

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

FILED
JUL 28 2008
TERENCE G. LORD, CLERK
WESTERN DISTRICT

CHARLES R. WATSON and)
CAROLYN WATSON, H & W,)

Respondents,)

VS.)

ROBERT E. MENSE and)
CAROLYN K. MENSE, H & W,)

Appellants.)

CASE Number: WD69255 89936

FILED

APR 3 2009

Thomas F. Simon
CLERK, SUPREME COURT
Appeal from the Circuit Court of Macon County, Missouri
Forty-First Judicial Circuit
The Honorable Gary G. Wallace, Assigned Judge

APPELLANTS' AMENDED BRIEF AND ARGUMENT

**DO NOT REMOVE
FROM FILE POOL**

Respectfully submitted,



R. Timothy Bickhaus, MBN 41544,
109 N. Missouri
P.O. Box 451,
Macon, MO 63552
Ph: 660-385-3854
Fax: 660-385-2769
email: bickhaus@istmacon.net
ATTORNEY FOR APPELLANTS

SCANNED

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... 2

JURISDICTIONAL STATEMENT..... 4

STATEMENT OF FACTS..... 5

POINTS RELIED ON..... 15

ARGUMENT

I..... 22

II..... 28

III..... 31

IV..... 33

V..... 37

VI..... 38

VII..... 40

VIII..... 42

IX..... 44

CONCLUSION..... 45

CERTIFICATE OF COMPLIANCE AND SERVICE..... 46

APPENDIX..... 47

TABLE OF AUTHORITIES

CASES:

Aley v. Hacienda Farms, Inc., 584 S.W.2d 126, 128-129 (Mo.App. S.D.1979)..... 15 & 25

Brinner v. Huckaba, 957 S.W.2d 491, 494 (Mo.App. 1997)..... 15 & 24

Beaty v. N.W. Electric Power Cooperative, 312 S.W.2d 369, 371 (Mo.App. 1958)..... 17 & 29

Bolton v. Missouri-Kansas-Texas Railroad Company, 373 S.W.2d 169, 173 (Mo.App.1963).....
17 & 29

Boyd v. Lollar, 985 S.W.2d 403, 405 (Mo.App. W.D.1999)..... 17, 21, 29, & 44

Burns v. Black & Veatch Architects, Inc., 854 S.W.2d 450, 457 (Mo.App. W.D.1993)..... 20 &
43

Conduff v. Stone, 968 S.W.2d 200, 203-205 (Mo.App. S.D.1998)..... 15, 17, 18, 19, 20, 21, 22,
23, 25, 26, 28, 31, 33, 37, 38, 40, 42, 43, & 44

Dent v. Dent, 166 S.W.2d 582, 587-588 (Mo.1942)..... 17 & 32

Dleeman v. Kingsley, 88 S.W.3d 521, 526 (Mo.App. S.D.2002)..... 20 & 41

Edmonds v. Thurman, 808 S.W.2d 408, 411 (Mo.App. S.D.1991)..... 15 24 & 25

Eime v. Bradford, 185 S.W.3d 233, 236-237 (Mo.App. E.D.2006)..... 16, 23, 24, & 25

Harris v. Lynch, 940 S.W.2d 42, 45 (Mo.App. E.D.1997)..... 16 & 24

Heigert v. Londell Maor, Inc., 834 S.W.2d 858, 863 (Mo.App. E.D. 1992)..... 16 & 23

Kelley v. Prock, 825 S.W.2d 896, 900 (Mo.App. S.D.1992)..... 16 & 25

Kitterman v. Simrall, 924 S.w.2d 872, 876 (Mo.App. W.D. 1996)..... 16 & 23

Longbottom v. Rains, 632 S.W.2d 525, 527 (Mo.App. S.D.1982)..... 20 & 41

Murphey v. Carron, 536 S.W.2d 30, 32 (Mo.banc 1976)..... 16, 17, 18, 19, 20, 21, 22, 28, 31, 33,
37, 38, 40, 42, & 44

Pauls v. County Com'n of Wayne County, 26 S.W.3d 597, 599-600 (Mo.App. S.D.2000)..... 20
& 41

Pippin v. City of St. Louis, 823 S.W.2d 131, 133 (Mo. App. E.D.1992)..... 20 & 43

Shoemaker v. Houchen, 994 S.W.2d 40, 44, 49 (Mo.App. W.D.1999)..... 16, 20, 23, 24, 26, & 41

Thompson v Thompson, 835 S.W.2d 560, 573 (Mo.App. WD.1992)..... 20 & 43

Tong v. Kincaid, 47 S.W.3d 418, 421 (Mo.App. S.D. 2001)..... 17 & 29

CONSTITUTIONAL PROVISIONS:

None.

STATUTES:

Mo. Rev. Stat. Section 524.130..... 18 & 32

MISSOURI SUPREME COURT RULES:

None.

JURISDICTIONAL STATEMENT

This appeal, is from a December 12, 2007, Judgment in favor of Respondents Charles Robert Watson and Carolyn Watson, husband and wife, on their 3-Count Petition filed June 22, 2006, and Appellants, Robert E. Mense and Carolyn K. Mense, husband and wife, Counter-Petition filed on July 20, 2006, entered by the Honorable G. Wallace, assigned Judge, of the 41st Circuit Court of Macon County, Missouri.

The Appellant's Notice of Appeal from this Judgment was filed on January 14, 2008.

Since this appeal does not involve any issues or matters within the exclusive jurisdiction of the Missouri Supreme Court, jurisdiction of this appeal is vested in this Court, pursuant to Article V, Section 3 of the Constitution of Missouri and Section 477.070, RSMo. 1994 (which implicitly provides that Macon County is within the territorial boundaries of the Western District of Missouri Court of Appeals).

STATEMENT OF FACTS

For purposes herein: “Lf” is reference to Legal File and then cited page(s); “Exb” is reference to trial exhibits and then either cited alpha (A-S/Appellants exhibits) or numeric (1-16/Respondents exhibits); and “Tr” is reference to Transcript on Appeal and cited page(s).

In framing a review of the facts presented at trial, it is important to first understand that there is no dispute between the parties that the Respondents, Charles and Carolyn Watson, are the owners of the following described two 40-acre tracts, to-wit:

All of the Northeast Quarter (NE1/4) of the Southeast Quarter (SE1/4) of Section Twenty-One (21) and all of the Southwest Quarter (SW1/4) of the Southwest Quarter SW1/4) of Section Twenty-Two (22), all in Township Fifty-Nine (59) North, Range Thirteen (13) West, Macon County, Missouri. (Lf5-6&Tr3).

Nor is there any dispute between the parties that Appellants, Robert and Carolyn Mense, are the owners of the following described 80 acre tract, to-wit:

All of the Southeast Quarter (SE1/4) of the Southeast Quarter (SE1/4) of Section Twenty-One (21) and the Northeast Quarter (NE1/4) of the Northeast Quarter (NE1/4) of Section Twenty-Eight (29), all in Township Fifty-Nine (59) North, Range Thirteen (13) West, Macon County Missouri. (Lf5-6&Tr3).

There is likewise no dispute between the parties that Respondents, or their predecessors in title, have for such time crossed where Respondents’ respective tracts touch at the northeast corner of Appellants’ real estate. (Tr3) However, what is in dispute regarding such northeast corner is the width of Respondents’ path between their two 40-acre tracts and how much of that path is on Appellants’ property and a neighboring landowner, who is not a party to this action, who is known as “Ross”.

For purposes of illustration only, and to assist the reader, the following illustration is inserted showing Appellants' 80-acre tract in the darkened area, and Respondents' two 40-acre tracts in the lightly shaded gray areas. The following Illustration #1 is similar to Respondents' Trial Exhibit #1. (Exb1)

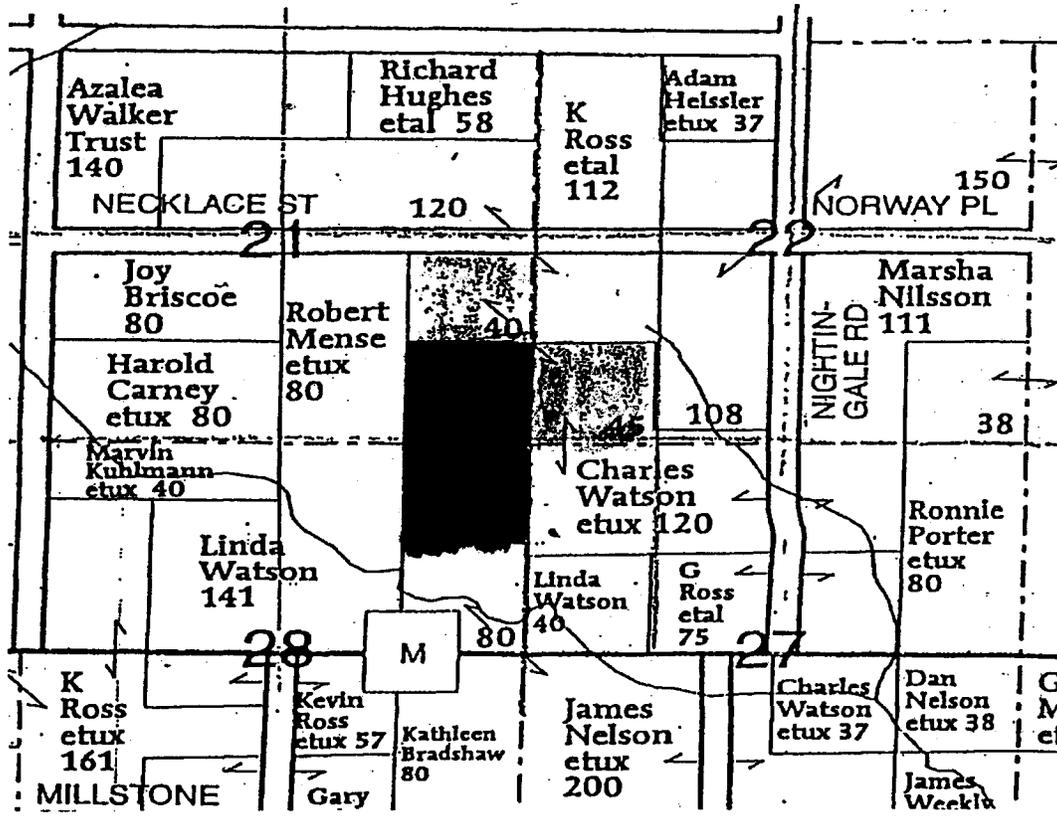


Illustration #1

Appellants acquired their interest in their 80-acres in January of 2006. (Tr45) Appellants' most immediate predecessors in title are Frank Bush (hereinafter referred to as "Bush") and Jim Nelson (hereinafter referred to as "Nelson"). (Tr45)

