

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

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MISSOURI COURT OF APPEALS
WESTERN DISTRICT

CHARLES R. WATSON and)
CAROLYN WATSON, husband and wife,)

Respondents,)

VS.)

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

Appellants.)

Case Number: WD 69255 **89936**

FILED

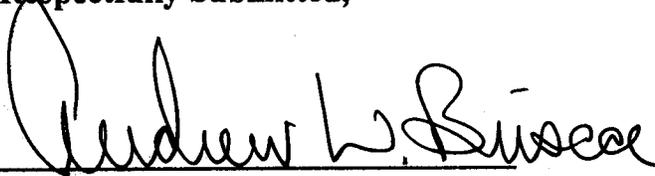
APR 3 2009

Thomas F. Simon
CLERK, SUPREME COURT

Appeal from the Circuit Court of Macon County, Missouri
Forty-First Judicial Circuit
The Honorable Gary G. Wallace, Judge

RESPONDENTS' BRIEF

Respectfully Submitted,



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ATTORNEY FOR RESPONDENTS

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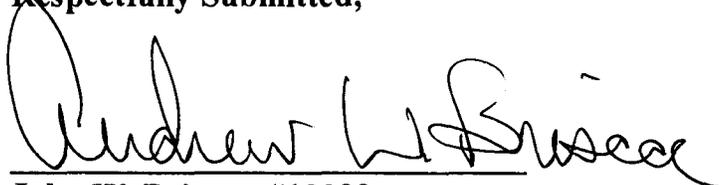
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JURISDICTIONAL STATEMENT

This is an appeal from a final judgment entered on December 12, 2007, in the Circuit Court of Macon County, Missouri.

This case does not fall within the exclusive jurisdiction of the Supreme Court of Missouri, pursuant to Article V, Section 3, of the Constitution of Missouri. Therefore, this case is within the jurisdiction of the Missouri Court of Appeals. This case arose in Macon County, Missouri. Pursuant to Section 477.070, Revised Statutes of Missouri, venue lies within the Western District of Missouri.

STATEMENT OF FACTS

Respondents, and their predecessors in title, acquired title to two diagonally adjacent 40 acre tracts of land described as follows:

All of the Northeast Quarter (NE-1/4) of the Southeast Quarter (SE-1/4) of Section Twenty-One (21) and all of the Southwest Quarter (SW-1/4) of the Southwest Quarter (SW-1/4) of Section Twenty-Two (22), all in Township Fifty-Nine (59) North, Range Thirteen (13) West, Macon County, Missouri. (L.F. 5 - 6, T.R. 3)

Respondents, and their predecessors in title, having continuously been in the open, notorious, adverse, hostile, and exclusive possession of the parcels under a claim of right, have paid taxes on the property in question for over 45 years. L.F. 35 - 36, T.R. 34. Both parcels are utilized for agricultural uses. Never, throughout the chain of title, had a boundary dispute arisen. T.R. 34, 36 - 37, 46 - 47, 119. Adjacent landowners had cleared portions of a hedgerow dividing the property, and erected fencing commensurate with the hedgerow. T.R. 22, 39 - 40, 46, 87, 124 - 125. But, there was not a dispute as to where the boundary line was. All prior parties acknowledged the hedgerow as the boundary line between the properties, regardless of whether it was partially cleared or fenced. T.R. 47.

Since Respondents, and their predecessors in title, had diagonally adjacent tracts, they would cross from one parcel to another, using a private roadway. T.R. 67 - 68. Such use has been continuous and uninterrupted for more than 17 years. L.F. 7. The use involved utilizing a small portion of land abutting the diagonal parcels. Never, throughout the chain of title, had a dispute arisen about Respondents, and their predecessors in title,

using abutting land as a means of ingress and egress to their diagonally adjacent parcels.

L.F. 34, 36 - 37, 46 - 47, 119.

In January, 2006, Appellants acquired title to an 80 acre tract situated South and West of Respondent's two tracts, and described as follows:

All of the Southeast Quarter (SE-1/4) of the Southeast Quarter (SE-1/4) of Section Twenty-One (21) and the Northeast Quarter (NE-1/4) of the Northeast Quarter (NE-1/4) of Section Twenty-Eight (28), all in Township Fifty-Nine (59) North, Range Thirteen (13) West, Macon County, Missouri. (L.F. 5 - 6, T.R. 3, 45)

Appellants, after acquiring title, cleared some brush from the hedgerow and began planting crops on the Northern edge of their alleged parcel. T.R. 167 - 168, 176. Respondents set a corner post and brace to demarcate the acknowledged boundary line. T.R. 55, 167 - 168. The post was in conformity with the hedgerow that had been accepted as the dividing line between the parcels for decades. Appellants promptly removed the post and brace. T.R. 59, 76, 158, 172. After Respondents replaced the post and brace, Appellants again removed it. Further, Appellants attempted to block Respondent's means of ingress and egress between their parcels by placing a tractor in between the diagonally adjacent parcels. T.R. 64, 65. Thereafter, Appellants had a survey prepared purporting to establish the Northern boundary line between Appellant and Respondent roughly 7 - 8 feet North of the acknowledged, and accepted, hedgerow line. Appellants then planted crops according to the survey results, effectively planting their crop on land owned by Respondents.

