissioner and a member of the County Salary Board, which manages the allocation of funds to the court of common pleas. This issue was not raised in Demaree's post-trial motions and, therefore, is waived. *See Smith v. Manson*, 806 A.2d 518, 521 n.3 (Pa. Cmwlth. 2002).

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Pennsylvania Fish and Boat	:	
Commission	:	
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v.	:	No. 165 C.D. 2012
	:	
Nicholas Demaree,	:	
Appellant	:	

**ORDER**

AND NOW, this 11th day of October, 2012, the judgment entered by the Court of Common Pleas of Susquehanna County in the above-captioned matter is hereby affirmed.

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**BONNIE BRIGANCE LEADBETTER,**  
Judge