Respondents' most immediate predecessor in title is Jane Boulton, and her husband, who are Appellants parents. (Tr34) Appellants' parents owned the two (2) 40-acre tracts from 1958 until the tracts were conveyed to Respondents' in 1989. (Tr34)

From 1958 to 1989, Respondents parents, being Respondents predecessors in title, never had a boundary dispute with an adjoining landowner. (Tr34) They never had any problems with Luther Kelly, when he owned the land prior to Bush and Nelson. (Tr36-37) Respondents' parents never had a dispute about the boundary line with Bush. (Tr37,47,&119) Neither did Respondents ever have a dispute about the boundary line with Nelson. (Tr45,46&119)

An old hedgerow divided the disputed east/west line between Appellants and Respondents' respective north/south tracts. (Tr9&28). Until 2006, the immediate area along the old hedgerow was covered in growth no less than a tree wide. (Tr84-85,98)

Sometime in the mid to early 1980's, Bush bulldozed and cleaned out the eastern half of the old hedgerow that divided the tracts along the now disputed boundary line. (Tr22,39,40,46,124-125) This was done before Respondents' came into title of their respective tracts. (Tr46) The eastern half of the old hedgerow was so well cleaned out by Bush that to this day, there's nothing to indicate a line where the old hedgerow had grown. (Tr87) No fence was put up in place of the old hedgerow that was removed by Bush. (Tr25,41) Certainly, no cattle have been run on Respondent's 40-acres north of Appellants land since Bush removed the eastern half of the hedgerow. (Tr41) There was no dispute with Bush by Respondent's parents when Bush bulldozed down the old hedgerow and old fence along the eastern half of the boundary line in dispute. (Tr47) In fact, Bush never even had any words about the boundary with his neighbors, Respondents' predecessors in title. (Tr125-126)

Nelson bought what is Appellants 80-acre tract from Bush in either 1999 or 2000 and then Nelson sold it to Appellant in 2006. (Tr134-135) Nelson never discussed anything regarding the fence line or boundary line with Respondents or their predecessor in title. (Tr136-137) Nelson never had a boundary line dispute with Respondents. (Tr46&142)

The old hedgerow remained on the western half of the line dividing the tracts until 1998-1999. (Tr40,88&108-109) That is when Respondents for themselves, likewise cleaned out much of the western half of the old hedgerow and the old fence that divided the tracts along the now disputed boundary line. (Tr52-53,Exb4) Leaving some hedge trees, Respondents did not clear out all of the western half. (Tr60-61) In the year 2000—only 8-years before the trial of this matter—but only along the western half of the disputed boundary line, Respondents’ had placed a barbed wire fence along where Respondents believed the old hedgerow and old fence had been. (Tr62,79,87,91-92,109) Respondents never “used” the land immediately north of the fence that they placed in 2000. (Tr103) The simple reason neither owner farmed near the old hedgerow is because a farmer plowing and planting is going to stay a sound distance from a hedgerow to avoid roots and tearing up equipment. (Tr139-140)

From the early to mid 1980s, when Bush cleared out the old hedgerow along the eastern half, to the year 2000, when Respondents placed a fence along the western half, there was no fence or hedgerow on the eastern half of the boundary line. (Tr79-80) To be clear, some reference of “a hump” where the old hedgerow had been remained on the eastern half. (Tr80) But there was no line to indicate where the old fence was on the eastern portion of the now disputed boundary line (Tr81-82) To be sure, there was no evidence that a fence had every been on the eastern half of the disputed boundary line. (Tr83-84)

In the year 2000, Nelson, Appellants’ predecessor in title, did not object to the Respondents putting up a barbed fence along the western half of the line where Respondent’s claim the old hedgerow had been. (Tr116) Nor was there any mention of a boundary dispute one-way or the other between Respondents and Nelson. (Tr45&116)

In March of 2006, Appellants bulldozed out any roots along the entire northern line of their 80-acre tract to clean it up for plowing and planting. (Tr167) Without any objection from Respondents, Appellants' disked and cleared along the entire northern quarter mile. (Tr167-168)

The only response to Appellants bulldozing and clearing, was that sometime after March 2006, but in 2006, Respondents had set a corner post at the northeast corner of Appellants' property where Respondents thought the line was in respect to where the old hedgerow and old fence Respondents allege had been located therein such old hedgerow. (Tr55,167-168;Exb6) This post was somewhat tentatively set, as Appellants admitted that it was placed some 2-feet north of where Appellants now claim the disputed line should be located. (Tr82) That tentative act of placing a corner post in 2006, was the first act by Respondents that they disputed where Appellants may have thought the corner and boundary line was located. (Tr55;Exb6) Thereby, in 2006, was the first time Respondents took any affirmative act in establishing a fence boundary line. (Tr84)

To be sure, the dispute is not over a great distance, as the fence constructed by Respondents and placed on the western half of the old hedgerow as shown on a July 13, 2006 survey prepared by Edward Cleaver ranged from 7.2 feet south of the true line of the Quarter Quarter to 8.4 feet south of the true line of the Quarter Quarter dividing Appellants and Respondents' property. (Tr149-150;ExbG)

To establish a line along the eastern half of the disputed boundary line, in April of 2006, Respondents did run a "smooth wire" along the eastern half of where Respondent's believed the boundary line should be from a post Respondents set in 2000 in the middle of the quarter mile to the eastern end of the disputed line, where Respondents had placed a corner post at the northeast

corner of Appellants' property where Respondents thought the line was in respect to where the old hedgerow and where a fence had been located in the past. (Tr55,96-97,159;Exb6)

The first time there was every a dispute about the boundary line was 1 1/2 years before October 29, 2007, which was the date of the trial. (Tr55;Exb6) Respondents had set a corner post at the northeast corner of Appellants' property where Respondents thought the line was in respect to where the old hedgerow and where a fence had been located in the old hedgerow. (Tr55;Exb6) That act in 2006, was the first time Respondents made any indication that could be interpreted as being directed to anyone about where Respondents thought the corner and boundary line was located between the two tracts. (Tr55&84;Exb6)

The post set by Respondent's in Appellants northeast corner ground was set 13 to 15 feet south of an existing east/west hedgerow line between Respondent's southeast 40-acre tract and a neighbor by the name of "Ross" to his direct north. (Tr162-163) The "Ross" tract shows that despite the long obliteration of the eastern half of the old hedgerow between Appellants and Respondents' property, it appears from viewing such line that the existing "Ross" hedgerow is much further north from where Respondents' claim the boundary line should be between the Appellant and Respondent. (Tr166) Appellants felt vindicated by seeing that the survey flags confirmed Appellants assumption of where the boundary line was in relation to Ross's property and still existing hedgerow located at Appellants' northeastern corner and lined up with Appellants' northwestern corner. (Tr176)

Appellants crops in 2006 were planted 1-foot south of the flags staked by Edward Cleaver and did not cross the Quarter Quarter line of Respondents' northwest 40-acre tract. (Tr176)

Respondents' belief that the boundary line between the properties may be summed up in the leading and conclusionary statement of Respondent Charles Watson, that "the old fence row was and what has always -- been regarded as the line." (Tr77) However, the belief of Respondents is based on an old hedgerow one tree in width, wherein the old fence had been strung. (Tr84-85) About a 10-foot wide path along the old hedgerow to this day is covered by "horseweeds". (Tr86) These "horseweeds" grow so tall that they can be seen a quarter mile from the road just north of Respondents' northwest 40-acre tract. (Tr187) The immediate area north and south of where Respondents assert the boundary line should be is grown over in weeds. (Tr98) The growth being so thick that that Respondents never "used" the land immediately north of where Respondents had placed a fence on the western half in 2000. (Tr103) Respondents admitted to not growing alfalfa to where Respondents think the old fence line and hedgerow should be located. (Tr111) The growth along the old hedgerow can clearly be seen in ASCS aerial photographs taken from 1991 to 2001. (ExbH,I,J,K,L,M,N,O,P,Q,R,&S)

For purpose of clarifying the facts, for all we know, the old fence in the old hedgerow was first placed, where Respondents state it was, by one of Appellants' predecessors in title. To be sure, nothing—at trial—is known about the history of the old hedgerow or old fence, except that the old fence was placed in the old hedgerow the way "they used to do it." (Tr109) All that the Respondents know is that the old fence was conveniently constructed the old way of pulling up barbed wire and tying it to the hedge. (Tr109) That is why it is of some import, historically, but long removed, there was fence line that was along the western line of Appellants' 80-acre tract. (Tr112,114,&115) That is important to emphasis that there was a time that the alleged east/west fence line in dispute once "T" intersected with a north/south fence line along the west line of Appellants' land. (Tr112,114,&115) Thus, the post on the northwest corner of

Appellants 80-acres, may be merely a random post that had been selected by Respondents to create their belief that the post held more meaning than it actually did. However, we don't know anything else about that and why or who constructed the fence now asserted by Respondents to be the dividing line between the tracts owned by Appellants and Respondents. Not for purposes of argument, but simply to clarify what is not known, is that, for all we know it was Appellants predecessors in title who pastured cattle on what had been a fenced 80-acre tract now owned by Appellants.

In the spring of 2006, and in response to Respondents' placement of a post in their northeast corner, Appellants used the loader on their tractor to doze out the post set by Respondents. (Tr59) The post was not broken, but was pulled out. (Tr158) To emphasize their ownership, Appellants left the tractor in the northeast corner of their land with a sign warning against trespass and property damage. (Tr64;Exb11&12)

Respondents' allege that they were damaged by Appellants having pushed over the post set, by the loss of cement and a brace in the amount of \$75.00. (Tr76) Despite the Edward Cleaver survey, Respondents' further contended that Appellants planted soybeans 8 to 9 feet north of where the old fence and hedgerow had been, which Respondents' assert is the true boundary line. (Tr75) Thereby, Appellants felt they were damaged for 10 bushel of soybeans at the price of \$9.00 per bushel, total damage of \$90.00. (Tr77)

It took Appellants 2-3 hours to move the post over, including time to get the tractor in position. (Tr172) Appellants claim the cost to operate their tractor for 2-3 hours was \$250.00.