The means of ingress and egress between the two diagonally adjacent parcels became a point of contention after Appellants sought to prevent Respondents from accessing their land. T.R. 64 - 65, 157 - 158. Respondents testified at trial that they use the property intersection for an assortment of tasks including, but not limited to: transporting farm machinery, herding livestock, and driving. T.R. 18, 55 - 56, 68 - 69. Appellants contended that Respondents' right should be restricted and limited. L.F. 31 - 32, T.R. 195. Such a limitation would preclude certain items of farm machinery, and a limited number of livestock, from utilizing the road.

A trial was held on the matter on October 29, 2007. L.F. 3. Judgment was entered for Respondents on all counts on December 12, 2007. L.F. 33 - 39. This appeal follows. L.F. 40.

POINTS RELIED ON

- I. THE TRIAL COURT DID NOT ERR IN ENTERING A JUDGMENT QUIETING TITLE BY DECLARING THE SOUTH LINE OF THE NORTHEAST QUARTER (NE-1/4) OF THE SOUTHEAST QUARTER (SE-1/4) OF SECTION TWENTY-ONE (21) TO BE THE FENCE LINE BETWEEN SAID QUARTER QUARTER AND APPELLANTS' PROPERTY SOUTH OF IT, BECAUSE THERE WAS 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 RIPENED TO BEING ADVERSE IN THAT RESPONDENTS' CLAIM WAS HOSTILE AND UNDER A CLAIM OF RIGHT; RESPONDENTS' CLAIM WAS ACTUAL; RESPONDENTS' CLAIM WAS OPEN AND NOTORIOUS; RESPONDENTS' CLAIM WAS EXCLUSIVE; AND RESPONDENTS' CLAIM WAS CONTINUOUS FOR A PERIOD OF TEN YEARS WITHOUT INTERRUPTION.

II. THE TRIAL COURT DID NOT ERR IN AWARDING RESPONDENTS JUDGMENT FOR DAMAGES IN THE SUM OF \$75.00 FOR TRESPASS BECAUSE THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT SUCH AN AWARD, IN THAT THERE WAS EVIDENCE OF THE LOCATION OF THE POST BEING NORTH OF THE BOUNDARY LINE DIVIDING THE PARTIES' RESPECTIVE PROPERTY IF POINT I IS DENIED; AND IF NOT, THEN THE TRIAL COURT DID NOT ERR IN AWARDING RESPONDENTS JUDGMENT FOR DAMAGES IN THE SUM OF \$75.00 FOR TRESPASS BECAUSE THE COURT PROPERLY APPLIED 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 FAIR MARKET VALUE OF THE REAL ESTATE BEFORE AND AFTER THE ALLEGED INJURY.

III. THE TRIAL COURT DID NOT ERR IN AWARDING RESPONDENTS JUDGMENT FOR DAMAGES IN THE SUM OF \$90.00 IN EJECTMENT BECAUSE THE COURT PROPERLY APPLIED THE LAW OF DAMAGES, IN THAT THE PROPER MEASURE OF DAMAGES IS FOR RENTAL VALUE OF THE LAND, NOT THE VALUE OF THE CROPS

AND THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT SUCH AN AWARD, IN THAT IF POINT RELIED ON I IS DENIED THERE WAS EVIDENCE THAT APPELLANTS TRESPASSED ON RESPONDENTS' LAND; AND IF NOT, THEN THE TRIAL COURT DID NOT ERR IN AWARDING RESPONDENTS JUDGMENT FOR DAMAGES IN THE SUM OF \$90.00 IN EJECTMENT BECAUSE THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT SUCH AN AWARD, IN THAT THERE WAS EVIDENCE PRESENTED OF THE RENTAL VALUE OF RESPONDENTS' LAND.

IV. THE TRIAL COURT DID NOT ERR IN DECLARING (1) THE WIDTH OF AN EASEMENT BY PRESCRIPTION TO BE 24 FEET, (2) DECLARING THE USE, (3) AND SPECIFICALLY STATING THAT ONLY ONE HALF OF THE WIDTH WAS A BURDEN ON APPELLANTS, BECAUSE THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE COURT'S DECLARATION OF THE WIDTH BASED ON A FENCE LYING ON RESPONDENTS' LAND AND THE ACTUAL PATH USED, IN THAT THOUGH APPELLANTS CONSENTED TO A JUDGMENT CREATING AN EASEMENT BY PRESCRIPTION, THE EVIDENCE WAS SUFFICIENT TO DECLARE THE WIDTH OF THE EASEMENT TO BE 24 FEET.

