To: Supervising Attorney
From: Law Clerk
Date: November 15, 2006
RE: The Land Strip Case

I. Statement of Facts

Wallace Stovers built a house with a driveway at 44 Sanders Road in Cummington, Massachusetts. Stovers and his father built a split-rail fence thirty-four feet to the north of the driveway to keep livestock and the neighbor's pets from straying onto their property. The inaccurate placement of the fence left a thirty-four foot strip of land between the driveway and the fence inside the adjacent property line at 46 Sanders Road.

Stovers deeded 44 Sanders Road on November 12, 1986 to Marci and William Brown. Stovers obtained an easement from his parents at 46 Sanders Road and conveyed it to the Browns so the Browns could use the existing driveway, which encroached on 46 Sanders Road by five feet. The Browns later told neighbors that they did not own the strip of land between the fence and the driveway. Despite what the Browns said, the Browns started using the strip as a side yard, and continued to use it until the beginning of the current dispute.

In 1986, William Brown asked and received express permission from Stovers and Stovers' parents to use a machete to chop some weeds and to clear underbrush from the strip. Brown says that he never mentioned to either of them that he used the strip as a side yard. Stovers' parents never used the strip.

Stovers became the owner of 46 Sanders Road after his father passed away in 1991. It is unclear whether Stovers used it since obtaining title to 46 Sanders Road. Neighbors have said that they assumed that the Browns owned the strip but that no one had ever told them in fact. The Browns used the strip the entire time that they lived at the home. Up until the current dispute, the

Browns parked cars on it, installed a swing set, planted a tree, stored oil drums, and erected a carport.

There were no disputes over the ownership of the strip from the date of the deed in 1986 until the current dispute in 2006. Stovers became upset about the noise coming from Brown's son working on his 1957 Chevy at all hours of the day and night. In July 2006, Stovers objected to Brown spreading gravel over the strip, and ordered Brown to stop trespassing. When Brown refused, Stovers parked his truck on the strip to prevent Brown from spreading more gravel. He also removed the portions of the fence that separated the strip from the remainder of 46 Sanders Road.

II. Issue(s)

a. Under Massachusetts law, do the Browns have a likelihood of success on a claim for adverse possession of a strip of land at 46 Sanders Road against Stovers when the Browns used the land by parking cars, installing swing sets, planting trees, storing oil drums, building a carport and servicing cars since November of 1986?

b. Under Massachusetts Rules of Civil Procedure Rule 65(b), does Stovers have a successful claim for a preliminary injunction enjoining the Browns from spreading any more gravel on the strip or from using the land for any other activity?

III. Brief Answer

Brown most likely will not succeed on an adverse possession claim for the strip of land. Under Massachusetts case law, Brown has the burden of proving non-permissive use of the strip, which must be actual, open, notorious, exclusive and adverse for twenty years. Stovers can make a strong case that Brown does not meet the twenty-year statute. Stovers reentered the land before the full twenty years, and reasserted his dominion by demanding that Brown leave the property.

Stovers even parked his truck on the strip. Based upon the facts of the case, it appears that Brown does not have strong supportive evidence that he adversely possessed the strip for twenty years.

Stovers most likely will not succeed on the claim for a preliminary injunction enjoining Brown from using the strip. Under Massachusetts Rules of Civil Procedure Rule 65(b)(2), Stovers has the burden of proving likelihood of success on the merits, that irreparable harm will result from denial of the injunction, and that the balance of harms outweighs the potential harm to Brown in granting the injunction. Under this rule, Stovers must demonstrate that but for the preliminary injunction, he would suffer irreparable harm. Stovers could only claim that the gravel was waste on the strip, and that the nuisance caused problems. Based upon the facts of the case, it appears that Brown would suffer more harm than Stovers if the court applied a balancing test. This would favor Brown and therefore a court would most likely not grant a preliminary injunction.