To be sure, respecting the path between Respondents' 40-acre tracts, Appellants did not block the path in the northeast corner of their 80-acre tract. (Tr65,&157-158)

Turning now to the width of the path between Respondents' 40-acre tracts, at the northeast corner of Appellants' 80-acre tract, Respondents have placed a 16-foot red steel gate at the corner. (Tr67) There is also a 16-foot "panel" overlapping the gate by 8-feet. (Tr67) The total length of the gate and panel thereby combined is 24-feet. (Tr67-68) That 24-foot combined length is what Respondents' base their claim for the width of the easement (Tr77)

Respondents' gate and panel are not placed directly at the intersection of the Quarter Quarter lines, but are located somewhat southeast of the intersection of the lines at the northeast corner of Appellants property and are in the northwest corner of Respondents' own Southwest 40-acre tract. (ExbG) This is further factually shown by a review of the ASCS aerial photos, which indicate the gate appears to be on Respondents own property, thus certainly making the gate area wider than the path actually used by Respondents. (ExbH,I,J,K,L,M,N,O,P,Q,&R)

Further, there was conflicting testimony about the actual width of the path used. Though there was no conflicting testimony as to the only use of the path by Respondents or their predecessors in title, and that was for agricultural use and purposes only. (Tr18,35-36,&68-69) Daniel Mense, Appellants' son, testified that the path at the corner was 15 to 16 feet in width. (Tr157) Appellants' claim that the width of the path is 16-feet. (Tr195) Respondents' brother stated that width was large enough for a 14-foot wide tractor to cross. (Tr18) Respondents claim to have taken a 13 1/2 foot combine through the pass (Tr68-69) Respondents' mother, Jane Boulton testified that the width was about 15 to 18 feet. (Tr35-36) Respondents' brother testified that the path was 16 to 18 feet in width. (Tr9)

Whatever the ultimate width of the path, Respondents only claim that one-half (1/2) of the width is over Appellants' property (Tr105-106,&121) Respondents brother, Lester Snow, was incorrect that all the path was on Appellants' property. (Tr32) To be exact, Respondents for

themselves only claim that 12-feet of their alleged 24-foot path, between their two 40-acre tracts crosses at Appellants northeast corner. (Tr106)

Based on the gate and the survey of where a cattle panel exists on the “Ross” property, there can be little consistent facts to determine where the gate is actually located in respect to Appellants and Respondents’ respective corners. (ExbG)

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN ENTERING A JUDGMENT QUIETING TITLE BY DECLARING THE SOUTH LINE OF THE NE1/4 OF THE SE1/4 OF SECTION 21 TO BE THE FENCE LINE BETWEEN SAID QTR-QTR AND APPELLANTS' PROPERTY SOUTH OF IT, BECAUSE THERE WAS NO SUBSTANTIAL EVIDENCE TO SUPPORT SUCH A RULING BASED ON A CLAIM OF ADVERSE POSSESSION, IN THAT UNTIL 2006, THERE HAD NEVER BEEN A DISPUTE BETWEEN APPELLANTS' AND RESPONDENTS' PREDECESSORS IN TITLE ABOUT AN OLD FENCE LINE IN AN OLD HEDGEROW BEING THE BOUNDARY LINE BETWEEN THE ADJOINING PROPERTIES AND THEREBY RESPONDENTS' CLAIM OF ANY PORTION NORTH OF THE OLD FENCE LINE HAD NOT RIPENED TO BEING ADVERSE IN THAT RESPONDENTS' CLAIM WAS NOT HOSTILE AND UNDER A CLAIM OF RIGHT; RESPONDENTS' CLAIM WAS NOT ACTUAL; RESPONDENTS' CLAIM WAS NOT OPEN AND NOTORIOUS; RESPONDENTS' CLAIM WAS NOT EXCLUSIVE; AND RESPONDENTS' CLAIM WAS NOT CONTINUOUS FOR A PERIOD OF TEN YEARS WITHOUT INTERRUPTION.

Aley v. Hacienda Farms, Inc., 584 S.W.2d 126, 128, 129 (Mo.App. S.D.1979)

Brinner v. Huckaba, 957 S.W.2d 491, 494 (Mo.App. 1997)

Conduff v. Stone, 968 S.W.2d 200, 203, 204-205 (Mo.App. S.D.1998)

Edmonds v. Thurman, 808 S.W.2d 408, 411 (Mo.App. S.D.1991)

Eime v. Bradford, 185 S.W.3d 233, 236-237 (Mo.App. E.D.2006)

Harris v. Lynch, 940 S.W.2d 42, 45 (Mo.App. E.D.1997)

Heigert v. Londell Maor, Inc., 834 S.W.2d 858, 863 (Mo.App. E.D. 1992)

Kelley v. Prock, 825 S.W.2d 896, 900 (Mo.App. S.D.1992)

Kitterman v. Simrall, 924 S.w.2d 872, 876 (Mo.App. W.D. 1996)

Murphey v. Carron, 536 S.W.2d 30, 32 (Mo.banc 1976)

Shoemaker v. Houchen, 994 S.W.2d 40, 44, 49 (Mo.App. W.D.1999)

II. THE TRIAL COURT ERRED IN AWARDING RESPONDENTS JUDGMENT FOR DAMAGES IN THE SUM OF \$75.00 FOR TRESPASS BECAUSE THERE WAS NO SUBSTANTIAL EVIDENCE TO SUPPORT SUCH AN AWARD, IN THAT THERE WAS NO EVIDENCE OF THE LOCATION OF THE POST BEING NORTH OF THE BOUNDARY LINE DIVIDING THE PARTIES' RESPECTIVE PROPERTY IF POINT RELIED ON I IS AFFIRMED; AND IF NOT, THEN THE TRIAL COURT ERRED IN AWARDING RESPONDENTS JUDGMENT FOR DAMAGES IN THE SUM OF \$75.00 FOR TRESPASS BECAUSE THE COURT DID NOT PROPERLY APPLY THE LAW IN THE MEASURE OF DAMAGES IN TRESPASS OF EITHER THE COST OF RESTORATION, OR THE DIFFERENCE IN VALUE OF PROPERTY BEFORE AND AFTER THE TRESPASS, WHICHEVER IS LESS, IN THAT THOUGH THERE WAS EVIDENCE OF THE COST OF RESTORATION, THERE WAS NO EVIDENCE OF THE FAIR MARKET VALUE OF THE REAL ESTATE BEFORE AND AFTER THE ALLEGED INJURY.

Beaty v. N.W. Electric Power Cooperative, 312 S.W.2d 369, 371 (Mo.App. 1958)

Bolton v. Missouri-Kansas-Texas Railroad Company, 373 S.W.2d 169, 173 (Mo.App.1963)

Boyd v. Lollar, 985 S.W.2d 403, 405 (Mo.App. W.D.1999)

Conduff v. Stone, 968 S.W.2d 200, 203 (Mo.App. S.D. 1998)

Murphey v. Carron, 536 S.W.2d 30, 32 (Mo.banc 1976)

Tong v. Kincaid, 47 S.W.3d 418, 421 (Mo.App. S.D. 2001)

III. THE TRIAL COURT ERRED IN AWARDING RESPONDENTS JUDGMENT FOR DAMAGES IN THE SUM OF \$90.00 IN EJECTMENT BECAUSE THE COURT IMPROPERLY APPLIED THE LAW OF DAMAGES, IN THAT THE PROPER MEASURE OF DAMAGES IS FOR THE RENTAL VALUE OF THE LAND, NOT THE VALUE OF THE CROPS AND THERE WAS NO SUBSTANTIAL EVIDENCE TO SUPPORT SUCH AN AWARD, IN THAT IF POINT RELIED ON I IS AFFIRMED THERE WAS NO EVIDENCE THAT APPELLANTS' TRESPASSED ON RESPONDENTS' LAND; AND IF NOT, THEN THE TRIAL COURT ERRED IN AWARDING RESPONDENTS JUDGMENT FOR DAMAGES IN THE SUM OF \$90.00 IN EJECTMENT BECAUSE THERE WAS NO SUBSTANTIAL EVIDENCE TO SUPPORT SUCH AN AWARD, IN THAT THERE WAS NO EVIDENCE PRESENTED OF THE RENTAL VALUE OF RESPONDENTS' LAND.

Conduff v. Stone, 968 S.W.2d 200, 203 (Mo.App. S.D. 1998)

Dent v. Dent, 166 S.W.2d 582, 587-588 (Mo.1942)

Murphey v. Carron, 536 S.W.2d 30, 32 (Mo.banc 1976)

IV. THE TRIAL COURT ERRED IN DECLARING (1) THE WIDTH OF AN EASEMENT BY PRESCRIPTION TO BE 24 FEET, (2) NOT DECLARING THE USE, (3) AND NOT SPECIFICALLY STATING THAT ONLY ONE HALF OF THE WIDTH WAS A BURDEN ON APPELLANTS, BECAUSE THERE WAS NO SUBSTANTIAL EVIDENCE TO SUPPORT THE COURT'S DECLARATION OF THE WIDTH BASED ON A FENCE LYING ON RESPONDENTS' LAND AND NOT THE ACTUAL PATH USED, IN THAT THOUGH APPELLANTS CONSENTED TO A JUDGMENT CREATING AN EASEMENT BY PRESCRIPTION, THE EVIDENCE WAS ONLY SUFFICIENT TO DECLARE THE WIDTH OF THE EASEMENT TO BE 16 FEET, FOR AGRICULTURAL USES, AND THAT IT WAS CLEAR ONLY ONE-HALF OF THAT WIDTH WAS BURDENED ON APPELLANTS.

Conduff v. Stone, 968 S.W.2d 200, 203 (Mo.App. S.D. 1998)

Murphey v. Carron, 536 S.W.2d 30, 32 (Mo.banc 1976)

V. THE TRIAL COURT ERRED IN ORDERING APPELLANTS TO CEASE AND DESIST IN INTERFERING WITH RESPONDENTS' USE AND ENJOYMENT OF THE PRESCRIPTIVE EASEMENT, BECAUSE THERE WAS NO EVIDENCE THAT APPELLANTS HAD INTERFERED WITH RESPONDENTS' COMING AND GOINGS, IN THAT RESPONDENT TESTIFIED THAT APPELLANTS DID NOT BLOCK THE PATH RESPONDENTS' USED.

Conduff v. Stone, 968 S.W.2d 200, 203 (Mo.App. S.D. 1998)

Murphey v. Carron, 536 S.W.2d 30, 32 (Mo.banc 1976)

VI. THE TRIAL COURT ERRED IN NOT AWARDING JUDGMENT TO APPELLANTS BEING THE HOLDER IN FEE AND PERMANENTLY ENJOINING AND RESTRAINING RESPONDENTS FROM ASSERTING, CLAIMING, USING OR SETTING UP ANY CLAIM OF RIGHT, TITLE OR INTEREST IN APPELLANTS REAL ESTATE DESCRIBED AS ALL OF THE SE1/4 OF THE SE1/4 OF SEC. 21 AND THE NE1/4 OF THE NE1/4 OF SEC. 29, TWP. 59N, RNG. 13W, MACON COUNTY, MO., BECAUSE THERE WAS NO DISPUTE THAT APPELLANTS HAD TITLE TO THEIR REAL ESTATE, IN THAT RESPONDENTS DID NOT PROVE THEIR CLAIM IN ADVERSE POSSESSION TO ANY PORTION OF APPELLANTS DESCRIBED LAND.