- V. THE TRIAL COURT DID NOT ERR IN ORDERING APPELLANTS TO CEASE AND DESIST IN INTERFERING WITH RESPONDENTS' USE AND ENJOYMENT OF THE PRESCRIPTIVE EASEMENT, BECAUSE THERE WAS EVIDENCE THAT APPELLANTS HAD INTERFERED WITH RESPONDENTS' COMING AND GOINGS, IN THAT RESPONDENT TESTIFIED THAT APPELLANTS DID BLOCK THE PATH RESPONDENTS' USED.
- VI. THE TRIAL COURT DID NOT ERR IN DENYING JUDGMENT TO APPELLANTS AS 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 SOUTHEAST QUARTER (SE-1/4) OF THE SOUTHEAST QUARTER (SE-1/4) OF SECTION TWENTY-ONE (21) AND THE NORTHEAST QUARTER (NE-1/4) OF THE NORTHEAST QUARTER (NE-1/4) OF SECTION TWENTY-NINE (29), TOWNSHIP FIFTY-NINE (59) NORTH, RANGE THIRTEEN (13) WEST, MACON COUNTY, MISSOURI, BECAUSE THERE WAS A DISPUTE THAT APPELLANTS HAD TITLE TO THEIR REAL ESTATE, IN THAT RESPONDENTS PROVED THEIR CLAIM IN ADVERSE POSSESSION TO THAT

NORTHERN PORTION OF APPELLANTS' LAND BORDERING RESPONDENTS' LAND.

VII. THE TRIAL COURT DID NOT ERR IN SPECIFYING THE LEGAL DESCRIPTION OF ITS AWARD TO RESPONDENTS AS THE FENCE LINE AND PATH ON THE NORTHERN PORTION OF APPELLANTS' LAND, IN THAT, IF POINT RELIED ON I IS DENIED, THE DESCRIPTION DOES NOT REQUIRE SURVEYING TO SPECIFICALLY ADVISE THE PRESENT PARTIES AND ANY SUCCESSORS OR ASSIGNEES THE WHEREABOUTS OF THE BOUNDARY LINE.

VIII. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANTS JUDGMENT QUIETING TITLE BY DECLARING THE SOUTH LINE OF THE NORTHEAST QUARTER (NE-1/4) OF THE SOUTHEAST QUARTER (SE-1/4) OF SECTION TWENTY-ONE (21) TO BE THE FENCE LINE BETWEEN SAID QUARTER QUARTER AND APPELLANTS' PROPERTY SOUTH OF IT, BECAUSE SUCH A FINDING WAS WITHIN RESPONDENTS' PLEADINGS, IN THAT APPELLANTS CONSENTED TO JUDGMENT AS RESPONDENTS' PLEAD THAT ANY PORTION OF A FENCE WAS SOUTH OF THE SOUTH LINE OF THE NORTHEAST QUARTER (NE-1/4) OF THE SOUTHEAST QUARTER (SE-1/4) OF SECTION TWENTY-ONE (21).

IX. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANTS' JUDGMENT FOR DAMAGES IN THE SUM OF \$250.00 FROM RESPONDENTS IN TRESPASS BECAUSE THERE WAS NO EVIDENCE TO SUPPORT SUCH A JUDGMENT, IN THAT RESPONDENT ADMITTED TO PLACING A POST ON HIS OWN PROPERTY.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN ENTERING A JUDGMENT QUIETING TITLE BY DECLARING THE SOUTH LINE OF THE NORTHEAST QUARTER (NE-1/4) OF THE SOUTHEAST QUARTER (SE-1/4) OF SECTION TWENTY-ONE (21) TO BE THE FENCE LINE BETWEEN SAID QUARTER QUARTER AND APPELLANTS' PROPERTY SOUTH OF IT, BECAUSE THERE WAS 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 RIPENED TO BEING ADVERSE IN THAT RESPONDENTS' CLAIM WAS HOSTILE AND UNDER A CLAIM OF RIGHT; RESPONDENTS' CLAIM WAS ACTUAL; RESPONDENTS' CLAIM WAS OPEN AND NOTORIOUS; RESPONDENTS' CLAIM WAS EXCLUSIVE; AND RESPONDENTS' CLAIM WAS CONTINUOUS FOR A PERIOD OF TEN YEARS WITHOUT INTERRUPTION.

Standard of Review

In a bench-tryed case, the judgment will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976). In a bench-tryed matter, the Appellate Court accepts as true the evidence and reasonable inferences therefrom in favor of the prevailing party and disregards any contrary evidence. Gilmartin Brothers, Inc. v. Kern, 916 S.W.2d 324, 331 (Mo. App. E.D. 1995). The Appellate Court will set aside the trial court's decision only when it is firmly convinced that the judgment is wrong. Waldroup v. Dravenstott, 972 S.W.2d 364, 368 (Mo. App. W.D. 1998). A judgment will be affirmed if it is correct under any reasonable theory supported by the evidence. Kleeman v. Kingsley, 88 S.W.3d 521, 522 (Mo. App. S.D. 2002)(internal citations omitted).