IV. Discussion

a. Adverse Possession

To establish title by adverse possession in Massachusetts, the possessor must offer "proof of non-permissive use which is actual, open, notorious, exclusive and adverse for twenty years." Ryan v. Stavros, 203 N.E.2d 85 (Mass. 1964). The non-permissive use of the possessor does not require that possessor give the true owner explicit notice of adverse use, but the burden of proving adverse possession is on the person claiming title and "extends to all of the necessary elements of such possession." Lawrence v. Town of Concord, 788 N.E.2d 546 (Mass. 2003). The possessor's state of mind is irrelevant. The possessor's actions provide notice of non-permissive use, not his intent. See Kendall v. Selvaggio, 602 N.E.2d 206 (Mass. 1992), Peck v. Bigelow, 613 N.E.2d 134 (Mass. App. Ct. 1993). Therefore, the possessor's claim of adverse possession

does not require him to believe that the land is his, but his intent in which he asserts right of possession against all others. Id.

In order to have a proper claim of adverse possession to the land, the claimant must demonstrate that he has non-permissive use of the land, and has done so with open, notorious, continuous, exclusive, hostile, and actual use for twenty years. Ryan, 203 N.E.2d at 92. In our case, the court will apply an objective test to the seven elements to determine the reasonableness of each element. The parties will disagree whether Brown openly, notoriously, continuously, exclusively, hostilely and actually used the disputed land for the required twenty years.

1. Open and Notorious

The Supreme Judicial Court of Massachusetts defines open and notorious as use of the property, which places the true owner on constructive notice of the hostile activity so that the true owner may have an opportunity to take steps to vindicate his rights by legal actions. Lawrence, 788 N.E.2d at 551. The openness element is where the adverse possessor's use of the land is open to the world to see. The notorious element is where the adverse possessor appears to be acting as though he were a true owner. Id.

In Lawrence, the Supreme Judicial Court ruled that the Frazier satisfied all the requirements for a claim of adverse possession of the property. The Town alleged that Frazier concealed his lack of ownership of the property and therefore his possession was atypical of the open and notorious possession needed to sustain the burden of proof. The court disagreed, found that there was no fraud and that "[h]e had no duty to disclose his lack of ownership or to enlighten the town as to its interests." In contrast, another Massachusetts court found that the plaintiff's did not have adverse possession to a strip of land around a diner because they did not direct cars to park or have plows remove snow from the strip. Ryan, 203 N.E.2d at 92. The court

found that the plaintiffs did not have adverse possession because "[t]he nature and the extent of occupancy required … vary with the character of the land, the purposes for which it is adapted, and the uses to which is has been put." Id.

In the present case, Brown can argue that he used the land openly and notoriously. Brown can distinguish the facts with Ryan and argue that Brown used the land open to the world to see. Brown used the strip as a side yard up until the beginning of the current dispute. The neighbors have said that they assumed that the Browns owned the strip. Brown parked cars on it, installed a swing set, planted a tree, stored oil drums and erected a carport. These open activities gave notice that Brown possessed the strip of land. In addition, unlike Ryan, Brown acted as if he was the true owner. Brown cleared weeds and underbrush, and even spread gravel over the strip. Brown can claim that Stovers' parents never used the strip, and that he took care of the strip as his own.

Stovers will argue that Brown did not use the land openly and notoriously. Stovers can say that Brown told the neighbors that he did not own the land between the driveway and the fence ("the strip"), which was part of 46 Sanders Road. Stovers will argue that if Brown were acting as the true owner, than he would not have asked permission from them to hack weeds from the strip.

Brown can respond by stating that Lawrence determined that there was no duty to disclose that he was not the owner, therefore even if he told others that he did not own it, open possession is determined through his actions, not his words. Lawrence, 788 N.E.2d at 551. Brown can also reiterate that he took care of the strip as his own, and used it as if it was part of his own property.