Conduff v. Stone, 968 S.W.2d 200, 203 (Mo.App. S.D. 1998)

Murphey v. Carron, 536 S.W.2d 30, 32 (Mo.banc 1976)

VII. THE TRIAL COURT ERRED IN NOT MAKING MORE SPECIFIC LEGAL DESCRIPTIONS OF ITS AWARD TO RESPONDENTS OF THE FENCE LINE AND PATH BECAUSE SUCH NON-SPECIFICITY RESULTS IN A VOIDED JUDGMENT, IN THAT, IF POINT RELIED ON I IS DENIED, THE DESCRIPTION REQUIRES SURVEYING TO SPECIFICALLY ADVISE THE PRESENT PARTIES AND ANY SUCCESSORS OR ASSIGNS THE WHEREABOUTS OF THE BOUNDARY LINE WITH MORE SPECIFICITY

THAN A MERE REFERENCE TO AN OLD FENCE THAT DOES NOT PRESENTLY EXIST ALONG THE EASTERN HALF OF THE DISPUTED LINE.

Conduff v. Stone, 968 S.W.2d 200, 203 (Mo.App. S.D. 1998)

Dleeman v. Kingsley, 88 S.W.3d 521, 526 (Mo.App. S.D.2002)

Longbottom v. Rains, 632 S.W.2d 525, 527 (Mo.App. S.D.1982)

Murphey v. Carron, 536 S.W.2d 30, 32 (Mo.banc 1976)

Pauls v. County Com'n of Wayne County, 26 S.W.3d 597, 599-600 (Mo.App. S.D.2000)

Shoemaker v. Houchen, 994 S.W.2d 40, 44, (Ct.App. W.D.1999)

VIII. THE TRIAL COURT ERRED IN ENTERING A JUDGMENT QUIETING TITLE BY DECLARING THE SOUTH LINE OF THE NE1/4 OF THE SE1/4 OF SECTION 21 TO BE THE FENCE LINE BETWEEN SAID QTR-QTR AND APPELLANTS' PROPERTY SOUTH OF IT, BECAUSE SUCH FINDING WAS OUTSIDE RESPONDENTS' PLEADINGS, IN THAT APPELLANTS CONSENTED TO JUDGMENT AS RESPONDENTS' SPECIFICALLY PLEAD IN THEIR PLEADING TO QUITE TITLE AND RESPONDENTS' FAILED TO PLEAD THAT ANY PORTION OF A FENCE WAS SOUTH OF THE SOUTH LINE OF THE NE1/4 OF THE SE1/4 OF SECTION 21.

Burns v. Black & Veatch Architects, Inc., 854 S.W.2d 450, 457 (Mo.App. W.D.1993)

Conduff v. Stone, 968 S.W.2d 200, 203, 205 (Mo.App. S.D. 1998)

Murphey v. Carron, 536 S.W.2d 30, 32 (Mo.banc 1976)

Pippin v. City of St. Louis, 823 S.W.2d 131, 133 (Mo. App. E.D.1992)

Thompson v Thompson, 835 S.W.2d 560, 573 (Mo.App. WD.1992)

IX. THE TRIAL COURT ERRED IN NOT AWARDING APPELLANTS' JUDGMENT FOR DAMAGES IN THE SUM OF \$250.00 FROM RESPONDENTS IN TRESPASS BECAUSE THERE WAS EVIDENCE TO SUPPORT SUCH A JUDGMENT, IN THAT RESPONDENT ADMITTED TO PLACING A POST SOUTH OF THE SOUTH LINE OF THE NE1/4 OF THE SE1/4 OF SECTION 21, WHICH WOULD BE ON APPELLANTS' LAND AND THE MEASURE OF DAMAGES IS THE \$250.00 FOR THE COST TO REMOVE THE POST WRONGFULLY PLACED BY RESPONDENTS' ON APPELLANTS' LAND.

Boyd v. Lollar, 985 S.W.2d 403, 405 (Mo.App. W.D.1999)

Conduff v. Stone, 968 S.W.2d 200, 203, 205 (Mo.App. S.D. 1998)

Murphey v. Carron, 536 S.W.2d 30, 32 (Mo.banc 1976)

ARGUMENT

I. THE TRIAL COURT ERRED IN ENTERING A JUDGMENT QUIETING TITLE BY DECLARING THE SOUTH LINE OF THE NE1/4 OF THE SE1/4 OF SECTION 21 TO BE THE FENCE LINE BETWEEN SAID QTR-QTR AND APPELLANTS' PROPERTY SOUTH OF IT, BECAUSE THERE WAS NO SUBSTANTIAL EVIDENCE TO SUPPORT SUCH A RULING BASED ON A CLAIM OF ADVERSE POSSESSION, IN THAT UNTIL 2006, THERE HAD NEVER BEEN A DISPUTE BETWEEN APPELLANTS' AND RESPONDENTS' PREDECESSORS IN TITLE ABOUT AN OLD FENCE LINE IN AN OLD HEDGEROW BEING THE BOUNDARY LINE BETWEEN THE ADJOINING PROPERTIES AND THEREBY RESPONDENTS' CLAIM OF ANY PORTION NORTH OF THE OLD FENCE LINE HAD NOT RIPENED TO BEING ADVERSE IN THAT RESPONDENTS' CLAIM WAS NOT HOSTILE AND UNDER A CLAIM OF RIGHT; RESPONDENTS' CLAIM WAS NOT ACTUAL; RESPONDENTS' CLAIM WAS NOT OPEN AND NOTORIOUS; RESPONDENTS' CLAIM WAS NOT EXCLUSIVE; AND RESPONDENTS' CLAIM WAS NOT CONTINUOUS FOR A PERIOD OF TEN YEARS WITHOUT INTERRUPTION.

Standard of Review

“This court will affirm the judgment of the trial court unless no substantial evidence supports it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law. Murphey v. Carron, 536 S.W.2d 30, 32 (Mo.banc 1976).” Conduff v. Stone, 968 S.W.2d 200, 203 (Mo.App. S.D. 1998)

Discussion

The trial court appears to have based its judgment on a combination of theories of adverse possession and boundary by acquiescence. Even though the court did find that “Boundary by acquiescence was not pleaded or argued by the Plaintiffs.” (Lf35) The result reached, is contra to such a finding. This case is very similar to the cases and facts discussed in Shoemaker v. Houchen, 994 S.W.2d 40, (Mo.App. W.D.1999); Conduff v. Stone, 968 S.W.2d 200, (Mo.App. S.D.1998); and, Eime v. Bradford, 185 S.W.3d 233, 236 (Mo.App. E.D.2006).

To be clear, that though the trial court found that “Boundary by acquiescence was not pleaded or argued by the Plaintiffs” (Lf35), the crux of trial court’s ruling and Respondent’s pleadings, evidence, and argument at trial rests on the idea that a fence located between adjoining properties for a long period of time alone creates a claim of ownership and shifts the boundary line between the properties. That’s simply not the law and the facts herein do not support a claim by adverse possession.

Respondents’ claim was based on adverse possession and “[a] party who seeks to establish title to real property by adverse possession must prove that he possessed the land, and that his possession was 1) hostile and under a claim of right; 2) actual; 3) open and notorious; 4) exclusive; and 5) continuous for a period of ten years. Kitterman v. Simrall, 924 S.w.2d 872, 876 (Mo.App. W.D. 1996). The ten years of possession must be consecutive, although they need not immediately precede the date of the suit to quiet title. Id. An adverse possession claimant may tack his possession to that of his predecessors in title to establish the requisite ten year period. Heigert v. Londell Maor, Inc., 834 S.W.2d 858, 863 (Mo.App. E.D. 1992).” Conduff v. Stone, 968 S.W.2d 200, 203 (Mo.App. S.D. 1998) “The burden of proving each element by a preponderance of the evidence is on the plaintiff, and failure to prove even one element defeats

the claim. Brinner v. Huckaba, 957 S.W.2d 491, 494 (Mo.App. 1997).” Shoemaker v. Houchen, 994 S.W.2d 40, 44 (Mo.App. W.D. 1999). In addition, consideration must be give to the location, character, and reasonable use of the land. Eime v. Bradford, 185 S.W.3d 233, 236 (Mo.App. E.D.2006).

The trial court’s findings that Respondents’ “possessed, used and farmed the land north of the fence line”, (Lf35) was counter to Respondents’ own testimony that they did not use the land directly north of the old hedgerow and old fence line. (Tr103) There was no evidence offered at trial that Respondents “maintained and improved the property which constituted visible acts of ownership” as the trial court declared in its findings (Lf35) south of the true line of the Quarter Quarter dividing Appellants and Respondents’ property. (Tr149-150;ExbG)

After the old fence and old hedgerow was removed by Bush in the early to mid 1980’s along the eastern half of the dividing line, apparently the only indication or claim by Respondents or their predecessors in title was a mental claim despite the complete obliteration of the entire old hedgerow that had grown both north and south of the true line of the Quarter Quarter dividing Appellants and Respondents’ property. (Tr25,37,41,47,87&119) “A mere ‘mental enclosure’ of land is not enough for actual possession. Harris [v. Lynch] 940 S.W.2d [42] at 45[(Mo.App. E.D.1997)]. There must be continued acts of occupying, clearing, cultivating, pasturing, building fences or other improvements, and paying taxes. Id. (no adverse possession of strip of land between fence and boundary line, when owners merely let cattle have access to the land extended part of fence, and maintained fence; Edmonds v. Thurman, 808 S.W.2d 408, 411 (Mo.App. S.D.1991) (maintenance of old fence build by predecessor in title not enough to establish adverse possession).” Eime v. Bradford, 185 S.W.3d 233, 236-237, (Mo.App. E.D.2006). “[O]ccasional trespasses such as intermittent use of land for pasture or

gathering firewood do not establish adverse possession.” Eime v. Bradford, 185 S.W.3d 233, 237, (Mo.App. E.D.2006), citing Edmonds v. Thurman, 808 S.W.2d 408, 411 (Mo.App. S.D.1991).

Respondents and their predecessors in title were most empathetic in that there had never been a dispute between them and Appellants’ predecessors in title about the boundary line. (Tr36-37,45-47,&119) That is to say no one every talked about it. When Bush bulldozed the eastern half of the old hedgerow and old fence, not a word was mentioned. (Tr125-126) When Respondents cleared out the western half of the old hedgerow and old fence, not a sound was heard. (Tr136-137) There was never any contention between the adjoining landowners until 2006!

Since Respondents failed to show any evidence that there had every been some boundary dispute there claim to any portion south of the true line of the Quarter Quarter dividing Appellants and Respondents’ property never ripened to being adverse. “Acquiescence in the existence of a fence as a barrier, for convenience or for any reason other than as boundary *will not constitute an agreement that it is a boundary or establish it as the true line.* Aley v. Hacienda Farms, Inc. 584 S.W.2d 126, 128 (Mo.App. S.D.1979). Nor is the failure to dispute the location of a fence necessarily acquiescence in a boundary, because a fence may be placed for purposes other than fixing it as a boundary. Id. at 129. While the location of a fence may be a factor in determining the property line, it is not conclusive in the absence of other findings. Kelley [v. Prock], 825 S.W.2d [896,] at 900 [(Mo.App. S.D.1992)].” Conduff v. Stone, 968 S.W.2d 200, 204-205 (Mo.App. S.D. 1998) (emphasis added).