Discussion

Respondents, and their predecessors in title, have had possession of the diagonally adjacent parcels in question since 1958. L.F. 35 - 36, T.R.34. During this time, Respondents, and their predecessors in title, acknowledged the hedgerow as the boundary line. T.R. 47. Appellants' predecessors in title similarly acknowledged the hedgerow as the proper boundary line. T.R. 47. This acknowledgment continued after a portion of the hedgerow was removed. T.R. 46, 47. Consequently, the portion of the land immediately North of the hedgerow was adversely possessed by Respondents' predecessors in title. The

trial court found that all of the elements of adverse possession for the disputed portion of land had been met by Respondents. L.F. 35 - 36. Respondents, and their predecessors in title, used and farmed the land North of hedgerow. L.F. 35. Respondents, and their predecessors in title, improved the property such that it constituted visible acts of ownership. L.F. 35. Respondents, and their predecessors in title, owned and possessed the property exclusively for more than 46 years. L.F. 35, 36. Respondents, and their predecessors in title, acknowledged the hedgerow as the rightful boundary between the tracts. L.F. 36. After a portion of the hedgerow was removed and a fence erected in its place, Respondents, and their predecessors in title, continued to use and respect the hedgerow line as the boundary. L.F. 36. Similarly, Appellant's predecessors in title used and respected the hedgerow line (and the subsequent fence erected in its stead) as the proper boundary between the parcels. T.R. 47.

Adverse possession presents mixed questions of law and fact and the principles or elements to prove such a case are considered with the view that every property is unique. Kitterman v. Simrall, 924 S.W.2d 872, 876 (Mo. App. W.D. 1996). Once adverse possession is once shown, it is presumed, in the absence of evidence to the contrary, to have continued in the possessor. Williams v. Frymire, 186 S.W.3d 912, 922 (Mo App. S.D. 2006).

**II. THE TRIAL COURT DID NOT ERR IN AWARDING RESPONDENTS
JUDGMENT FOR DAMAGES IN THE SUM OF \$75.00 FOR TRESPASS**

BECAUSE THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT SUCH AN AWARD, IN THAT THERE WAS EVIDENCE OF THE LOCATION OF THE POST BEING NORTH OF THE BOUNDARY LINE DIVIDING THE PARTIES' RESPECTIVE PROPERTY IF POINT I IS DENIED; AND IF NOT, THEN THE TRIAL COURT DID NOT ERR IN AWARDING RESPONDENTS JUDGMENT FOR DAMAGES IN THE SUM OF \$75.00 FOR TRESPASS BECAUSE THE COURT PROPERLY APPLIED 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 FAIR MARKET VALUE OF THE REAL ESTATE BEFORE AND AFTER THE ALLEGED INJURY.

Standard of Review

In a bench-tried case, the judgment will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976). In a bench-tried matter, the Appellate Court accepts as true the evidence and reasonable inferences therefrom in favor of the prevailing party and disregard any contrary evidence. Gilmartin Brothers, Inc. v. Kern, 916 S.W.2d 324, 331 (Mo. App. E.D. 1995). The Appellate Court

will set aside the trial court's decision only when it is firmly convinced that the judgment is wrong. Waldroup v. Dravenstott, 972 S.W.2d 364, 368 (Mo. App. W.D. 1998). Points that can not be clearly understood without reference to other portions of an Appellant's brief preserve nothing for appellate review. Plaster v. Standley, 569 S.W.2d 784, 789 (Mo. App. S.D. 1978)(internal citations omitted). A judgment will be affirmed if it is correct under any reasonable theory supported by the evidence. Kleeman v. Kingsley, 88 S.W.3d 521, 522 (Mo. App. S.D. 2002)(internal citations omitted).

Discussion

Respondents were in rightful and lawful possession of their land. Respondents, and their predecessors in title, acquired title to the land North of the hedgerow by adverse possession. L.F. 35, 36. As the rightful and lawful owners, they were well within their rights to erect a post and brace on their land for purposes of demarcation. T.R. 55 - 64. Trespass is the unauthorized entry upon the land of another. Newbill v. Forrester-Gaffney, 181 S.W.3d 114, 122 (Mo. App. E.D. 2005). Appellants were unauthorized to enter Respondents' land. Appellants removal of the post and brace, on two separate occasions, were compensable acts. L.F. 37. The proper measure of damage would be, and should be, the province of the court.

**III. THE TRIAL COURT DID NOT ERR IN AWARDING RESPONDENTS
JUDGMENT FOR DAMAGES IN THE SUM OF \$90.00 IN EJECTMENT
BECAUSE THE COURT PROPERLY APPLIED THE LAW OF**

DAMAGES, IN THAT THE PROPER MEASURE OF DAMAGES IS FOR RENTAL VALUE OF THE LAND, NOT THE VALUE OF THE CROPS AND THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT SUCH AN AWARD, IN THAT IF POINT RELIED ON I IS DENIED THERE WAS EVIDENCE THAT APPELLANTS' TRESPASSED ON RESPONDENTS' LAND; AND IF NOT, THEN THE TRIAL COURT DID NOT ERR IN AWARDING RESPONDENTS JUDGMENT FOR DAMAGES IN THE SUM OF \$90.00 IN EJECTMENT BECAUSE THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT SUCH AN AWARD, IN THAT THERE WAS EVIDENCE PRESENTED OF THE RENTAL VALUE OF RESPONDENTS' LAND.