The court will probably find that Brown openly and notoriously took care of the strip of land in dispute. Brown took care of the strip of land, used it to park cars, play sets, and storage. Neighbors have said that they thought Brown owned the strip by his actions.

2. Continuous and Duration

The Supreme Judicial Court of Massachusetts defines continuous as "[i]f there were possession before and after this … period the continuity of possession would be broken, so that a title would not be acquired." Old South Soc. v. Wainwright, 30 N.E. 476 (Mass. 1892). As for duration, the twenty years of possession is actually a statute of limitations period "after which the true owner may not recover possession of the land from the adverse possessor." In re Colorusso v. Rogasa, 382 F.3d 51 (1st Cir. 2004). The possessor must continuously use the land in order to claim adverse possession, and "within twenty years after the right of action or of entry first accrued." Mass. Gen. Laws ch. 260 § 21 (2006).

In Old South Soc., the demandant tried to acquire title to an alleyway via adverse possession, but the court found that he did not continuously use the alleyway. The demandant did not use the alleyway for a period of six years, and therefore this broke the continuity of possession. Old South Soc., 30 N.E. at 477. "Mere records of the doings of the demandant corporation in regard to the property from time to time, could not be received as evidence in its favor." Id. In contrast, in Ryan, the plaintiffs became the successors of interest, "thus completing the chain of privity with regard to use." Ryan, 203 N.E.2d at 93. The court determined that there was no break in the continuity of use even though the plaintiff leased the property to other parties because "right can be made up of several periods of successive adverse use by different persons provided that there is privity between the persons making the successive uses." Id. The successive uses could be "tacked." Id. As for duration, Brown could contrast with the facts in

Hewitt, where the court found that "to acquire title … by adverse possession, one must have held it full 20 years, and not 19 years and some months." Hewitt v. Peterson, 148 N.E. 450 (Mass. 1925).

In the present case, Brown can claim that he continuously used the land for the twenty-year period. Brown can contrast the facts with Old South Soc. because he lived on his property and used the strip from November 12, 1986 until the present, with no breaks in possession. Based upon the facts, Brown can contend that he has used the strip for twenty years continuously.

Stovers will argue that the easement Stovers' parents gave to the Browns during their lifetime ceased to be valid when his father passed. This easement gave the Brown's permission to use the land. In order to claim adverse possession, it must be non-permissive. This would have placed the Brown's adversely using the land from 1991. This fifteen-year period clearly falls short of the required twenty. Stovers will also contend that Brown stopped adversely using the land and permissively started using the land when he asked Stovers for permission to cut the weeds and clear some underbrush. Stovers will mention that Brown also stopped adversely using the land when Stovers parked his truck on the lot and removed portions of the fence. Stovers will also bring up the fact that Brown is one month shy of the twenty years required to claim adverse possession.

Brown can respond by stating that the parents' lifetime of the easement is not relevant, because he is claiming adverse possession of the strip, not that he had valid title to use the strip. The easement was for use of the driveway that encroached on Stovers' property, not for the use of the strip. Brown can state that asking for permission to clear the strip was out of respect for his neighbor, since the strip ran so close to Stovers' property. Brown will argue that Stovers was out

of possession "in a constructive as well as an actual sense". Lawrence, 788 N.E.2d at 552. Brown will contend that merely parking a truck does not constitute repossession of the property.

The court will probably find that Brown continuously used the disputed land. There is no question of a break in continuity since Brown lived at the residence and used the land during the entire period.

3. Exclusive

The Appeals Court of Massachusetts defines exclusive as activities associated with use that must "encompass a disseisin of the record owner." Peck, 613 N.E.2d at 138. The possessor must exclude "not only of that owner but of all third persons to the extent that the owner would have excluded them." Id. The use could also consist of "[a]cts of enclosure or cultivation" which "are evidence of exclusive possession." Labounty v. Vickers, 225 N.E.2d 333 (Mass. 1967).

