

IN THE SUPREME COURT OF MISSOURI

STATE ex rel. Billie Barker,)
Trustee of the Mary Almond)
Living Trust,)
)
Relator.)
v.)
)
Honorable David B. Tobben)
Judge, Division)
Circuit Court,)
Franklin County, Missouri)
)
and)
)
Gloria J. Kappler, Trustee of the)
Gloria J. Kappler Living Trust)
)
Respondent.)

Case No: SC90407

From the Circuit Court of Jefferson County, Missouri
Twenty-Third Judicial Circuit
Special Judge, Honorable David B. Tobben

RELATOR'S BRIEF IN SUPPORT OF WRIT OF PROHIBITION

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JURISDICTIONAL STATEMENT

This action involves the question of whether Respondent, the Honorable David B. Tobben, has acted in excess of his jurisdiction in denying Relator's demand for a right to a trial by jury as provided by the Missouri Constitution. The trial court determined that Relator did not have a right to trial by jury with respect to claims for title by adverse possession and by boundary by acquiescence, but did have the right to trial by jury on the issue of damages, should she prevail on the issue of possession.

The Missouri Constitution guarantees the right to trial by jury shall remain inviolate. MO. CONST. art. I, § 22(a). Further, Supreme Court Rule 69(a) states: "The right of trial by jury as declared in the Constitution or as given by statute shall be preserved to the parties inviolate." Supreme Court Rule 69(a).

This action is one involving the question of whether Respondent's denial of Relator's demand to a trial by jury was in violation and contravention of the constitution and laws of the State of Missouri. Thus, Relator institutes this proceeding and this Court has jurisdiction to hear and determine this original writ proceeding pursuant to Article V, § 3 of the Missouri Constitution, as amended and pursuant to Supreme Court Rule 97.01. MO. CONST. art. V, § 3; Supreme Court Rule 97.01.

STATEMENT OF FACTS

On July 19, 2004, Gloria Kappler, acting as Trustee (hereinafter referred to as “Kappler”), instituted and filed in the Circuit Court of Jefferson County her Petition to quiet title in two counts - by adverse possession or boundary by acquiescence. Said Petition is styled: Gloria J. Kappler, Trustee of the Gloria J. Kappler Living Trust v. Mary Almond. On June 7, 2005, Kappler filed her first amended Petition. (See Appendix, A29-32). Immediately prior to trial on June 10, 2009, Plaintiff asked for leave of court and it was granted to amend her petition by interlineations on June 12, 2009, by adding a specific metes and bounds description to her petition. (See Appendix, A33-35). In her Petition, Kappler prayed for equitable relief and requested a decree quieting title, and that the boundary between her and Relator’s property be established accordingly. (See Appendix, A29-32).

On November 1, 2005, Relator filed a motion to substitute parties. (See Appendix, A36-37). In her motion, Relator moved for substitution of parties due to Mary Almond completing estate planning documents and titling the real estate in question in the name of Mary Almond Trustee for the Mary Almond Living Trust. (See Appendix, A36). Relator’s motion to substitute parties was granted on January 27, 2006. (See Appendix, A15). May Almond or the Mary

Almond Living Trust has been the fee simple title holder of the subject property since the mid-1960s.

Also, on November 1, 2005, Relator filed both her answer to the Petition and also a Counterclaim. Subsequently, on June 3, 2009, Relator filed her first amended Counterclaim and Answer to Kappler's Petition. (See Appendix, A38-49). In her answer to Kappler's Petition, Relator asserted various affirmative defenses, including Relator granting permission to Kappler to use the property, failure to satisfy the necessary elements of adverse possession, laches and waiver of any claim. (See Appendix, A38-41).

In Relator's Counterclaim, she asserts causes of action for quiet title, injunctive relief, ejectment, trespass, conversion, and punitive damages. (See Appendix, A42-49).

The case was originally assigned to Judge Gary Kramer of the Twenty-Third Judicial Circuit of Missouri. (See Appendix, A10). There were several changes of judge, and the trial date was continued at least twice. (See Appendix, A10-28). Following the personal recusal of Judge Weber of Ste. Genevieve County, the case was ultimately assigned to Respondent herein, The Honorable David B. Tobben, Associate Circuit Judge of Franklin County, as Special Judge on November 20, 2008. (See Appendix, A24).

