

# METES AND BOUNDS

BY WILLIAM MAKER, JR.



**WILLIAM MAKER, JR.**, is a member of McMillan, Constabile, Maker & Perone, LLP, Larchmont, NY, and is the Town Attorney for the Town of Mamaroneck. He received his LL.M. and his J.D. from New York University School of Law and a B.A. in Economics from Queens College of the City University of New York.

## Has the Court of Appeals Defined What Is Meant by a “Claim of Right” in Adverse Possession Cases?

**A**dverse possessors must meet the “OCEAN” mnemonic in order to succeed. For a minimum of 10 years, their possession must be: Open, Continuous, Exclusive, Actual and Notorious. In addition, their possession must be hostile and under a claim of right.<sup>1</sup> Hostility is readily understood. “All that is required is a showing that the possession constitutes an actual invasion of or infringement upon the owner’s rights. . . . Consequently, hostility may be found even though the possession occurred inadvertently or by mistake.”<sup>2</sup>

But, what is a claim of right?

### Conflicting Views Prior to 2006

Before 2006, all of the Judicial Departments except the Third held that adverse possessors who enter upon land *knowing* it not to be theirs cannot establish a claim of right because they are aware from the start that they are on somebody else’s land.<sup>3</sup> The logic supporting this position was best summarized in *Falco v. Pollitts*<sup>4</sup>: “Possession under a claim of right is incompatible with knowledge or a belief that one does not own the land in question but that ownership rests in another.”<sup>5</sup>

In *Birkholz v. Wells*,<sup>6</sup> the Third Department rejected the notion that knowledge alone defeats adverse possession. It affirmed an award of adverse possession because the evidence at trial justified the lower court’s finding that “during the 10-year statutory period, [the adverse possessors] or their predecessors in title [had not] recognized or acknowledged any superior claim to the disputed property.”<sup>7</sup>

With *Birkholz*, the Third Department decided that an adverse possessor’s claim of right should be examined differently from the way its fellow Appellate Divisions approached the issue. If the other elements of the OCEAN mnemonic were satisfied, the Third Department would require proof that the adverse possessors *recognized or acknowledged* ownership in another before it would rule against them.

### Journey to the Court of Appeals

*Birkholz* begot *Walling v. Przybylo*.<sup>8</sup> The Wallings and the Przybylos are neighbors. When the Przybylos built their home in 1991, the Wallings had been living in the subdivision for about four years. Before the Przybylos’ arrival, the Wallings already had begun to maintain a portion of what would become the Przybylos’ property.

The Przybylos were unaware that the Wallings had been occupying a portion of their land until 2004 when a survey commissioned by the Przybylos uncovered the encroachment. Based upon the survey, the Przybylos asserted their ownership over the disputed wedge of land. The Wallings countered by commencing an action for adverse possession. Both sides moved for summary judgment. Each partially succeeded.

The property at issue consisted of what County Court Judge John S. Hall, Jr. characterized as a “grassy lawn area” and a “wooded portion.” Judge Hall awarded the Wallings adverse possession to the “grassy lawn area” because they had cultivated and improved that area. The wooded area, being virginal, was neither cultivated, improved nor

enclosed by them. Consequently, Judge Hall denied the Wallings’ claim to the “wooded portion.”

The Przybylos moved to reargue and renew the motions based upon new evidence that, if believed by the trier of fact, would establish that the Wallings knew the wedge did not belong to them even before they had purchased their property. That new evidence came in the form of an affidavit by Charles Maine. Mr. Maine and his wife once owned the entire subdivision and thus were predecessors in title of both the Wallings and the Przybylos.

In their affidavit, the Wallings averred that before purchasing Lot 22, they had asked Mr. Maine – the then owner – to point out its boundaries. According to the Wallings,

We then walked to the rear of the lot, and Mr. Maine pointed to a large tree situated at the end of a stone wall. . . . That tree had a strand of barbed wire running right through it and had a length of orange plastic survey tape tied to the barbed wire. This tree, Mr. Maine indicated, was the north-westerly corner of lot 22.<sup>9</sup>

Mr. Maine’s recollection of the events leading up to the sale to the Wallings was completely different.