Standard of Review

In a bench-tryed case, the judgment will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976). In a bench-tryed matter, the Appellate Court accepts as true the evidence and reasonable inferences therefrom in favor of the prevailing party and disregard any contrary evidence. Gilmartin Brothers, Inc. v. Kern, 916 S.W.2d 324, 331 (Mo. App. E.D. 1995). The Appellate Court will set aside the trial court's decision only when it is firmly convinced that the judgment is wrong. Waldroup v. Dravenstott, 972 S.W.2d 364, 368 (Mo. App. W.D. 1998). Points

that can not be clearly understood without reference to other portions of an Appellant's brief preserve nothing for appellate review. Plaster v. Standley, 569 S.W.2d 784, 789 (Mo. App. S.D. 1978)(internal citations omitted). A judgment will be affirmed if it is correct under any reasonable theory supported by the evidence. Kleeman v. Kingsley, 88 S.W.3d 521, 522 (Mo. App. S.D. 2002)(internal citations omitted).

Discussion

Respondents were in rightful and lawful possession of their land. Respondents, and their predecessors in title, acquired title to the land North of the hedgerow by adverse possession. L.F. 35, 36. As the rightful and lawful owners, they were well within their rights to plant the crops of their choice on their land. Appellants unlawfully entered into Respondents' land, illegally planted and harvested crops, and deprived Respondents of their use and enjoyment of their property. L.F. 37. Appellants base their claims on the determination of the county surveyor. L.F. 36. Surveys of the county surveyor, when made in accordance with relevant statutes, are prima facie evidence of their correctness, but not conclusive. Enderle v. Robert, 863 S.W.2d 692, 693 (Mo. App. S.D. 1993). A surveyor, relying on a legal description that is lacking any alterations as a result of adverse possession, would not be conducting a survey in accordance with relevant statutes. A survey conducted by a county surveyor is subject to being overthrown and disproved by any competent evidence. Shuffit v. Wade, 13 S.W.3d 329, 334 (Mo. App. S.D. 2000). Competent evidence of adverse possession would suffice to disprove such a survey. Once

adverse possession is shown, it is presumed, in the absence of evidence to the contrary, to have continued in the possessor. Williams v. Frymire, 186 S.W.3d 912, 922 (Mo App. S.D. 2006). Appellants' unlawful entry, illegal planting and harvesting, and deprivation of Respondents' property rights (which were acquired through adverse possession), while under the presumed protection of a survey, was a compensable act. L.F. 39. The proper measure of damage would be, and should be, the province of the court.

IV. THE TRIAL COURT DID NOT ERR IN DECLARING (1) THE WIDTH OF AN EASEMENT BY PRESCRIPTION TO BE 24 FEET, (2) DECLARING THE USE, (3) AND SPECIFICALLY STATING THAT ONLY ONE HALF OF THE WIDTH WAS A BURDEN ON APPELLANTS, BECAUSE THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE COURT'S DECLARATION OF THE WIDTH BASED ON A FENCE LYING ON RESPONDENTS' LAND AND THE ACTUAL PATH USED, IN THAT THOUGH APPELLANTS CONSENTED TO A JUDGMENT CREATING AN EASEMENT BY PRESCRIPTION, THE EVIDENCE WAS SUFFICIENT TO DECLARE THE WIDTH OF THE EASEMENT TO BE 24 FEET.

Standard of Review

In a bench-trying case, the judgment will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares

or applies the law. Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976). In a bench-tried matter, the Appellate Court accepts as true the evidence and reasonable inferences therefrom in favor of the prevailing party and disregard any contrary evidence. Gilmartin Brothers, Inc. v. Kern, 916 S.W.2d 324, 331 (Mo. App. E.D. 1995). The Appellate Court will set aside the trial court's decision only when it is firmly convinced that the judgment is wrong. Waldroup v. Dravenstott, 972 S.W.2d 364, 368 (Mo. App. W.D. 1998). A judgment will be affirmed if it is correct under any reasonable theory supported by the evidence. Kleeman v. Kingsley, 88 S.W.3d 521, 522 (Mo. App. S.D. 2002)(internal citations omitted).