Two years before the June 2009 trial date, Relator filed her Request for Jury Trial on March 8, 2007. (See Appendix, A50). Prior to Relator's request for a jury trial, there existed no waiver of jury trial, nor has Relator subsequently waived trial by jury.

On May 12, 2009, Relator filed a motion to substitute parties (See Appendix, A51-52). In her motion, Relator requested the court substitute parties from Mary Almond as Trustee of the Mary A. Almond Trust to Billie Barker as Trustee of the Mary A. Almond Trust due to Mary A. Almond resigning her position as Trustee of the Mary A. Almond Trust. (See Appendix, A51). The court granted Relator's motion on May 21, 2009. (See Appendix, A25).

On May 14, 2009, a pre-trial conference was conducted by the Respondent. (See Appendix, A24). At the pre-trial conference, the parties submitted suggested jury verdict directions regarding the issues of adverse possession and boundary by acquiescence. (See Appendix, A53-54).

On June 17, 2009, Kappler filed an Objection to Relator's Request for Jury Trial with The Honorable David B. Tobben. (See Appendix, A55-58). In Kappler's Objection to Relator's Request for Jury Trial, she argued that her Petition contained only equitable claims and that a jury trial is not available in said cause of action. (See Appendix, A55-58). Additionally, Kappler's objection also contained a motion to sever the equitable claims in her Petition

from Relator's trespass claim raised in her Counterclaim. (See Appendix, A55-58). Also, on June 17, 2009, Kappler filed a waiver of jury trial on her claims of adverse possession and boundary by acquiescence. (See Appendix, A59). Relator then filed a Memorandum in Opposition to Kappler's Objection alleging that Relator has a right to trial by jury and that the Defendant had not waived that right. (See Appendix, A60-63). Immediately thereafter, on June 18, 2009, Kappler filed a responsive letter with Judge Tobben in which counsel for Kappler cited several cases that he believed stand for the proposition that there is not a right to a jury trial in adverse possession causes of action. (See Appendix, A64-65). On the same day, Counsel for Relator filed a reply to Kappler's letter, distinguishing the cases cited by Kappler to the present case. (See Appendix, A66-67).

On June 19, 2009, the Court entered its Order sustaining Kappler's Objection to Defendant's Request for Jury Trial. (See Appendix, A68-70). The Order stated that Relator did not have a right to trial by jury with respect to the issues raised by Kappler's pleadings, but that Relator was entitled to a jury trial on the issue of damages in the event that Defendant prevailed on Kappler's claims. (See Appendix, A68-70).

On June 15, 2009, Relator filed her Petition for Writ of Prohibition and Suggestions in Support directly with this Court seeking an order compelling a

jury trial on all the issues presented. On August 24, 2009, this Court denied Relator's Petition without prejudice pursuant to Rule 84.22(a). (See Appendix, A71).

Relator subsequently re-filed her Petition for Writ of Prohibition and Suggestions in Support with the Missouri Court of Appeals, Eastern District, on August 28, 2009. On the same day, the Court of Appeals entered a Preliminary Order in Prohibition against the Honorable David B. Tobben. (See Appendix, A72). On September 3, 2009, the Court of Appeals, Eastern District, entered a final Order quashing the Preliminary Writ of Prohibition without issuing an opinion. (See Appendix, A73).

On September 17, 2009, Relator filed her Writ of Prohibition and Suggestions in Support with this Court seeking an order compelling a jury trial on all the issues presented. On September 22, 2009, this Court issued an Order requesting Respondent to file suggestions in opposition on or before October 2, 2009. (See Appendix, A74). On October 6, 2009, this Court sustained Relator's Petition for Writ of Prohibition and ordered a Preliminary Writ to issue. (See Appendix, 75-76).

This cause is scheduled for oral argument on January 27, 2010 at 9:30 a.m.