For Respondents claim to ever ripen into being adverse, an agreement must be demonstrated that between adjoining land owners whether by an express agreement or by

acquiescence in a fence as a boundary line. Conduff v. Stone, 968 S.W.2d 200, 204 (Mo.App. S.D. 1998). The act of the Respondents and Appellants' predecessors in title are just the opposite to acquiescence. Bush bulldozed down an eighth of a mile of hedgerow and old fence and nobody complained. (Tr47,125-126) Likewise, Respondents cleaned out an eighth of a mile of hedgerow and old fence and nobody complained. (Tr46,136-137,&142)

There was no evidence of any maintenance of the old fence, just evidence that in the year 2000—only 8-years before the trial of this matter—but only along the western half of the disputed boundary line, Respondents' had placed a barbed wire fence along where Respondents believed the old hedgerow and old fence had been. (Tr62,79,87,91-92,109) Contrary to the court's finding, the respondents testified that they never "used" the land immediately north of the old hedgerow and old fence! (Tr103)

The facts in this case are devoid of any evidence that Respondents' or their predecessors in title had occupied, used or otherwise exercised control over the hedgerow or even to the north of the tree line. For similar analysis, See: Shoemaker v. Houchen, 994 S.W.2d 40, 49 (Mo.App. W.D. 1999).

1) The only evidence of anyone for a period of ten years acting hostile and under a claim of right was Bush in the mid to early 1980s, when bulldozed down the old hedgerow and old fence along the true line of the Quarter Quarter dividing Appellants and Respondents' property. Respondents only bulldozed down the western half in 1998-1999, but certainly not ten years before filing the petition on June 22, 2006. (Lf05) Respondents constructed a fence along the western half in 2000. The trial was void of any testimony of anyone maintaining, fixing, or repairing, the old fence. Neither was there evidence of who even constructed the old fence Respondents rely so keenly on to assert their point that it now serves as the legal boundary line.

2) There was no evidence of anyone actually possessing the ground south of the true line of the Quarter Quarter dividing Appellants and Respondents' property, as it was grown up in a hedgerow a tree size width and covered in "horse weeds".

3) If there was no showing of actual possession, then there hardly could be any possession that was open and notorious;

4) Certainly the mental enclosure that Respondents assert over the eastern half of the disputed line may hardly be described as exclusive, when they did not do anything directly along the northern line of where they now express a claim by adverse possession.

5) Other than there having been an old hedgerow and an old fence along the old hedgerow dating back to 1958 and before, when we don't even know who built the fence or why, there are no elements shown to be a continuous activity for a period of ten years. That is to say except for Bush having in the early to mid 1980s, more than 10 years ago, obliterating the old hedgerow and old fence along the eastern half of the now disputed line. That act by Appellants' predecessor in title certainly would not be favorable to nor bolster the assertions of Respondents' adverse possession claim.

Therefore, the trial court erred in entering a judgment quieting title by declaring the south line of the NE1/4 of the SE1/4 section 21 to be the fence line between said Qtr-Qtr and Appellants' property south of it, when there was no substantial evidence to support such a ruling based on a claim of adverse possession.

II. THE TRIAL COURT ERRED IN AWARDING RESPONDENTS JUDGMENT FOR DAMAGES IN THE SUM OF \$75.00 FOR TRESPASS BECAUSE THERE WAS NO SUBSTANTIAL EVIDENCE TO SUPPORT SUCH AN AWARD, IN THAT THERE WAS NO EVIDENCE OF THE LOCATION OF THE POST BEING NORTH OF THE BOUNDARY LINE DIVIDING THE PARTIES' RESPECTIVE PROPERTY IF POINT RELIED ON I IS AFFIRMED; AND IF NOT, THEN THE TRIAL COURT ERRED IN AWARDING RESPONDENTS JUDGMENT FOR DAMAGES IN THE SUM OF \$75.00 FOR TRESPASS BECAUSE THE COURT DID NOT PROPERLY APPLY THE LAW IN THE MEASURE OF DAMAGES IN TRESPASS OF EITHER THE COST OF RESTORATION, OR THE DIFFERENCE IN VALUE OF PROPERTY BEFORE AND AFTER THE TRESPASS, WHICHEVER IS LESS, IN THAT THOUGH THERE WAS EVIDENCE OF THE COST OF RESTORATION, THERE WAS NO EVIDENCE OF THE FAIR MARKET VALUE OF THE REAL ESTATE BEFORE AND AFTER THE ALLEGED INJURY.

Standard of Review

“This court will affirm the judgment of the trial court unless no substantial evidence supports it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law. Murphey v. Carron, 536 S.W.2d 30, 32 (Mo.banc 1976).” Conduff v. Stone, 968 S.W.2d 200, 203 (Mo.App. S.D. 1998)

Discussion

Certainly, if the trial courts judgment is reversed, then there is no basis at all in awarding Respondents judgment for \$75.00; but, should this court affirm the trial courts ruling as to Respondents claim in chief, then there is the issue of damages awarded Respondents.

The trial court awarded Respondents' damages under a theory of trespass in the amount of \$75.00 based upon the testimony of Charles Watson. (Lf37&38)

Charles Watson, Respondent, alleged that Respondents were damaged by Appellants having pushed a post set by Respondent, and were damaged by the loss of cement and a brace in the amount of \$75.00. (Tr76) This post was set south of the true line of the Quarter Quarter dividing Appellants and Respondents' property. (ExbG)

The true measure of damages for a neighbors' bulldozing of property owners' property is the cost of restoration, or difference in value of property before and after bulldozing, whichever is less. Tong v. Kincaid, 47 S.W.3d 418, 421 (Mo.App. S.D. 2001).

Although there was evidence of the cost of the cement and a brace, thus thereby being Respondents' cost to restore their post to its former condition, there was no evidence of the fair market value of the real estate before and after the alleged injury.

Appellant does conversely cite Boyd v. Lollar, 985 S.W.2d 403, (Mo.App. W.D.1999), where in this court stated: "The general measure of damages in Missouri for the destruction of a fence is the actual value of the fence as it stood, before destruction. Beaty v. N.W. Electric Power Cooperative, 312 S.W.2d 369, 371 (Mo.App. 1958); Bolton v. Missouri-Kansas-Texas Railroad Company, 373 S.W.2d 169, 173 (Mo.App.1963). Additionally, this court has held that the cost of repairing a fence to a condition equal to the existing before the damage is sufficient. Bolton, 373 S.W.2d at 173." Id. at 405.

However, Respondents' claim for damages is a post, which though the location of which is does not appear in the transcript to be directly located, there certainly would be no claim if placed in the path, which Appellants consent to its being created, but the right of ingress and egress certainly does not bestow the right to enter and claim a path in fee.

Therefore, regardless of the theory of the damage amount, the trial court erred in awarding damages to Respondents in the sum of \$75.00.

III. THE TRIAL COURT ERRED IN AWARDING RESPONDENTS JUDGMENT FOR DAMAGES IN THE SUM OF \$90.00 IN EJECTMENT BECAUSE THE COURT IMPROPERLY APPLIED THE LAW OF DAMAGES, IN THAT THE PROPER MEASURE OF DAMAGES IS FOR THE RENTAL VALUE OF THE LAND, NOT THE VALUE OF THE CROPS AND THERE WAS NO SUBSTANTIAL EVIDENCE TO SUPPORT SUCH AN AWARD, IN THAT IF POINT RELIED ON I IS AFFIRMED THERE WAS NO EVIDENCE THAT APPELLANTS' TRESPASSED ON RESPONDENTS' LAND; AND IF NOT, THEN THE TRIAL COURT ERRED IN AWARDING RESPONDENTS JUDGMENT FOR DAMAGES IN THE SUM OF \$90.00 IN EJECTMENT BECAUSE THERE WAS NO SUBSTANTIAL EVIDENCE TO SUPPORT SUCH AN AWARD, IN THAT THERE WAS NO EVIDENCE PRESENTED OF THE RENTAL VALUE OF RESPONDENTS' LAND.

Standard of Review

“This court will affirm the judgment of the trial court unless no substantial evidence supports it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law. Murphey v. Carron, 536 S.W.2d 30, 32 (Mo.banc 1976).” Conduff v. Stone, 968 S.W.2d 200, 203 (Mo.App. S.D. 1998)

Discussion

Certainly, if the trial courts judgment is reversed, then there is no basis at all in awarding Respondents judgment for \$90.00; but, should this court affirm the trial courts ruling as to Respondents claim in chief, then there is the issue of damages awarded Respondents in ejectment.

The trial court awarded Respondents' damages under a theory of trespass in the amount of \$90.00 based upon the testimony of Charles Watson. (Lf37&39)

Despite the Edward Cleaver survey showing where the fence constructed by Respondent's along the west half of the disputed line actually is set south of the true line of the Quarter Quarter dividing Appellants and Respondents' property; (ExbG), Respondents' contended that Appellants planted soybeans 8 to 9 feet north of where the old fence and hedgerow had been. (Tr75) Thereby, Appellants felt they were damaged for 10 bushel of soybeans at the price of \$9.00 per bushel, total damage of \$90.00. (Tr77)

Even if Appellants' wrongfully grew crops on Respondents' land, Respondents were not entitled to recover the value of the crops from the Appellants, but were entitled to the rental value of the land for such period as they had been deprived of possession. Dent v. Dent, 166 S.W.2d 582, 587-588 (Mo.1942); and, §524.130 RSMo.

Under the facts here Respondents' are not entitled to recover the value of the crops. All Respondents are entitled to recover is the rental value for such period as they have been wrongfully deprived of possession. Appellants find no testimony at trial of the exact area for which Respondents allege they were deprived nor for how long they were deprived.

Therefore, the trial court erred in awarding damages to Respondents in the sum of \$90.00 in ejectment.

IV. THE TRIAL COURT ERRED IN DECLARING (1) THE WIDTH OF AN EASEMENT BY PRESCRIPTION TO BE 24 FEET, (2) NOT DECLARING THE USE, (3) AND NOT SPECIFICALLY STATING THAT ONLY ONE HALF OF THE WIDTH WAS A BURDEN ON APPELLANTS, BECAUSE THERE WAS NO SUBSTANTIAL EVIDENCE TO SUPPORT THE COURT'S DECLARATION OF THE WIDTH BASED ON A FENCE LYING ON RESPONDENTS' LAND AND NOT THE ACTUAL PATH USED, IN THAT THOUGH APPELLANTS CONSENTED TO A JUDGMENT CREATING AN EASEMENT BY PRESCRIPTION, THE EVIDENCE WAS ONLY SUFFICIENT TO DECLARE THE WIDTH OF THE EASEMENT TO BE 16 FEET, FOR AGRICULTURAL USES, AND THAT IT WAS CLEAR ONLY ONE-HALF OF THAT WIDTH WAS BURDENED ON APPELLANTS.