In Peck, the defendant claimed adverse possession of adjoining land, but the court found that he did use the property exclusively, because there was enough "traffic over the rugged lot to repel any conclusion of exclusivity". Peck, 613 N.E.2d at 138. In contrast, in Lawrence, the court found Frazier to have exclusively possessed the property even though he did not occupy the land personally because "[h]e may rely on the possession of his tenants, whose possession is his own." Lawrence, 788 N.E.2d at 553.

In the present case, Brown can argue that he and his family used the land exclusively as to the whole world. Stovers' parents never used the strip during the time that Brown claimed adverse possession. It is unclear if the Stovers used the strip at all, and this would need to be addressed once more research on the facts is done. Brown did not allow anyone else to use the strip in dispute, and therefore Brown has had exclusive use of the strip, similar to Lawrence.

Stovers will argue that Brown did not have exclusive use of the land for the statutory period because of Stovers' actions during the summer of 2006. Peck found that a use must "encompass a disseisin of the record owner" to be exclusive. Peck, 613 N.E.2d at 138. Stovers will argue that Brown's use did not oust him from the disputed land. Stovers even parked his truck and removed portions of the fence rightfully reclaiming his land.

Brown can respond by stating that the actions of Stovers in the summer of 2006 were not enough for Brown to have given up his exclusive use of the land. Brown could argue that Stovers' actions were a nothing more than a deterrence and were not constructive use of the land. Brown could contend that Stovers never actually used the land while Brown possessed it.

The court will probably find that Brown exclusively possessed the land for the statutory amount of time. Brown exclusively used the land for planting a tree, parking cars, and storing oil drums. It is not clear if Stovers used the land given the facts. Stovers could argue that he effectively blocked Brown's use of the strip. The court may find that this was a retaliatory action and not one that demonstrates use of the land in dispute.

4. Hostile

The Supreme Judicial Court of Massachusetts defines hostile as putting the true owner on "notice of the hostile activity of the possession". Lawrence, 788 N.E.2d at 550. The hostile activity refers to the activity of possessing land in an adverse use to the true owner's possession. Id.

"It is the nonrecognition of such authority at the time a use is made which determines whether it is adverse; and permissive use is inconsistent with adverse use." Ryan, 203 N.E.2d at 92. In Lyon, the court found that the plaintiff had successfully claimed adverse possession, and

that his actions were adverse because he "always stopped anyone he saw passing over his locus." Lyon v. Parkinson, 113 N.E.2d 861 (Mass. 1953).

In the present case, Brown will argue that he was using the property without permission. Brown will point out that Stovers told him to stop trespassing, and yet he refused.

Stovers will argue that the Ryan determined that "[t]here was recognition by the plaintiffs of authority in the defendant to prevent or permit continuance of the use." Ryan, 203 N.E.2d at 92. Stovers objected to Brown's use of the strip and ordered Brown to stop trespassing. Stovers will state that this is sufficient to nullify Brown's claim of adverse possession.

Brown can respond that he refused to stop placing gravel on the strip. Brown will contend that he acted without permission in continuing to use the property and adversely challenged the owner when claim of right came due.

The court will probably find that Brown adversely possessed the strip of land by his actions when the true owner tried to claim the land. Brown acted hostile to the true owner in the world as if he was the true owner himself.

5. Actual Possession

The Appeals Court of Massachusetts defines actual possession when the adverse possessor making changes upon the land that constitutes "such control and dominion over the premises as to be readily considered acts similar to those which are usually and ordinarily associated with ownership." Peck, 613 N.E.2d at 137. It is at the discretion of the judge to "examine the nature of the occupancy in relation to the character of the land." Id.