Discussion

Evidence was tendered to the Court that the right of ingress and egress between Respondents' diagonally adjacent tracts was needed and a prescriptive easement warranted. T.R. 3. Testimony varied as to the uses of the easement, including: transporting farm machinery, herding livestock, and driving. T.R. 9, 18, 35, 36, 68, 69. Ample space is needed to transport farm machinery. Similarly, as livestock do not always travel in a single file line, ample space is needed to accommodate herding them from one parcel to another. The witnesses testifying alluded to the fact that the width of the easement would vary with the task. Consequently, the weight of the evidence adduced supports the court's finding regarding the width of the easement. L.F. 35, 37, 38. The trial judge is in a better position than the appellate court to determine the credibility of parties

and the appellate court will give due regard to the trial court's determination of witness credibility. Kelley v. Prock, 825 S.W.2d 896, 897 (Mo. App. S.D. 1992), Thomas v. King, 160 S.W.3d 445, 452 (Mo. App. S.D. 2005).

V. THE TRIAL COURT DID NOT ERR IN ORDERING APPELLANTS TO CEASE AND DESIST IN INTERFERING WITH RESPONDENTS' USE AND ENJOYMENT OF THE PRESCRIPTIVE EASEMENT, BECAUSE THERE WAS EVIDENCE THAT APPELLANTS HAD INTERFERED WITH RESPONDENTS' COMING AND GOINGS, IN THAT RESPONDENT TESTIFIED THAT APPELLANTS DID BLOCK THE PATH RESPONDENTS' USED.

Standard of Review

In a bench-trying case, the judgment will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976). In a bench-trying matter, the Appellate Court accepts as true the evidence and reasonable inferences therefrom in favor of the prevailing party and disregards any contrary evidence. Gilmartin Brothers, Inc. v. Kern, 916 S.W.2d 324, 331 (Mo. App. E.D. 1995). The Appellate Court will set aside the trial court's decision only when it is firmly convinced that the judgment is wrong. Waldroup v. Dravenstott, 972 S.W.2d 364, 368 (Mo. App. W.D. 1998). A judgment will be affirmed if it is correct under any reasonable theory supported by the

evidence. Kleeman v. Kingsley, 88 S.W.3d 521, 522 (Mo. App. S.D. 2002)(internal citations omitted).

Discussion

Appellants assert that the Court failed to factually find Appellants interfered with Respondents' use and enjoyment of a prescriptive easement allowing for ingress and egress to their diagonally adjacent parcels. Placing a large tractor in the path of that prescriptive easement, while not completely blocking it, would preclude the full use and enjoyment of the easement. T.R. 65, 157, 158. Posting a threatening note visible to users of the prescriptive easement would preclude the full use and enjoyment of the easement. T.R. 66. Requesting a greatly diminished prescriptive easement width would preclude the full use and enjoyment of the prescriptive easement.

VI. THE TRIAL COURT DID NOT ERR IN DENYING JUDGMENT TO APPELLANTS AS 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 SOUTHEAST QUARTER (SE-1/4) OF THE SOUTHEAST QUARTER (SE-1/4) OF SECTION TWENTY-ONE (21) AND THE NORTHEAST QUARTER (NE-1/4) OF THE NORTHEAST QUARTER (NE-1/4) OF SECTION TWENTY-NINE (29), TOWNSHIP FIFTY-NINE

(59) NORTH, RANGE THIRTEEN (13) WEST, MACON COUNTY, MISSOURI, BECAUSE THERE WAS A DISPUTE THAT APPELLANTS HAD TITLE TO THEIR REAL ESTATE, IN THAT RESPONDENTS PROVED THEIR CLAIM IN ADVERSE POSSESSION TO THAT NORTHERN PORTION OF APPELLANTS' LAND BORDERING RESPONDENTS' LAND.

Standard of Review

In a bench-tryed case, the judgment will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976). In a bench-tryed matter, the Appellate Court accepts as true the evidence and reasonable inferences therefrom in favor of the prevailing party and disregard any contrary evidence. Gilmartin Brothers, Inc. v. Kern, 916 S.W.2d 324, 331 (Mo. App. E.D. 1995). The Appellate Court will set aside the trial court's decision only when it is firmly convinced that the judgment is wrong. Waldroup v. Dravenstott, 972 S.W.2d 364, 368 (Mo. App. W.D. 1998). A judgment will be affirmed if it is correct under any reasonable theory supported by the evidence. Kleeman v. Kingsley, 88 S.W.3d 521, 522 (Mo. App. S.D. 2002)(internal citations omitted).

Discussion

The Court properly found that Respondents, and their predecessors in title, had

established title to the land North of the hedgerow by meeting each element of adverse possession. L.F. 35, 36. Once adverse possession is shown, it is presumed, in the absence of evidence to the contrary, to have continued in the possessor. Williams v. Frymire, 186 S.W.3d 912, 922 (Mo App. S.D. 2006).