Standard of Review

“This court will affirm the judgment of the trial court unless no substantial evidence supports it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law. Murphey v. Carron, 536 S.W.2d 30, 32 (Mo.banc 1976).” Conduff v. Stone, 968 S.W.2d 200, 203 (Mo.App. S.D. 1998)

Discussion

This point is appealed, not so much on the law, but that factually, the trial court based it's finding of the width against the weight of the evidence.

At trial, Appellants conceded that Respondents or their predecessors in title have for such time crossed where Respondents' respective tracts touch at the northeast corner of Appellants' real estate. (Tr3) However, what is in dispute regarding such northeast corner is the width of

Respondents' path between their two 40-acre tracts and how much of that path is on Appellants' property and a neighboring landowner, who is not a party to this action, who is known as "Ross".

Respondents have placed a 16-foot red steel gate at their corner. (Tr67) There is also a 16-foot "panel" overlapping the gate by 8-feet. (Tr67) The total length of the gate and panel thereby combined is 24-feet. (Tr67-68) That 24-foot combined length is what Respondents' base their claim for the width of the easement (Tr77)

Respondents' gate and panel are not placed directly at the intersection of the Quarter Quarter lines, but are located somewhat southeast of the intersection of the lines at the northeast corner of Appellants property and are in the northwest corner of Respondents' own Southwest 40-acre tract. (ExbG) This is further factually shown by a review of the ASCS aerial photos, which indicate the gate appears to be on Respondents own property, thus certainly making the gate area wider than the path actually used by Respondents. (ExbH,I,J,K,L,M,N,O,P,Q,&R)

Further, there was conflicting testimony about the actual width of the path used. Though there was no conflicting testimony as to the only use of the path by Respondents or their predecessors in title, and that was for agricultural use and purposes only. (Tr18,35-36,&68-69) Daniel Mense, Appellants' son, testified that the path at the corner was 15 to 16 feet in width. (Tr157) Appellants' claim that the width of the path is 16-feet. (Tr195) Respondents' brother stated that width was large enough for a 14-foot wide tractor to cross. (Tr18) Respondents claim to have taken a 13 1/2 foot combine through the pass (Tr68-69) Respondents' mother, Jane Boulton testified that the width was about 15 to 18 feet. (Tr35-36) Respondents' brother testified that the path was 16 to 18 feet in width. (Tr9)

Whatever the ultimate width of the path, Respondents only claim that one-half (1/2) of the width is over Appellants' property (Tr105-106,&121) Respondents brother, Lester Snow,

was incorrect that all the path was on Appellants' property. (Tr32) To be exact, Respondents for themselves only claim that 12-feet of their alleged 24-foot path, between their two 40-acre tracts crosses at Appellants northeast corner. (Tr106)

Even if this court should agree with the trial court, the trial court erred in describing the easement as 24 feet and not specifying clearly that only 12 feet was burdened on Appellants, and more specifically describing the path.

For purposes of illustration only, and to assist the reader, the following Illustration #2 is inserted showing a representation of the path in relation to the intersection of the tracts of Appellants, Respondents, and "Ross's" land.

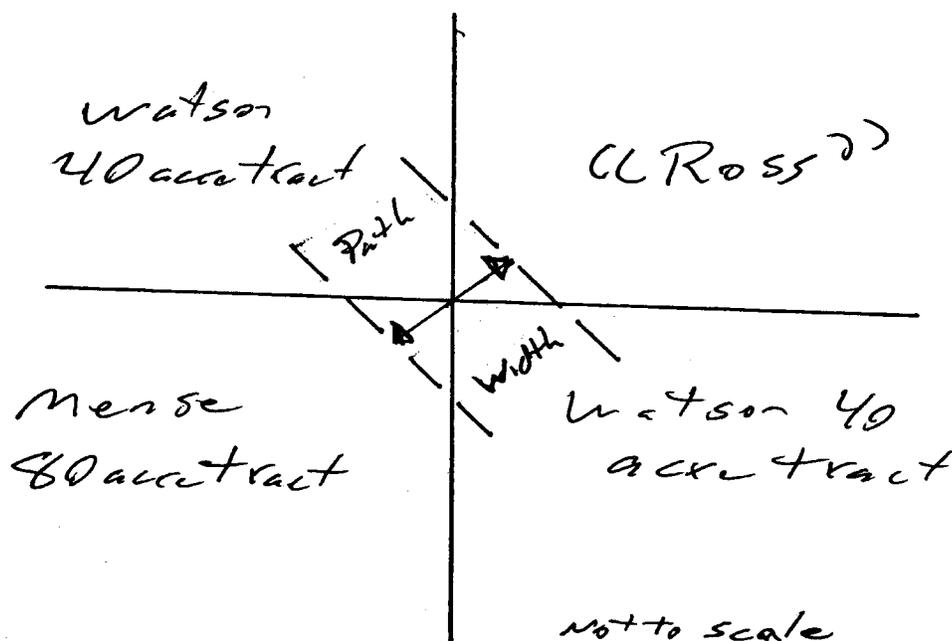


Illustration #2

Therefore, the trial court erred in declaring the width of an easement by prescription to be 24 feet when there was no substantial evidence to support such a width and the court failed to declare the use such easement may be put, when clearly it was only agricultural.

Appellants would offer, that the easement should be described at least as follows: “Beginning at the northeast corner of the southeast quarter of the southeast quarter of Section 21, for a point of beginning (POB), thence due west 8 feet along the quarter quarter section line, thence in a straight line to a point 8 feet due south of the POB on the line dividing Sections 21 and 22, thence due north along the section line to the POB, all in Township 59N, Range 13W, Macon County, Missouri; for agricultural uses only.”

Frankly, not being mathematicians, Appellants are under the impression that their own suggested description provides somewhat more than a combined 16-foot path between two touching corners, if measured at the angle of the intersection, half on Appellant and half on “Ross”.

V. THE TRIAL COURT ERRED IN ORDERING APPELLANTS TO CEASE AND DESIST IN INTERFERING WITH RESPONDENTS' USE AND ENJOYMENT OF THE PRESCRIPTIVE EASEMENT, BECAUSE THERE WAS NO EVIDENCE THAT APPELLANTS HAD INTERFERED WITH RESPONDENTS' COMING AND GOINGS, IN THAT RESPONDENT TESTIFIED THAT APPELLANTS DID NOT BLOCK THE PATH RESPONDENTS' USED.

Standard of Review

“This court will affirm the judgment of the trial court unless no substantial evidence supports it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law. Murphey v. Carron, 536 S.W.2d 30, 32 (Mo.banc 1976).” Conduff v. Stone, 968 S.W.2d 200, 203 (Mo.App. S.D. 1998)

Discussion

This point is appealed, not so much on the law, but that factually, the trial court made an error in making a finding that Appellants interfered with Respondents' coming and going along the conceded easement at Appellants northeast corner.

Respondent testified that, respecting the path between Respondents' 40-acre tracts, Appellants did not block the path in the northeast corner of their 80-acre tract. (Tr65,&157-158) There was no other testimony to suggest that Appellants had interfered with Respondents' use of the easement.

Therefore, the trial court erroneously found that Appellants interfered in anyway with Respondents' use of the path.

VI. THE TRIAL COURT ERRED IN NOT AWARDING JUDGMENT TO APPELLANTS BEING THE HOLDER IN FEE AND PERMANENTLY ENJOINING AND RESTRAINING RESPONDENTS FROM ASSERTING, CLAIMING, USING OR SETTING UP ANY CLAIM OF RIGHT, TITLE OR INTEREST IN APPELLANTS REAL ESTATE DESCRIBED AS ALL OF THE SE1/4 OF THE SE1/4 OF SEC. 21 AND THE NE1/4 OF THE NE1/4 OF SEC. 29, TWP. 59N, RNG. 13W, MACON COUNTY, MO., BECAUSE THERE WAS NO DISPUTE THAT APPELLANTS HAD TITLE TO THEIR REAL ESTATE, IN THAT RESPONDENTS DID NOT PROVE THEIR CLAIM IN ADVERSE POSSESSION TO ANY PORTION OF APPELLANTS DESCRIBED LAND.

Standard of Review

“This court will affirm the judgment of the trial court unless no substantial evidence supports it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law. Murphey v. Carron, 536 S.W.2d 30, 32 (Mo.banc 1976).” Conduff v. Stone, 968 S.W.2d 200, 203 (Mo.App. S.D. 1998)

Discussion

There was no dispute between the parties that Appellants, Robert and Carolyn Mense, are the owners of the following described 80 acre tract, to-wit:

All of the Southeast Quarter (SE1/4) of the Southeast Quarter (SE1/4) of Section Twenty-One (21) and the Northeast Quarter (NE1/4) of the Northeast Quarter (NE1/4) of Section Twenty-Eight (29), all in Township Fifty-Nine (59) North, Range Thirteen (13) West, Macon County Missouri. (Lf5-6&Tr3).

In the year 2000—only 8-years before the trial of this matter—but only along the western half of the disputed boundary line, Respondents' had placed a barbed wire fence along where Respondents believed the old hedgerow and old fence had been. (Tr62,79,87,91-92,109)

The fence constructed by Respondents and placed on the western half of the old hedgerow as shown on a July 13, 2006 survey prepared by Edward Cleaver ranged from 7.2 feet south of the true line of the Quarter Quarter to 8.4 feet south of the true line of the Quarter Quarter dividing Appellants and Respondents' property. (Tr149-150;ExbG)

Therefore, for all the reasons argued under Appellants Point I, including citation to authority therein, the trial court erred in not declaring the above described real estate free and clear of any claim of the Respondents and declaring that Respondents have no right, title or interest in that real property; and that Respondents ought to have been permanently enjoined and restrained from asserting, claiming, using or setting up any claim of right, title or interest in said real property.

VII. THE TRIAL COURT ERRED IN NOT MAKING MORE SPECIFIC LEGAL DESCRIPTIONS OF ITS AWARD TO RESPONDENTS OF THE FENCE LINE AND PATH BECAUSE SUCH NON-SPECIFICITY RESULTS IN A VOIDED JUDGMENT, IN THAT, IF POINT RELIED ON I IS DENIED, THE DESCRIPTION REQUIRES SURVEYING TO SPECIFICALLY ADVISE THE PRESENT PARTIES AND ANY SUCCESSORS OR ASSIGNS THE WHEREABOUTS OF THE BOUNDARY LINE WITH MORE SPECIFICITY THAN A MERE REFERENCE TO AN OLD FENCE THAT DOES NOT PRESENTLY EXIST ALONG THE EASTERN HALF OF THE DISPUTED LINE.