In Peck, the court found the claimant had no claim of adverse possession because he did not make any "permanent improvements on the lot … nor … significant changes to the land itself … nor did he utilize the land as a parking area for automobiles or boats." Id. In Lyon, the

plaintiff successfully claimed adverse possession. The court found that the plaintiff made sure that "[e]very summer this strip was tended and the rock garden and lawn kept up." Lyon, 113 N.E.2d at 861. Actual possession includes taking care of the property as if the person claiming adverse possession were the owner.

In the present case, Brown will argue that he actually possessed the strip because of the improvements he made, such as laying gravel and planting the tree. Brown will also argue that he actually used the land for parking cars, working on cars, storing containers and building a play area for his children. As in Peck, Brown actually used the property as if he were the true owner and cleaned the brush and weeds. Stovers will most likely concede that Brown did in fact actually use the land.

The court will probably find that Brown actually possessed the strip of land by his actions. Brown actually used the area as his own, unlike Stovers' parents or even Stovers himself. There were improvements, upkeeping, storage and general care in regards to the strip with Brown. These types of actions would most likely constitute actual use.

b. Preliminary Injunction

The "moving party must show, without the requested relief, it may suffer a loss of rights that cannot be vindicated should it prevail after a full hearing on the merits." Packaging Indus. Group, Inc. v. Cheney, 405 N.E.2d 106 (Mass. 1980). The risk that a party will suffer irreparable harm during the time between the hearing on the preliminary injunction and final adjudication on the merits may be minimized by consolidating the trial on the merits with the preliminary hearing. Massachusetts Rules of Civil Procedure Rule 65(b)(2).

Rule 65(b)(2) of the Massachusetts Rules of Civil Procedure Rule requests that there are three specific elements needed to establish a valid claim for a preliminary injunction in

Massachusetts. The moving party must show a likelihood of success on the merits, that irreparable harm will result from denial of the injunction, and that, in light of the moving party's likelihood of success on the merits, the risk of irreparable harm to the moving party outweighs the potential harm to the non-moving party to obtain a preliminary injunction.

1. Likelihood of Success on the Merits

The moving party must show the likelihood of success on the merits after "an abbreviated presentation of the facts and the law" in order to allow the judge an assessment of the parties' rights and judge should seek to minimize the "harm that final relief cannot redress." Packaging Indus. Group, Inc., 405 N.E.2d at 111. In addition, the court found that "evidence that goes beyond the unverified allegations of the pleadings and motion papers must be presented to support or oppose a motion for preliminary injunction." Brookline v. Goldstein, 447 N.E.2d 641 (Mass. 1983).

In the present case, Stovers will argue that he will most likely succeed on the merits. Stovers will allege that Brown is trespassing on his property and that Brown has not accrued the statutorily required twenty years for a valid claim of adverse possession.

Brown will argue that Stovers does not have a likelihood of winning the case on the merits, since Stovers does not have a claim to the land. Brown will contend that the strip is part of his land. Because the strip is part of his land, Stovers is the one who is trespassing on his land with the parked truck.

The court will probably find for Stovers on the likelihood of success on the merits on the facts in the case. There should be enough evidence to demonstrate that Brown did not possess the disputed land for the required twenty years.

2. Irreparable Harm will Result from Denial of Injunction

If irreparable harm to the moving party will result from the denial of the injunction, then the court should grant injunctive relief. Irreparable harm is absent "if trial on the merits can be conducted before the injury occurs." Packaging Indus. Group, Inc., 405 N.E.2d at 112. The moving party must show that, "without the requested relief, it may suffer a loss of rights that cannot be vindicated should it prevail after a full hearing on the merits." Id.

In Packaging Indus. Group, Inc., the plaintiff failed to show "sufficient risk of irreparable harm to warrant injunctive relief." Id. The harm caused by the injunction or lack of an injunction cannot be "economic harm alone" and "will not suffice irreparable harm unless the loss threatens the very existence of the movant's business." Tri-Nel Mgmt., Inc. v. Board of Health of Barnstable, 741 N.E.2d 37 (Mass. 2001).