POINT RELIED ON

RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM DENYING RELATOR’S RIGHT TO A TRIAL BY JURY, BECAUSE TO DENY RELATOR HER RIGHT TO TRIAL BY JURY IS A VIOLATION AND CONTRAVENTION OF THE CONSTITUTION AND LAWS OF THE STATE OF MISSOURI, IN THAT QUESTIONS PRESENTED IN PLAINTIFF’S PETITION FOR ADVERSE POSSESSION AND BOUNDARY BY ACQUIESCENCE ARE ACTIONS AT LAW AND FACTUAL IN NATURE AND THUS ARE QUESTIONS TO BE DETERMINED BY A JURY, THE MISSOURI CONSTITUTION GUARANTEES THE RIGHT TO TRIAL BY JURY ON ACTIONS AT LAW AND SAME SHALL REMAIN INVIOLETE, AND RELATOR PROPERLY DEMANDED A JURY TRIAL IN WRITING.

Benoist v. Thomas, 27 S.W. 609 (Mo. 1894)

Hatton v. City of St. Louis, 175 S.W. 888 (Mo. 1915)

Kansas City v. Smith, 141 S.W. 1103 (Mo. 1911)

Massachusetts General Life Ins. Co. v. Sellers, 835 S.W.2d 475 (Mo. Ct.

App. 1992).

Mo. CONST. art. I, § 22(a)

Section 527.150 RSMo

Supreme Court Rule 70.02(b)

ARGUMENT

RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM DENYING RELATOR'S RIGHT TO A TRIAL BY JURY, BECAUSE TO DENY RELATOR HER RIGHT TO TRIAL BY JURY IS A VIOLATION AND CONTRAVENTION OF THE CONSTITUTION AND LAWS OF THE STATE OF MISSOURI, IN THAT QUESTIONS PRESENTED IN PLAINTIFF'S PETITION FOR ADVERSE POSSESSION AND BOUNDARY BY ACQUIESCENCE ARE ACTIONS AT LAW AND FACTUAL IN NATURE AND THUS ARE QUESTIONS TO BE DETERMINED BY A JURY, THE MISSOURI CONSTITUTION GUARANTEES THE RIGHT TO TRIAL BY JURY ON ACTIONS AT LAW AND SAME SHALL REMAIN INVIOLETE, AND RELATOR PROPERLY DEMANDED A JURY TRIAL IN WRITING.

Standard of Review

“The extraordinary remedy of a writ of prohibition is appropriate in one of three circumstances: (1) to prevent the usurpation of judicial power when the trial court lacks jurisdiction; (2) to remedy an excess of jurisdiction or abuse of discretion where the lower court lacks the power to act as intended; or (3) where

a party may suffer irreparable harm if relief is not made available in response to the trial court's order.” *State ex rel. T.W. v. Ohmer*, 133 S.W.3d 41, 43 (Mo. banc 2004). Prohibition may be used to “undo acts done in excess of a court’s jurisdiction, as long as some part of the court’s duties in the matter remain to be performed[,]” and may be used to restrain further enforcement of orders beyond or in excess of a court’s authority. *State ex rel. Robinson v. Franklin*, 48 S.W.3d 64, 67 (Mo. Ct. App. 2001) (bracket in original; citation omitted).

Whether a trial court has exceeded its authority is a question of law which the appellate court reviews independently of the trial court. See *State ex rel. Teffey v. Bd. Of Zoning Adjustment*, 24 S.W.3d 681, 684 (Mo. banc 2000) (determination on appeal of whether administrative body’s action exceeded the authority granted to it is a question of law for the “independent judgment of the reviewing court”); *State ex rel. Beaird v. Del Muro*, 98 S.W.3d 902, 906-07 (Mo. Ct. App. 2003) (determination on appeal whether habeas court acted within its jurisdiction is a question of law).

While it is true that a writ of prohibition cannot “control discretionary acts,” *State ex rel. Allen v. Yeaman*, 440 S.W.2d 138, 145 (Mo. Ct. App. 1969), the principal act complained of here is not a discretionary act of the Respondent, it is the Respondent’s Order denying Relator of her right to trial by jury in an action at law, which is afforded to her as a constitutional right. When a trial

court exceeds its authority in denying an individual a constitutional right to trial by jury, a writ of prohibition must issue to prohibit or rescind the trial court's order.