Standard of Review

“This court will affirm the judgment of the trial court unless no substantial evidence supports it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law. Murphey v. Carron, 536 S.W.2d 30, 32 (Mo.banc 1976).” Conduff v. Stone, 968 S.W.2d 200, 203 (Mo.App. S.D. 1998)

Discussion

Certainly, if the trial courts judgment is reversed, then this point is moot; but, should this court affirm the trial courts ruling as to Respondents claim in chief, then there is the issue of how the court described the land subject to the trial courts judgment.

The fence constructed by Respondents and placed on the western half of the old hedgerow as shown on a July 13, 2006 survey prepared by Edward Cleaver ranged from 7.2 feet south of the true line of the Quarter Quarter to 8.4 feet south of the true line of the Quarter Quarter dividing Appellants and Respondents’ property. (Tr149-150;ExbG)

The trial court made no attempt to describe with specificity where on the planet Respondents now are declared to own of Appellants land south of the true line of the Quarter Quarter dividing Appellants and Respondents' property.

The trial court merely states in its judgment: "The Court further adjudges and decrees the south line of said Northeast Quarter (NE1/4) of the Southeast Quarter (SE1/4) of Section Twenty-one (21) to be the fence line between said quarter-quarter and [Appellants'] property south of it. (Lf48)

The question put to this court is that if the surface of the land were ever obliterated by a tornado crossing where then is the line?

In Shoemaker v. Houchen, 994 S.W.2d 40, 44, (Ct.App. W.D.1999), the trial court whose decision was ultimately reversed, knew as much the need for a specific legal description and "ordered that a new survey be done to show the boundary line as per court instruction."

The trial court's description that the boundary of the fence line south of the quarter-quarter is not sufficient. Longbottom v. Rains, 632 S.W.2d 525, 527 (Mo.App. S.D.1982). "It is universally held that judgments should describe with reasonable certainty the land adjudicated therein, both in ejectment and actions to determine title. If there is any difference, it seems the land description should be more definite in the latter, since we are coming to regard ejectment as a possessory action only." Id. at 527.

Further point of the need for a more specific legal description is offered in Pauls v. County Com'n of Wayne County, 26 S.W.3d 597, 599-600 (Mo.App. S.D.2000); and Dleeman v. Kingsley, 88 S.W.3d 521, 526 (Mo.App. S.D.2002).

Therefore, the trial court erred in not making more specific legal descriptions of its award to Respondents of the fence line and path as required and thereby resulting in a void judgment.

VIII. THE TRIAL COURT ERRED IN ENTERING A JUDGMENT QUIETING TITLE BY DECLARING THE SOUTH LINE OF THE NE1/4 OF THE SE1/4 OF SECTION 21 TO BE THE FENCE LINE BETWEEN SAID QTR-QTR AND APPELLANTS' PROPERTY SOUTH OF IT, BECAUSE SUCH FINDING WAS OUTSIDE RESPONDENTS' PLEADINGS, IN THAT APPELLANTS CONSENTED TO JUDGMENT AS RESPONDENTS' SPECIFICALLY PLEAD IN THEIR PLEADING TO QUITE TITLE AND RESPONDENTS' FAILED TO PLEAD THAT ANY PORTION OF A FENCE WAS SOUTH OF THE SOUTH LINE OF THE NE1/4 OF THE SE1/4 OF SECTION 21.

Standard of Review

“This court will affirm the judgment of the trial court unless no substantial evidence supports it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law. Murphey v. Carron, 536 S.W.2d 30, 32 (Mo.banc 1976).” Conduff v. Stone, 968 S.W.2d 200, 203 (Mo.App. S.D. 1998)

Discussion

There is no dispute in this case that between the parties the Respondents, Charles and Carolyn Watson, are the owners of the following described two 40-acre tracts, to-wit:

All of the Northeast Quarter (NE1/4) of the Southeast Quarter (SE1/4) of Section Twenty-One (21) and all of the Southwest Quarter (SW1/4) of the Southwest Quarter SW1/4) of Section Twenty-Two (22), all in Township Fifty-Nine (59) North, Range Thirteen (13) West, Macon County, Missouri. (Lf5-6&Tr3).

In as much, Appellants consented to judgment to Count I of Respondents' petition based on a reading of Respondents' pleadings.

“Averments in a pleading should be given a liberal construction and accorded those favorable inferences fairly deducible from the facts stated. Pippin v. City of St. Louis, 823 S.W.2d 131, 133 (Mo. App. E.D.1992). To determine the cause of action plead, we read the petition in its entirety “from its four corners,” giving the language its plain and ordinary meaning, and interpret it as it fairly appears to have been intended by the pleader. Burns v. Black & Veatch Architects, Inc., 854 S.W.2d 450, 457 (Mo.App. W.D.1993)” Conduff v. Stone, 968 S.W.2d 200, 205 (Mo.App. S.D.1998).

Trial by implied consent of anything south of the true line of the Quarter Quarter dividing Appellants and Respondents’ respective tracts is not applicable, as “The implied consent rule, however, applies only when the evidence presented applies only on a new issue and is not relevant to issues already present in the case. Thompson v Thompson, 835 S.W.2d 560, 573 (Mo.App. WD.1992).” Conduff v. Stone, 968 S.W.2d 200, 205 (Mo.App. S.D.1998).

Appellants do not dispute that Respondents are the fee owners of the land described in paragraph 1 of Respondents’ petition (Lf05), as Respondents reference in Count I of their petition Quiet Title (Lf06), which describes the land north of the true line of the Quarter Quarter dividing Appellants and Respondents’ respective properties. There is no mention in the numbered paragraphs of Respondents’ Count I to anything other than that described in paragraph 1 and therefore, the court erred in awarding Respondents anything south of the true line of the Quarter Quarter dividing Appellants and Respondents’ respective properties as surveyed by Edward Cleaver (ExbG).

Therefore, the trial court erred in entering a judgment quieting title by declaring the south line of the NE1/4 of the SE1/4 of Section 21 to be the fence line between said Qtr-Qtr and Appellants’ property south of it, when such finding was outside Respondents’ pleadings.

IX. THE TRIAL COURT ERRED IN NOT AWARDING APPELLANTS' JUDGMENT FOR DAMAGES IN THE SUM OF \$250.00 FROM RESPONDENTS IN TRESPASS BECAUSE THERE WAS EVIDENCE TO SUPPORT SUCH A JUDGMENT, IN THAT RESPONDENT ADMITTED TO PLACING A POST SOUTH OF THE SOUTH LINE OF THE NE1/4 OF THE SE1/4 OF SECTION 21, WHICH WOULD BE ON APPELLANTS' LAND AND THE MEASURE OF DAMAGES IS THE \$250.00 FOR THE COST TO REMOVE THE POST WRONGFULLY PLACED BY RESPONDENTS' ON APPELLANTS' LAND.

Standard of Review

“This court will affirm the judgment of the trial court unless no substantial evidence supports it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law. Murphey v. Carron, 536 S.W.2d 30, 32 (Mo.banc 1976).” Conduff v. Stone, 968 S.W.2d 200, 203 (Mo.App. S.D. 1998)

Discussion

In 2006, Respondents had set a corner post at the northeast corner of Appellants' property where Respondents thought the line was in respect to where the old hedgerow and old fence Respondents allege had been located therein such old hedgerow. (Tr55,167-168;Exb6) This post was set south of the true line of the Quarter Quarter dividing Appellants and Respondents' property. (ExbG)

It took Appellants 2-3 hours to move the post over, including time to get the tractor in position. (Tr172) Appellants claim the cost to operate their tractor for 2-3 hours was \$250.00.

If conversely, Boyd v. Lollar, 985 S.W.2d 403, 405 (Mo.App. W.D.1999), sets “[t]he general measure of damages in Missouri for the destruction of a fence is the actual value of the

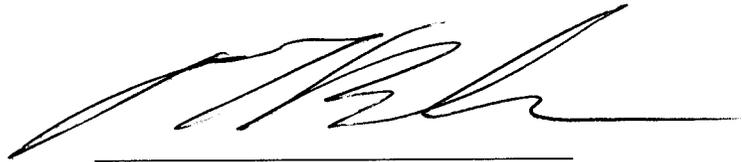
fence as it stood, before destruction”: Then equally the cost to remove a fence or post ought to be that same measure of damages.

Therefore, the trial court erred in not awarding damages to Appellants in the sum of \$250.00.

CONCLUSION

Appellants contends that, based on the foregoing points relied on, the trial court’s judgment should be reversed and judgment entered as provided herein Points 1-9, or, in the alternative, if necessary, that the cause be remanded for further proceedings.

Respectfully submitted,



R. Timothy Bickhaus, MBN 41544
P.O. Box 451,
Macon, MO 63552-0451
Ph. 660-385-3854
Fax: 660-385-2769
Email: bickhaus@istmacon.net
ATTORNEY FOR APPELLANTS

CERTIFICATE OF COMPLIANCE AND SERVICE

I, R. Timothy Bickhaus, hereby certify as follows:

- A. That the attached AMENDED brief complies with the limitation contained in Supreme Court Rule 84.06 (b) and (c) of the Court and contained 10,542 words, excluding the cover, and this certification, as determined by Microsoft “WORD” software; and,
- B. That the enclosed, simultaneously filed with the hard copies of this AMENDED brief, CD-RW, IBM-PC-compatible 700 MB, disk is properly labeled; the enclosed Disk is in Microsoft “WORD” format; has been scanned for viruses and that it is virus-free; and,
- C. That two (2) true and correct copies of the attached AMENDED brief, and one (1) labeled CD-RW, IBM-PC-compatible 700 MB, disk containing a copy of this AMENDED brief, were mailed, postage prepaid this 26th day of July, 2008 to John W. Briscoe, P.O. Box 446, New London, MO 63459, Attorney for Respondents.



R. Timothy Bickhaus, MBN 41544
P.O. Box 451,
Macon, MO 63552-0451
Ph. 660-385-3854
Fax: 660-385-2769
Email: bickhaus@istmacon.net
ATTORNEY FOR APPELLANTS

APPELLANTS'
APPENDIX

TABLE OF CONTENTS
INDEX TO APPENDIX

	PAGE
COPY OF 12/12/2007 JUDGMENT (Original Certified Copy in Legal File)	A01-A07
COPY OF Mo. Rev. Stat. Section 524.130	A08

IN THE CIRCUIT COURT OF MACON COUNTY, MISSOURI
AT MACON, MISSOURI

CHARLES ROBERT WATSON and)
CAROLYN WATSON, husband and wife.)
Plaintiffs,)

vs.) Cause No. 06MA-CC00037

ROBERT E. MENSE and)
CAROLYN K. MENSE, husband and wife,)
Defendants.)