In the present case, Stovers will argue that he will suffer irreparable harm if denied the injunction. Stovers can claim that the nuisance of Brown's son servicing the car at all hours of the day and night is harm that is continuous and ongoing. Stovers can also argue that Brown has made changes to the strip by laying down gravel, which changes the characteristics of the property.

Brown will argue that the nuisance of his son working on the car and the gravel do not constitute "substantial" injury. Brown will argue that these allegations certainly do not rise to a level where the Stovers would actually suffer physical harm. Brown will also contend that those events do not threaten or harm Stovers' livelihood.

Stovers will respond that the putting gravel on the strip is waste, and this in itself is harm to Stovers because it is his property. If Stovers continues to dump gravel on the strip, this will affect not only the characteristics but the value as well. Stovers will contend that the noise from Brown's son servicing the car is still harm to them by virtue of noise pollution and air pollution.

The court will probably not find for Stovers because the injuries that Stovers will claim do not seem to rise to a substantial level for a preliminary injunction. Undoubtedly, there are some grounds for injury, but that the verdict in Stovers favor should be sufficient in making him whole again.

3. The Risk of Irreparable Harm to the Plaintiff Outweighs the Potential Harm to the Defendant in Granting the Injunction

If the risk of irreparable harm to the plaintiff outweighs the potential harm to the defendant in granting the injunction, then the court should give the plaintiff the injunction. The court will determine if the "balance the equities here cut decisively in favor of the … denial of injunctive relief." Packaging Indus. Group, Inc., 405 N.E.2d at 112.

In the present case, Stovers will argue that there will be more harm to him if the nuisance continues and Brown lays down the gravel, then if Brown discontinues the activities.

Brown will argue that if the court enjoins him from the use on the disputed land, then he will he and his family will not have the use and enjoyment of their own land. Brown will contend that his children will not be able to use the swing-set, and that they will need to find another location for the oil drums. Brown will also claim that if he cannot park on the strip, then he will have a difficult time finding a proper place to park since he uses the strip as way of egress and ingress to the property.

Stovers will respond by claiming that if the injunctive relief is not granted, then he will suffer a more substantial harm than if the Brown's were enjoined from doing those activities. Stovers may claim loss of sleep and loss of the use and enjoyment of his property for damages.

The court will probably not find for Stovers when measuring the balance of harms. The court may evaluate the nuisance and may consider it not to be a substantial injury.

V. Conclusion

Based upon the facts, not all of the elements for an adverse possession claim established under Ryan are satisfied. Brown should be able to demonstrate that he openly, notoriously, exclusively, adversely and actually possessed the strip of land. Brown used the strip as a side yard up until the beginning of the current dispute. Brown parked cars on it, installed a swing set, planted a tree, stored oil drums and erected a carport. Brown has had exclusive use of the strip because at no time did Brown allow anyone else to use the disputed strip. When Stovers told Brown to stop trespassing, Brown refused, thus acting adversely with the property. Brown made improvements, such as the gravel and a tree. Brown actually used the land for parking cars, working on cars, storing containers, and as a play area for his children.

Brown may not be able to demonstrate that he continuously possessed the strip of land for twenty years. Therefore, it is unlikely that Brown will satisfy all the elements of adverse possession because he most likely did not possess the disputed land for the required twenty years.

Based upon the facts, not all of the elements for a preliminary injunction under Massachusetts Rules of Civil Procedure Rule 65(b) are satisfied. Stovers should be able to prove that he will likely succeed on the merits of his claim because Stovers parked his truck on the strip in dispute before the statute of limitations was up.

Stovers may not be able to prove that he will suffer irreparable harm if denied the injunction. Stovers also may not be able to prove that there will be more harm to him if the nuisance continues. Therefore, Stovers most likely will not get the preliminary injunction. Stovers may not be able to show the required substantial harm necessary in order to get a preliminary injunction under Massachusetts law.

Patrick Hoey