An Action to Quiet Title Can Be Either One at Law or One in Equity

The Missouri Constitution provides that “the right of trial by jury as heretofore enjoyed shall remain inviolate.” MO. CONST. art. I, § 22(a). This provision guarantees the right to trial by jury insofar as the right existed at common law. *Spitcaufsky v. Hatten*, 182 S.W.2d 86 (Mo. 1944).

In civil cases, the test is whether the action may be characterized as essentially “legal” – in which there is a right to trial by jury – or “equitable” – in which a jury trial is not available as a matter of right. *Downey v. United Weatherproofing, Inc.*, 253 S.W.2d 976 (Mo. 1953). The constitutional guarantee of the right to trial by jury “as heretofore enjoyed” is a reference to the right to trial by jury as set out in the Missouri Constitution at the time of statehood in 1820. *Scott v. Blue Springs Ford Sales, Inc.*, 176 S.W.3d 140, 141 (Mo. banc 2005).

Missouri law is clear that the right to trial by jury attaches as a matter of right in actions at law. *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82, 85 (Mo. 2003) (“[t]he right to trial by jury exists in actions at law but not in actions in

equity.”). To the contrary, Missouri is equally clear that Missouri’s constitutional guarantees to trial by jury have never been applied to claims seeking only equitable relief. *State ex rel. Leonardi v. Sherry*, 137 S.W.3d 462, 474 (Mo. 2004).

A quiet title suit is an action to adjudge the respective title, estate, and interests of claimants to land and is an action at law or in equity. *Lloyd v. Garren*, 366 S.W.2d 341, 344 (Mo. 1963). Section 527.150 RSMo expressly authorizes quiet title relief under both legal and equitable principles. Section 527.150 RMSo. Whether an action to quiet title is an action at law or in equity is to be determined “according to the issues presented by the pleadings.” *Rains v. Moulder*, 90 S.W.2d 81 (Mo. 1936) (citing *Lee v. Conran*, 111 S.W. 1151, 1153 (Mo. 1908); *Ebbs v. Neff*, 30 S.W.2d 616, 620 (Mo. 1930)).

When a quiet title petition is not seeking any affirmative equitable relief, but only a determination of the existing title as between the litigants, then it is an action at law. (emphasis added). *Erwin v. City of Palmyra*, 119 S.W.3d 582 (Mo. Ct. App. 2003) (citing *Massachusetts General Life Ins. Co. v. Sellers*, 835 S.W.2d 475, 482-483 (Mo. Ct. App. 1992)). On the other hand, a request for equitable relief in a quiet title petition, such as an injunction or specific performance, will make the quiet title suit equitable and thus the right to trial by jury does not attach. *Erwin*, 119 S.W.3d at 586-587. However, for equitable

relief to be available to a litigant in a quiet title action, it must be specifically prayed for in the petition. *Massachusetts General Life Ins. Co.*, 835 S.W.2d at 482 (citing *Rains*, 90 S.W.2d at 81; *Stafford v. Shinabargar*, 81 S.W.2d 626 (Mo. 1935)).

In *Massachusetts General Life Ins. Co.*, the Missouri Court of Appeals illustrated the differences between a quiet title petition seeking equitable relief and one seeking merely legal relief.

To illustrate, in *Stafford*, plaintiff sought to quiet title in her by asking the court to cancel a note and deed of trust; such action was said to be in equity and not at law. *Id.* 81 S.W.2d at 627. In *Rains*, plaintiff's quiet title petition was in conventional form but defendants, by their answer, sought removal of allegedly void deeds – a matter of equitable cognizance. *Id.* 90 S.W.2d at 84. In *Lloyd*, injunctive relief was sought as part of the quiet title suit; hence, the action was treated as one in equity. *Id.* at 344. In contrast, in *Baker*, a § 527.150 quiet title suit was held to be an action at law where no facts were stated which could make the cause one in equity and no affirmative equitable relief was sought. *Id.* at 34.