I personally walked the property with Mr. Scott Walling . . . and pointed out where the property corner stakes were and still are located. . . . I *never* identified the property line to Mr. Walling . . . by a tree with remnants of barbed wire.<sup>10</sup>

This clash created a textbook issue of fact warranting the denial of the Wallings' summary judgment motion assuming, of course, that the Wallings' knowledge was germane in deciding whether they had occupied the wedge under a claim of right.

Add to the mix the Wallings' 1986 survey of their property (Lot 22). Although that survey never became part of the record, the anecdotal information was that the Wallings' 1986 survey was consistent with the Przybylos' 2004 survey of their property (Lot 23). If subpoenaed at trial, the 1986 survey of the Walling property would show the same boundary line between Lots 22 and 23 as was shown on the 2004 survey of the Przybylo property. This could be further proof that the Wallings knew they were encroaching from the get-go.

In opposing the motion, the Wallings advanced the *Birkholz* rule. Because they had never recognized or acknowledged the Przybylos' title to the disputed parcel, proof of their knowledge about the true state of the title, standing alone, would not be enough to overcome their adverse possession.

Judge Hall, adopting the view held outside the Third Department, reasoned that the claim of adverse possession would be undone if the Wallings had known from the beginning that they did not have title to the wedge. Because there was a dispute over what the Wallings knew, Judge Hall amended his earlier decision by denying summary judgment to the Wallings.

### **Walling v. Przybylo: The Third Department Opines**

The Wallings appealed. Because the OCEAN mnemonic was otherwise met, the only issue addressed by the Third Department was "whether possessors, whose possession is otherwise open, hostile and continuous for the statutorily-prescribed period of time, can obtain property by adverse possession despite their knowledge that another party holds record title."<sup>11</sup> The court answered: Yes, provided that before the expiration of the statutory

period the Wallings had not *overtly acknowledged* that someone else was the true owner of the wedge.<sup>12</sup>

Leave to appeal to the Court of Appeals was granted, putting the "knowledge alone" rule of the First, Second and Fourth Departments on a collision course with the Third Department's "overt acknowledgment" criterion. Which principle was the iceberg and which was the *Titanic* was decided by the Court of Appeals on June 13, 2006, in *Walling v. Przybylo*.<sup>13</sup>

### **The Wallings Win, But Did the Third Department?**

The Court of Appeals affirmed the Appellate Division "[b]ecause actual knowledge that another person is the title owner does not, in and of itself, defeat a claim of right by an adverse possessor."<sup>14</sup> The Court cast aside the entire body of First, Second and Fourth Department case law with these words: "Conduct will prevail over knowledge, particularly when the true owners have acquiesced in the exercise of ownership rights by the adverse possessors."<sup>15</sup>

### **The Answer to the Title of This Article Is: No.**

Except for its appearance in a quotation taken from the Third Department's opinion, the word "acknowledgment" does not appear in the Court of Appeals's decision, however. Moreover, the Court's holding that "actual knowledge . . . does not, *in and of itself* defeat a claim of right" infers that there is something else which, when joined with knowledge, would negate a claim of right. Hence, it remains unclear whether an adverse possessor's knowledge that title resides in another, plus the possessor's acknowledgment thereof, would invalidate a claim of right. Because the Court of Appeals neither specifically disavowed nor adopted the Third Department's view that an "overt acknowledgment" can checkmate a claim of right, it is likely that the lower courts will consider such acknowledgments when deciding adverse possession cases.

This leaves open questions such as what constitutes an acknowledgment of title in another? If an adverse possessor mentions that he or she is encroaching upon a neighbor's land to a fellow member of a bowling team who testifies to the conversation at trial, is that an acknowledgment of title in another? Or, must the acknowledgment be made to the record owner who, based upon that acknowledgment, can be assured that 10 or more years of inaction on his or her part will not lead to title vesting in the adverse possessor? Can an acknowledgment be rescinded or revoked?