Respondents, and their predecessors in title, have had possession of the diagonally adjacent parcels in question since 1958. L.F. 5, 6, 35, 36, T.R. 3, 34. During this time, Respondents, and their predecessors in title, acknowledged the hedgerow as the boundary line. T.R. 47. This acknowledgment continued after a portion of the hedgerow was removed. T.R. 47. The trial court found that all of the elements of adverse possession for the disputed portion of land had been met by Respondents. L.F. 35, 36. Respondents, and their predecessors in title, used and farmed the land North of hedgerow. Respondents, and their predecessors in title, improved the property such that it constituted visible acts of ownership. Respondents, and their predecessors in title, owned and possessed the property exclusively for more than 46 years. Respondents, and their predecessors in title, acknowledged the hedgerow as the rightful boundary between the tracts. After a portion of the hedgerow was removed and a fence erected in its place, Respondents, and their predecessors in title, continued to use and respect the hedgerow line as the boundary. Similarly, Appellants' predecessors in title used and respected the hedgerow line (and the subsequent fence erected in its stead) as the proper boundary between the parcels. T.R. 47.

VII. THE TRIAL COURT DID NOT ERR IN SPECIFYING THE LEGAL

DESCRIPTION OF ITS AWARD TO RESPONDENTS AS THE FENCE LINE AND PATH ON THE NORTHERN PORTION OF APPELLANTS' LAND, IN THAT, IF POINT RELIED ON I IS DENIED, THE DESCRIPTION DOES NOT REQUIRE SURVEYING TO SPECIFICALLY ADVISE THE PRESENT PARTIES AND ANY SUCCESSORS OR ASSIGNEES THE WHEREABOUTS OF THE BOUNDARY LINE.

Standard of Review

In a bench-tryed case, the judgment will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976). In a bench-tryed matter, the Appellate Court accepts as true the evidence and reasonable inferences therefrom in favor of the prevailing party and disregard any contrary evidence. Gilmartin Brothers, Inc. v. Kern, 916 S.W.2d 324, 331 (Mo. App. E.D. 1995). The Appellate Court will set aside the trial court's decision only when it is firmly convinced that the judgment is wrong. Waldroup v. Dravenstott, 972 S.W.2d 364, 368 (Mo. App. W.D. 1998). Points that can not be clearly understood without reference to other portions of an Appellant's brief preserve nothing for appellate review. Plaster v. Standley, 569 S.W.2d 784, 789 (Mo. App. S.D. 1978)(internal citations omitted). A judgment will be affirmed if it is correct under any reasonable theory supported by the evidence. Kleeman v. Kingsley, 88 S.W.3d 521, 522 (Mo. App. S.D. 2002)(internal citations omitted).

Discussion

The evidence adduced at trial, as well as the trial court's judgment, attests to the fact that the boundary line is established and recognized. It is the hedgerow that has been, prior to this litigation, acknowledged as the proper boundary between the parcels. T.R. 47. Portions of the hedgerow have been removed and replaced with a fence conforming to the pre-existing hedgerow line. T.R. 62, 79, 87, 91, 92, 109. In its judgement, the Court made reference to the parcels of Appellant and Respondent, and deemed the new boundary between them to be "the South line of the Northeast Quarter (NE-1/4) of the Southeast Quarter (SE-1/4) of Section Twenty-One (21)." L.F. 38. Such definitional specificity makes locating the boundary a simple task. The existing hedgerow and fence form the boundary referenced in the trial court's judgment. Apprehensions of a cataclysmic event that could obliterate both the hedgerow and the fence are unfounded. The boundary is clearly established with the requisite specificity. L.F. 38. Evidence that a party had acquired ownership to another's land by adverse possession is limited to the disputed area. Rosen v. Nations, 72 S.W.3d 267, 274 (Mo. App. S.D. 2002).

**VIII. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANTS
JUDGMENT QUIETING TITLE BY DECLARING THE SOUTH LINE OF
THE NORTHEAST QUARTER (NE-1/4) OF THE SOUTHEAST QUARTER
(SE-1/4) OF SECTION TWENTY ONE (21) TO BE THE FENCE LINE
BETWEEN SAID QUARTER QUARTER AND APPELLANTS'**

PROPERTY SOUTH OF IT, BECAUSE SUCH A FINDING WAS WITHIN RESPONDENTS' PLEADINGS, IN THAT APPELLANTS CONSENTED TO JUDGMENT AS RESPONDENTS' PLEAD THAT ANY PORTION OF A FENCE WAS SOUTH OF THE SOUTH LINE OF THE NORTHEAST QUARTER (NE-1/4) OF THE SOUTHEAST QUARTER (SE-1/4) OF SECTION TWENTY-ONE (21).

Standard of Review

In a bench-tryed case, the judgment will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976). In a bench-tryed matter, the Appellate Court accepts as true the evidence and reasonable inferences therefrom in favor of the prevailing party and disregard any contrary evidence. Gilmartin Brothers, Inc. v. Kern, 916 S.W.2d 324, 331 (Mo. App. E.D. 1995). The Appellate Court will set aside the trial court's decision only when it is firmly convinced that the judgment is wrong. Waldroup v. Dravenstott, 972 S.W.2d 364, 368 (Mo. App. W.D. 1998). A judgment will be affirmed if it is correct under any reasonable theory supported by the evidence. Kleeman v. Kingsley, 88 S.W.3d 521, 522 (Mo. App. S.D. 2002)(internal citations omitted).