Id. 835 S.W.2d at 482-483. The court in *Massachusetts General Life Ins. Co.* held:

Here, the plaintiff's petition was in conventional form and the only relief sought was a quiet title decree. No injunctive relief was sought by plaintiff and none was granted by the trial court. The decree granting the plaintiff's request reads, in pertinent part: 'IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that title to the following described land is quieted in Plaintiff in fee simple absolute: [the exhibit 7 metes and bounds description followed].' By its judgment the trial court gave no affirmative relief and did not set aside any deed or other instrument; the relief granted was a determination of the existing title as between the litigants. (emphasis added).

Id. at 483.

Further, in *Roberts v. Murray*, 232 S.W.2d 540, 541 (Mo. 1950), the plaintiff's quiet title petition sought only a determination of the existing title. Accordingly, the *Roberts* court held that "the pleadings presented only issues at law and the action was not in equity, but at law." *Id.* (citations omitted).

In *Koehler v. Rowland*, 205 S.W. 217 (Mo. 1918), plaintiffs brought a quiet title action against defendants. The Supreme Court of Missouri noted:

If the pleadings present issues of equitable cognizance, then it becomes a proceeding in equity. But a straight action under this

statute, in the terms of the statute, is a suit at law. The petition in this case follows the statute substantially in the allegations of the plaintiffs' rights and the defendants' claim, prays this court to hear and determine all the rights, claims, and interests whatsoever of the parties to the proceeding, to adjudge and decree that the plaintiffs are the owners, and award plaintiffs the right of possession. The petition thus states purely an action at law.

Id. at 219.

Kappler's Quiet Title And Boundary By Acquiescence Action Is An Action At Law And Therefore Entitles Relator To A Trial By Jury

In the present case, Kappler asserted two counts in her petition to quiet title. In Count I of her Petition, Kappler's prays the trial court to decree her to be the rightful owner of the subject property, that the court commission a survey of the subject property as the Court finds to be rightfully owned by Plaintiff, that the court eject Relator and declaring her to have no right, title or interest therein, for all other and further relief as appropriate and for an award of costs. (See Appendix, A29-32). In her prayer for relief under Count II, Kappler requested the trial court to "declare the

boundary between Plaintiff's property and Defendant's property to be as established in accordance with the Exhibit attached to the Petition." (See Appendix, A32).

Kappler's Petition does not seek any affirmative equitable relief, and therefore her cause of action is an action at law. Kappler's Petition is one that simply seeks to determine and decree her as the rightful owner of the subject property. As the court in *Erwin* noted, when a quiet title petition is not seeking any affirmative equitable relief, but only a determination of the existing title as between the litigants, then it is an action at law (emphasis added). *Id.* 119 S.W.3d at 582. Here, Kappler's petition merely asks the trial court to decree her to be the rightful owner by quieting title in Relator by reason of limitations and adverse possession. (See Appendix, A29-32).

As the court in *Massachusetts General Life Ins. Co.* discussed, for a quiet title petition to be deemed an equitable action, it must seek affirmative relief in the form of specific performance or an injunction, such as canceling a note or deed of trust, or setting aside some other instrument. *Id.* 835 S.W.2d at 482-483. In the present case, Kappler never sought relief in the form of setting aside a deed or instrument nor has she requested specific performance or injunctive relief. Thus, Kappler's action is purely an action to adjudge the respective title

and interests of the litigants and therefore is an action at law. See *Erwin*, 119 S.W.3d at 582.

In Count I of her Petition, Kappler seeks relief from the Court that it commission a survey of the subject property as the Court finds to be rightfully owned by Plaintiff. This form of relief is simply asking the Court to make a determination as to which portion of the subject property is owned by Kappler, and decree that property to her. This form of relief sought by Kappler does not seek affirmative equitable relief, but rather a determination as to her interest and title in the subject property. The present case is similar to *Hart v. T.L. Wright Lumber, Co.*, 196 S.W.2d 272 (Mo. 1946), in that the plaintiff in *Hart* brought an action to determine title to land and in ejectment for possession of the land. The *Hart* court deemed plaintiff's action to be one at law, even when the trial court commissioned a survey of the line dividing the parties' properties. *Id.* at 278. Likewise, Kappler requesting the Court to commission a survey doesn't remove her purely legal cause of action to an equitable one.