### **Conclusion**

In *Walling*, the Court of Appeals flirted with a "might is right" rule for adverse possession. It eschewed the premise that knowledge alone defeats a claim of right but it did not endorse the Third Department's "overt acknowledgment" benchmark for deciding claims of right. By stating that the "[Przybylos'] failure

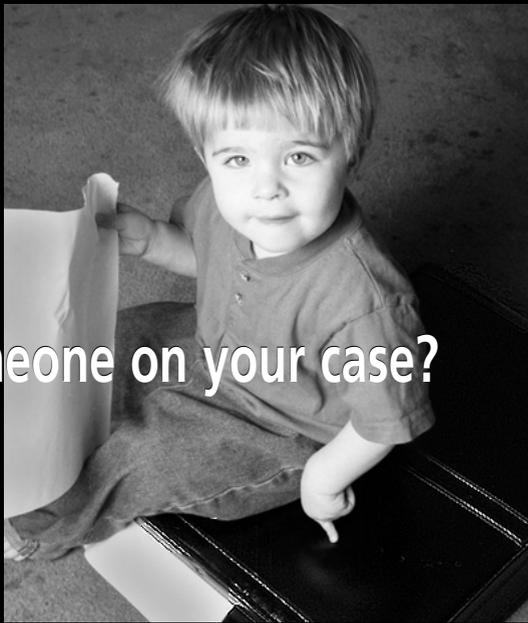
to assert their rights in a timely manner prevents [them] from prevailing on this appeal,"<sup>16</sup> the Court came close to holding that a claim of adverse possession is a pure statute of limitations question if the remaining elements of the OCEAN mnemonic exist.

*Walling* does not go that far, however. Like the Sphinx, it leaves us with an enticing riddle: While knowledge of the true title *in and of itself* will not overcome a claim of adverse possession, what factor, when coupled with knowledge, will? ■

1. *Belotti v. Bickhardt*, 228 N.Y. 296, 302, 127 N.E. 239 (1920).
2. *Gore v. Cambareri*, 303 A.D.2d 551, 553, 755 N.Y.S.2d 728 (2d Dep't 2003) (quoting *Katona v. Low*, 226 A.D.2d 433, 434, 641 N.Y.S.2d 62 (2d Dep't 1996)).
3. First Department: *Joseph v. Whitcombe*, 279 A.D.2d 122, 719 N.Y.S.2d 44 (1st Dep't 2001); Second Department: *Bockowski v. Malak*, 280 A.D.2d 572, 720 N.Y.S.2d 557 (2d Dep't 2001); Fourth Department: *City of Tonawanda v. Ellicott Creek Homeowners Ass'n, Inc.*, 86 A.D.2d 118, 449 N.Y.S.2d 116 (4th Dep't 1982).
4. 298 A.D.2d 838, 747 N.Y.S.2d 874 (4th Dep't 2002).
5. *Id.* at 839.
6. 272 A.D.2d 665, 708 N.Y.S.2d 168 (3d Dep't 2000).
7. *Id.* at 667.
8. 24 A.D.3d 1, 804 N.Y.S.2d 435 (3d Dep't 2005), *aff'd*, 7 N.Y.3d 228, 818 N.Y.S.2d 816 (2006).
9. *Walling*, 7 N.Y.3d 228 (2006), Record on Appeal at 77.
10. *Walling*, 7 N.Y.3d 228 (2006), Record on Appeal at 130.
11. *Walling*, 24 A.D.3d at 3.
12. *Id.* at 4.
13. *Walling*, 7 N.Y.3d 228.
14. *Id.* at 230.
15. *Id.* at 232-33.
16. *Id.* at 232.



"For what it's worth my client would like to point out that the get-away car was a hybrid."



Is someone on your case?

If you're trying to balance work and family, the New York State Bar Association's Lawyer Assistance Program can help. We understand the competition, constant stress and high expectations you face as a lawyer. Dealing with these demands and other issues can be overwhelming, which can lead to substance abuse and depression. NYSBA's Lawyer Assistance Program offers free, confidential support because sometimes the most difficult trials lie outside the court. All LAP services are confidential and protected under Section 499 of the Judiciary Law.



**NEW YORK STATE BAR ASSOCIATION**  
 Lawyer Assistance Program  
 1.800.255.0569 [lap@nysba.org](mailto:lap@nysba.org)