Discussion

The trial court found that Respondents had title to the disputed land via adverse

possession. L.F. 35, 36. Once adverse possession is shown, it is presumed, in the absence of evidence to the contrary, to have continued in the possessor. Williams v. Frymire, 186 S.W.3d 912, 922 (Mo App. S.D. 2006). This was established by the testimony of Respondents, and their predecessors in title. Appellants failed to successfully rebut Respondents' claims. In a quiet title action, where each party is claiming title against the other, the burden of proof is upon each party to prove better title than that of the adversary, with each relying on the strength of their own title and not upon the weakness of his adversary. Shuffit v. Wade, 13 S.W.3d. 329, 332-3 (Mo. App. S.D. 2000). The trial court properly affixed the location of the new boundary as "the South line of the Northeast Quarter (NE-1/4) of the Southeast Quarter (SE-1/4) of Section Twenty-One (21)." L.F. 38. Moreover, Appellants' displeasure at the specific location of the new boundary between the parcels is a tacit acknowledgment that there is, in fact, a discernible boundary. Consequently, such an admission defeats Appellants' Point Relied On VII.

IX. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANTS' JUDGMENT FOR DAMAGES IN THE SUM OF \$250.00 FROM RESPONDENTS IN TRESPASS BECAUSE THERE WAS NO EVIDENCE TO SUPPORT SUCH A JUDGMENT, IN THAT RESPONDENT ADMITTED TO PLACING A POST ON HIS OWN PROPERTY.

Standard of Review

In a bench-tried case, the judgment will be affirmed unless there is no substantial

evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976). In a bench-tried matter, the Appellate Court accepts as true the evidence and reasonable inferences therefrom in favor of the prevailing party and disregard any contrary evidence. Gilmartin Brothers, Inc. v. Kern, 916 S.W.2d 324, 331 (Mo. App. E.D. 1995). The Appellate Court will set aside the trial court's decision only when it is firmly convinced that the judgment is wrong. Waldroup v. Dravenstott, 972 S.W.2d 364, 368 (Mo. App. W.D. 1998). A judgment will be affirmed if it is correct under any reasonable theory supported by the evidence. Kleeman v. Kingsley, 88 S.W.3d 521, 522 (Mo. App. S.D. 2002)(internal citations omitted).

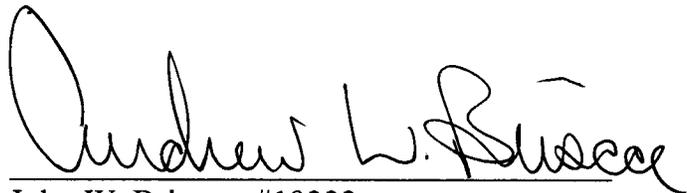
Discussion

Respondents were in rightful and lawful possession of their land. As rightful owners, they were within their rights to erect a post and brace on their land for purposes of demarcation. T.R. 55 - 64, 167, 168. Appellants' removal of that post and brace, on two separate occasions, were compensable acts. L.F. 37. Respondents are due compensation for having the enjoyment of their property disrupted. Property owners must feel secure knowing they are not liable for the labor an interloper expends in attempting to destroy items the property-owner erected. Appellants deem Respondents owe Appellants money for expenses incurred in removing a post and brace Respondents erected on land owned by the Respondents. T.R. 172. Such a contention is in contravention of simple logic.

CONCLUSION

For the foregoing reasons, Respondents contend that the decision of the trial court should be affirmed.

Respectfully Submitted,

A handwritten signature in black ink that reads "Andrew W. Briscoe". The signature is written in a cursive style with a large initial 'A'.

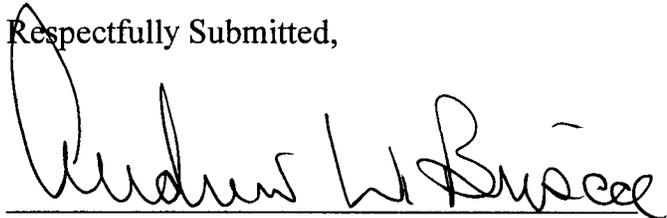
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CERTIFICATE OF COMPLIANCE AND SERVICE

I, John W. Briscoe, hereby certify as follows:

- A. That the attached brief complies with the limitation contained in Supreme Court Rule 84.06(b) and (c) and contains 6,331, as determined by Microsoft WordPerfect 11 Software; and,
- B. That the enclosed, simultaneously filed with the hard copies of this brief, IBM PC Compatible 2HD 1.44 MB disk is properly labeled; the enclosed disk is in Microsoft Word format and it has been scanned for viruses and that it is virus-free; and
- C. That two (2) true and correct copies of the attached brief, and one (1) labeled CD-RW, IBM-PC Compatible 700 MB disk containing a copy of this brief, were mailed first class postage paid on this 25th day of August, 2008, to R. Timothy Bickhaus, P.O. Box 451, Macon, Missouri 63552-0451, Attorney for Appellants.

Respectfully Submitted,



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