MACON COUNTY CIRCUIT COURT DIV. 1
DEC 12 2007
KIMBERLY J. MARCH
Circuit Clerk & Ex-Officio Recorder

JUDGMENT

The parties appeared in person and with counsel for trial of this cause on October 29, 2007. The cause was tried to the Court and taken under advisement.

Prior to the introduction of evidence, the Defendants consented to judgment on Count I of Plaintiffs' petition to quiet title and on Count III of Plaintiffs' petition for a prescriptive easement with the stipulation that the Court determine only the width of the easement roadway between two forty acre tracts owned by Plaintiffs.

Evidence was adduced by both parties and the Court finds the essential facts to be as follows: Plaintiffs own a forty acre tract of land legally described in their petition and acquired by them in 1989 from Jane Bolton, the mother of Plaintiff Charles Watson. Mrs. Bolton testified that she and her husband acquired the land in 1958 and that she owned it individually after her husband's death and until she conveyed it to Plaintiffs. She also testified that there was never any dispute as to the land's boundaries as long as she was an owner. Defendants acquired a forty acre tract south of Plaintiffs'

tract in 2006 from Frank Bush. Defendants' predecessors in title were Frank Bush and Jim Nelson who owned Defendants' tract for more than 30 years prior to Defendants' acquisition of it. Both Mr. Bush and Mr. Nelson testified that the south line of Plaintiffs' tract and the north line of Defendants' tract had always been a fence line in a hedgerow between the two properties. Mr. Bush removed the east half of the fence and cleaned out the hedgerow on his end of the fence line in the early 1980's and did not put the fence back in on the east half. Plaintiff Charles Watson testified that there was a "hump" along the east end of the line where the hedgerow and fence had been and that Frank Bush never crossed it to the north. Frank Bush verified this in his testimony. Plaintiffs and their predecessors in title farmed up to the line from the north and never crossed south of it. Plaintiff Charles Watson testified that he cleaned up the hedgerow on the west end of the line in 2000 leaving only a small part of the hedgerow. He put the fence back in on the west half of the line on the same line as the fence that had been there since at least 1958. Plaintiffs' and their predecessors in title farmed up to the line of the fence on the west and the line of the fence on the east both before and after the east end of the fence was removed for a continuous period of over 45 years. This is verified by aerial photos and the testimony of all witnesses and is not contradicted by any evidence. No owner of the tract to the south acquired by Defendants in 2006 ever attempted to farm north of the line from 1958 to 2006. In 2006 and 2007 the Defendants planted crops north of the east one-half of the fence line or the line where the fence had been removed by Mr. Bush. The Defendants relied upon a survey they had done by county surveyor Edward Cleaver dated July 13, 2006 which purportedly established the south line of Plaintiffs' tract 7 or 8 feet north of the fence line that existed for over 45 years. Plaintiff Charles Watson set a

post at the east end of the fence line on two occasions after Defendants acquired the tract to the south and Defendant Robert Mense admittedly pushed out the post both times. Defendant Mense made no move to remove Plaintiffs' fence on the West half of the fence line.

The Court also finds from the testimony of Lester Snow, Jane Bolton, Charles Watson and Danny Mense that the width of the roadway to which Plaintiffs have a prescriptive easement by consent to judgment is from 15 feet to 24 feet wide. Estimates varied that much. Pictures of the roadway show it to be 24 feet wide rather than less and a picture in evidence (Plaintiffs' Ex. 13) shows the width to be equal to a 16 foot gate plus one-half of a 16 foot cattle panel or 24 feet.

Based upon the above facts and the pleadings, other than the width of the prescriptive easement, all other issues turn on whether the south line of Plaintiffs' tract is established by adverse possession at the fence line in existence for over 45 years or is established by the Defendants' survey (Defendants' Ex. G) 7 to 8 feet north of the fence line. Boundary by acquiescence was not pleaded or argued by the Plaintiffs. Plaintiffs had the burden to prove by a preponderance of the evidence the elements of adverse possession. Those elements are possession which is (1) hostile, (2) actual, (3) open and notorious, (4) exclusive and (5) continuous for a ten year period prior to the commencement of the action. The facts found above establish elements (2) through (5) by a clear preponderance of the evidence. Plaintiffs and their predecessors in title possessed, used and farmed the land north of the fence line. They maintained and improved the property which constituted visible acts of ownership. They possessed the property for themselves and to the exclusion of all others for a period of more than 45

years. The first element is also satisfied by a preponderance of the evidence. Plaintiffs and their predecessors in title possessed the land to the fence line as their own and not in subservience to others. When Frank Bush removed his half of the fence on the line (the east half) in the early 1980's, Plaintiffs continued to farm to the fence on the west and the old fence line extended on the east and Mr. Bush farmed south of that line and did not go north of it. When Plaintiff Charles Watson removed the west end of the fence and cleaned the hogcrow on his end of the fence in 2000, he put the fence back on the line that the fence had been on since at least 1958 and continued to farm to the line. No owner of the Defendants' tract ever moved against the fence, tried to remove it or farm north of it. The south line of Plaintiffs' tract was there by hostile, actual, open and notorious, exclusive and continuous possession of all of the land north of it and the fence line is the south line of the Northeast Quarter (NE¼) of the Southeast Quarter (SE¼) of Section Twenty-one (21), Township Fifty-nine (59) North, Range Thirteen (13) West, Macon County, Missouri.

The Defendants' Ex. G, being a survey by Edward Cleaver, R.L.S., dated July 13, 2006, which purported to establish the south line of Plaintiffs' property 7 to 8 feet north of the line recognized by all abutting property owners for over 45 years is rebutted and disapproved by competent and substantial evidence and is of no effect. Plaintiffs' title to the above described real estate should be quieted by judgment in favor of Plaintiffs with equitable title to the real estate held to have emanated from the United States Government and the real estate owned by them in fee simple absolute by general warranty deed to the exclusion of Defendants and all others. Pursuant to the above

findings the south line of said real estate is the fence line and Plaintiffs are entitled to judgment on Count I of their petition.

The Defendants have trespassed on Plaintiffs' land by planting crops on that land in 2006 and 2007 and by tearing down a post set twice by Plaintiff Charles Watson to mark the south line of Plaintiffs' property while engaging in the trespass. Plaintiffs are entitled to trespass damages in the amount of \$75.00 based upon the testimony of Plaintiff Charles Watson on Count II of Plaintiffs' petition.

The Plaintiffs are entitled to a prescriptive easement based upon the consent of the Defendants and the facts found herein and said easement should be over an existing roadway and 24 feet wide. The Defendants should be ordered to cease and desist from interference with Plaintiffs' prescriptive easement to travel back and forth between Plaintiffs' tracts of real estate, all pursuant to Count III of Plaintiffs' petition.

Plaintiffs have the right to possession of all of the Northeast Quarter (NE ¼) of the Southeast Quarter (SE¼) of Section Twenty-one (21), Township Fifty-nine (59) North, Range Thirteen (13) West, Macon County, Missouri to the exclusion of the Defendants, Plaintiffs' title found to be in fee simple absolute. Defendants have taken possession of a strip of the above described real estate along and north of the east half of the south line of said real estate and such possession is unlawful and under no valid legal right or claim. Defendants should be ejected from Plaintiffs' real estate lying North of the Plaintiffs' south property line which has been found to be the fence line on the west extended to the east. Plaintiffs should have judgment against the Defendants for crops taken from Defendants' land in the sum of \$90.00 pursuant to Count IV of Plaintiffs' petition.

The Court finds all issues on Counts I and II of Defendants' counter-petition in favor of Plaintiffs and against Defendants.

It is ordered, adjudged and decreed as follows.

1. That Plaintiffs have judgment against the Defendants on Count I of Plaintiffs' petition and decrees Plaintiffs' title to the following described real estate to be an estate in fee simple absolute to the exclusion of the Defendants. Said real estate is legally described as follows:

All of the Northeast Quarter (NE $\frac{1}{4}$) of the Southeast Quarter (SE $\frac{1}{4}$) of Section Twenty-one (21) and all of the Southwest Quarter (SW $\frac{1}{4}$) of the Southwest Quarter (SW $\frac{1}{4}$) of Section Twenty-two (22), all in Township Fifty-nine (59) North, Range Thirteen (13) West, Macon County, Missouri.

The Court further adjudges and decrees the south line of said Northeast Quarter (NE $\frac{1}{4}$) of the Southeast Quarter (SE $\frac{1}{4}$) of Section Twenty-one (21) to be the fence line between said quarter-quarter and Defendants' property south of it.

2. That Plaintiffs have judgment against Defendants on Count II of Plaintiffs' petition for trespass and Plaintiffs are awarded damages in the sum of \$75.00.

3. That Plaintiffs have judgment against Defendants on Count III of Plaintiffs' petition establishing a prescriptive easement over a private roadway 24 feet in width to pass back and forth between the Southwest Quarter (SW $\frac{1}{4}$) of the Southwest Quarter (SW $\frac{1}{4}$) of Section Twenty-two (22) and the Northeast Quarter (NE $\frac{1}{4}$) of the Southeast Quarter (SE $\frac{1}{4}$) of Section Twenty-one (21), Township Fifty-nine (59) North, Range Thirteen (13) West, Macon County, Missouri. The Defendants are ordered to cease and desist from interference with Plaintiffs' use and enjoyment of the prescriptive easement awarded to them.

4. That Plaintiffs have judgment against Defendants on Count IV of Plaintiffs' petition and Defendants are ejected from the Northeast Quarter (NE $\frac{1}{4}$) of the Southeast Quarter (SE $\frac{1}{4}$) of Section Twenty-one (21), Township Fifty-nine (59) North, Range Thirteen (13) West, Macon County, Missouri lying north of the south fence line of said tract extended owned by Plaintiffs as adjudged herein and Plaintiffs are awarded damages in the sum of \$90.00 in ejection in accordance with findings made herein.

5. That Plaintiffs have judgment against the Defendants on Counts I and II of Defendants counter-petition against Plaintiffs.

Costs of this action are taxed to the Defendants.

Gary Wallace
Judge

Dated. 12/11/07

V.A.M.S. 524.130

C

**VERNON'S ANNOTATED MISSOURI STATUTES
TITLE XXXVI. STATUTORY ACTIONS AND TORTS
CHAPTER 524. EJECTMENT**

→ 524.130. Jury shall assess value of rents and profits, when

If the plaintiff prevail in his action, and it appear in evidence that the right of the plaintiff to the possession is unexpired, the jury shall find the monthly value of the rents and profits.

Statutes are current with emergency legislation approved through June 24, 2008, of the 2008 Second Regular Session of the 94th General Assembly.
Constitution is current through the November 7, 2006 General Election.

© 2008 Thomson Reuters/West

END OF DOCUMENT