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Dear Mr. Gonski:

It is my pleasure to enclose a reprint of your article, "In Adverse Possession, 'Hostility' Is Both a Chameleon and a Phoenix," which was published in the Law Journal's "In Practice" column in this week's issue.

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Please consider writing again for the Law Journal. You should contact Law Editor Louis Tafuri to discuss a proposed topic for the weekly "In Practice" column or for one of our supplements. Our 2004 editorial calendar is enclosed (with its three real estate supplements).

Sincerely yours,



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IN PRACTICE

REAL ESTATE LAW

By DENNIS M. GONSKI

In Adverse Possession, 'Hostility' Is Both a Chameleon and a Phoenix

Hostility has gone from being a required element to a discarded element to a necessary, court created co-element

A recent trial in Morris County has surprisingly revisited an issue seemingly settled by the New Jersey Supreme Court almost four decades ago.

In *Mannillo v. Gorski*, 54 N.J. 378 (1969), the Court held that “we discard the requirement that entry and continued possession must be accomplished by a knowing hostility ... to support a claim of title by adverse possession.” And as noted in Fineberg, *Handbook of New Jersey Title Practice*, §2201 (3rd Ed.), conscious hostility is no longer a necessary element of adverse possession.

In a seeming rebuff to *Mannillo*, the trial court in *Stoller* denied an adverse possession/prescriptive easement claim — citing the plaintiff’s failure to prove hostility as a necessary element of the plaintiff’s proofs. The trial judge wrote:

Plaintiff cannot establish the element of hostility with regard to the septic system existing on defendant’s property for over 30 years ... [T]he Court must also deny Plaintiff’s arguments for a prescrip-

tive easement over the adjacent property. An easement by prescription arises where the user is “adverse or hostile, continuous, uninterrupted, visible and notorious.” ... This must be a continuing, open, visible and exclusive user, hostile, showing intent to claim as against the true owner, ... “Adverse” and “hostile” have the same meaning, which is that the use must not have been by permission ... Since Plaintiff cannot establish those elements under his adverse possession claim he likewise cannot establish the elements necessary for prescriptive easement relief.

Based upon the trial judge’s insistence upon hostility being a required element of adverse possession, the plaintiff’s lawyer filed a post-trial motion seeking a new trial. The plaintiff’s challenge was succinct and to the point: “Hostility, I believe, is no longer a required element of an adverse possession claim. *Mannillo v. Gorski*, 54 N.J. 378 (1969).”

Still, the trial judge remained steadfast in his initial interpretation of law, and no new trial was granted.

Although *Stoller v. Hansen*, July

22, 2003, Docket No. MRS-C-146-02, is only at the trial level, it nevertheless presents a unique opportunity to review *Mannillo* and its progeny, and to realize the apparent judicial resurrection of hostility as an element back into adverse possession law.

Case Law Post-*Mannillo*

The *Mannillo* decision was, and still is, heralded by many attorneys as the demise of hostility as an element of adverse possession in New Jersey. Prior to *Mannillo*, a hostile possession was necessary to succeed in obtaining a title by adverse possession.

Hence, when the Supreme Court stated in *Mannillo* “we discard” the requirement of hostility, the Bar naturally accepted such pronouncement as literally removing hostility as a necessary element to an adverse possession cause of action.

However, an erosion of *Mannillo* noticeably began in 1983, when the Supreme Court revisited its previously announced disregard of hostility, in *Patton v. North Jersey District Water*, 93 N.J. 180 (1983), where — citing *Mannillo* — its dicta at once suggested that the notion of hostility is not dead, but rather to be considered as a degree of one’s adverse possession: “Any entry, whether mistaken or intentionally hostile, is sufficient to support a claim of title by adverse possession, provided, it is exclusive, continuous, uninterrupted, visible and notorious. (Emphasis supplied).”

Relying on *Patton*, the Appellate Division, in *Leach v. Anderl*, 218 N.J.

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Super. 18 (App. Div. 1987), furthered the revival by elevating the term hostility to the status of an alternative element of an adverse possession: "The nature of the user necessary for the creation of an easement by prescription is the same as that for the acquisition of title by adverse possession, i.e., it must be adverse or hostile, exclusive, continuous, uninterrupted, visible and notorious for [the statutory period]."

The following year, in *Maggio v. Pruzansky*, 222 N.J. Super. 567 (App. Div. 1988), the Appellate Division — citing *Mannillo* — again favored hostility as part of the formula for adverse possession: "In such a case, the true owners (Pruzanskys) and their predecessors in title must have had actual knowledge of the minor encroachment, even if the encroachment is not hostile, in order for the possession by the Maggios to be open and notorious."

Then, in 1991, the Supreme Court directly opined as to the value of a hostile possession in applying adverse possession law to certain municipally owned real property. In *Devins v. Borough of Bogota*, 124 N.J. 570 (1991), the Court wrote:

We are left with a feeling of unease

whether the acts of possession were of such a character as is calculated to inform the true owner ... of their hostile possession. On remand, the trial court should consider not only whether their possession was of such a character, but also whether it was accompanied by such circumstances of notoriety that the owner [would] be aware of the fact and thus alerted to resist the acquisition of the right by claimant.

In 1998, the Appellate Division decided *Stump v. Whibco*, 314 N.J. Super. 560 (App. Div. 1998), whereby it likened hostility to an "act of dominion over the land."

Most recently, in *J & M Land Co. v. First Union National Bank*, 166 N.J. 493 (2001), citing *Patton*, the Supreme Court stated:

Once the adverse possessor's possession is interrupted after 20 years but before his or her right to title accrues pursuant to either the controlling 30- or 60-year substantive statute of limitations, J & M's possession is no longer "adverse and hostile ... continu[ous] and uninterrupted," which are essential elements of the cause of action., supra, 93 N.J. at 186, 459 A.2d 1177.

So, in *J & M Land*, the Court judicially combined the concepts of adversity and hostility to create a joint element of "adverse and hostile," which is essential to a successful adverse possession claim.

Full Circle

Since its decision in *Mannillo* in 1969, the Supreme Court — with the aide of the Appellate Division — has brought the term hostility full circle, from a discarded element to the now necessary co-element of adverse and hostile pronounced in *J & M Land*.

Although *Mannillo* is still widely cited as a landmark case on adverse possession — its authority on the issue of hostility is no longer reliable law. The term hostility has been judicially redefined to connote a possession that is openly and notoriously adverse. The judicial redefinition of hostility has made that term a part of the adversity element traditionally needed to achieve an adverse possession.

Like the mythical phoenix, hostility has risen from ashes and is once again an essential part of adverse possession law. ■