Next, Kappler's Petition seeks relief from the Court by requesting the Court eject Relator, "declaring that [Relator has] no right, title nor interest therein." Once again, Kappler simply seeks that the Court determines her to be the rightful owner of the subject property. Thus, based on Missouri case law, it

is an action to determine existing title and interests in the subject property and therefore is an action at law. See *Roberts*, 232 S.W.2d at 541.

This Court may conclude that Kappler's prayer for relief to eject Relator from the subject property and decree her to be the rightful owner is tantamount to an ejectment cause of action, although not specifically pled by Kappler. In Missouri, courts determine the cause of action pled by reading the petition in its entirety and 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 & Veatech Architects, Inc.*, 854 S.W.2d 450, 457 (Mo. Ct. App. 1993). Thus, if this Court concludes that Kappler's Petition includes an ejectment cause of action in Count I, her action would still remain an action at law, because ejectment is deemed to be an action at law. *State ex rel. Dowd v. Turpin*, 576 S.W.2d 754 (Mo. Ct. App. 1979).

In Count II of her Petition to quiet title, Kappler pleads a theory of boundary by acquiescence. In Count II, Kappler seeks to quiet title in Relator and have the boundary line between her and Relator's property re-established in accordance with the exhibit she attached to the Petition. In an action to determine a boundary line, such as Count II of Kappler's Petition, the appropriate remedy is not an action to quiet title as Kappler asserts, but ejectment. *Carroz v. Kaminiski*, 467 S.W.2d 871, 872 (Mo. banc 1971).

Nevertheless, under either cause of action, Kappler's cause of action is one at law, and not in equity, because an ejectment action is one at law and Count II of Kappler's Petition to quiet title is one that states no facts to make the case one in equity and no affirmative equitable relief was sought, such as injunctive relief or specific performance.

The present case is very similar to *Benoist v. Thomas*, 27 S.W. 609 (Mo. 1894). In *Benoist*, this Court held that in an action for partition where the litigation directly involved the title to specific real property, the issue was triable by jury as a matter of right. (emphasis added) *Id.* at 610. The *Benoist* court further noted that although the action was a partition proceeding, "in substance it is simply a trial of title as between [the litigants]" and involving the question of adverse possession. *Id.* Similarly, the present case is a trial of title of the subject property between Kappler and Relator. The question of title turns on whether Kappler adversely possessed Relator's property. Accordingly, the case presents very similar facts as the *Benoist* case and therefore, this Court should also conclude that Kappler's action is one at law and Relator is entitled to a trial by jury as a matter of right.

Even if this Court finds Kappler's Petition includes equitable claims or Kappler amends her Petition to include equitable claims, Missouri trial courts have jurisdiction to try cases involving requests for equitable relief and claims at

law in one proceeding. *State ex rel. Leonardi v. Sherry*, 137 S.W.3d 462 (Mo. banc 2004). Accordingly, the trial court has discretion to try cases involving requests for equitable relief and damages in the most practical and efficient manner possible, consistent with Missouri’s historical preference for party’s right to trial by jury of claims at law. *Id.* Thus, the court in *Leonardi* enables Missouri trial courts to try a case involving both equitable and legal claims to a jury in one proceeding. However, the trial court also has discretion to conduct two proceedings – one for equitable claims and one for legal claims. *Id.* In conducting two separate proceedings, however, *Leonardi* holds that the trial court may resolve equitable claims but must act consistently with the factual findings made by the jury. *Id.*

In light of the *Leonardi* decision, even if Kappler were to amend her Petition to include equitable claims of relief, the trial court may join all claims into one proceeding, “consistent with Missouri’s historical preference for a litigant’s ability to have a jury trial of claims at law.” *Id.* Furthermore, if Kappler were to amend her Petition to include equitable claims of relief, the trial court must conduct a trial by jury for at least Count I and II of her Petition – both actions at law – and also Relator’s trespassing claim, and then the trial court could resolve any equitable claims. However, if Kappler does add equitable claims to her Petition, the trial court must allow the jury to make

factual findings and reserve to itself the relief that would be granted, if Kappler would prevail.

Based on Missouri precedent and statutes, Kappler's cause of action is one at law, and accordingly, Relator is guaranteed to the right to trial by jury.

In Missouri, A Cause Of Action To Quiet Title By Adverse Possession Is One Of Fact To Be Determined By A Jury

Traditionally, an adverse possession case in Missouri is one of fact to be determined by a jury. *Hatton v. City of St. Louis*, 175 S.W. 888 (Mo. 1915). *Hatton* involved a petition to quiet title to property plaintiff obtained by quitclaim deed and in which the plaintiff alleged to have fee simple title by adverse possession. *Id.* First, it is important to note that the *Hatton* court deemed plaintiff's cause of action to be an action at law, stating "that the instant case is one at law; for . . . it is predicated upon the assertion of a legal title in fee simple to the property described in the petition . . ." *Id.* at 890. Next, the *Hatton* court noted that "[p]laintiff's claim of title by the statute of limitations, or by abandonment, if available at all, presented issues properly triable by jury" (emphasis added). *Id.* (citing *Kansas City v. Smith*, 141 S.W. 1103 (Mo. 1911)). Like *Hatton*, this Court should conclude that Kappler's action is one at law, and not in equity, as it too "is predicated upon the assertion of a legal title in fee simple to the property described in the petition . . ." *Id.*

In *Kansas City v. Smith*, 141 S.W. 1103 (Mo. 1911), the court discussed the case of *Frowein v. Poage*, 132 S.W. 241 (Mo. 1910). *Frowein* was a case involving a cause of action to quiet title as to an increase of land due to the Mississippi River's actions. *Id.* The court held:

There were no equities pleaded, either in plaintiff's petition and reply or the defendant's answer, nor did the evidence tend to show a right in equity on either side. It was a plain contest of law, a question of fact, as to which tract the new made land in controversy herein was an accretion. In a word, the issue was one of accretion alone. Was it an accretion to plaintiff's lands on the west shore of the river, or was it an accretion to defendant's island? In the face of these undeniable facts there can we think be no doubt that the defendant was entitled to a jury and that the court erred in denying a jury trial. (emphasis added).

Id. at 1106. Applying the reasoning in *Frowein* to *Kansas City*, the Supreme Court of Missouri held that "the question of abandonment of a public road or highway is not an issue for a chancellor or a referee, but is peculiarly one of fact for a jury" (emphasis added). *Id.* at 1107. Although the present cause of action is a quiet title petition, it too is a case involving one of fact that the jury should be entitled to hear rather than the judge.

Kappler's two-count Petition is fact-based and sets forth various acts or events that Kappler believes rise to a level sufficient for the minimum time frame to cause the claim of title to vest in Kappler as opposed to the existing fee ownership of Relator. Scores of Missouri cases have held that a cause of action involving adverse possession is factual in nature and for a jury to determine. *Adams v. Wright*, 353 Mo. 1226 (Mo. 1945). Accordingly, the issue of hostility requires a factual inquiry for the jury to decide. *Hearod v. Baggs*, 169 S.W.3d 198 (Mo. Ct. App. 2005). Similarly, the issue of possession and ownership are facts to be determined by a jury in a suit for adverse possession. *Lemmons v. McKinney*, 162 Mo. 525 (Mo. 1901). Missouri courts have consistently held that where conflicting evidence presents questions of fact on adverse possession, those issues are properly submitted to the jury. *Adams*, 353 Mo. 1226.

In denying Relator to her right to trial by jury, Respondent noted that if the Supreme Court had wanted cases of adverse possession to be tried to the jury, "the Committee (and the Supreme Court) would have drafted appropriate instructions for use in such cases." Respondent's rationale entirely overlooks Supreme Court Rule 70.02(b), which addresses the method in which to deal with cases for which there are no applicable, approved instructions. Supreme Court Rule 70.02(b) states:

Whenever Missouri Approved Instructions contains an instruction applicable in a particular case that the appropriate party requests or the court decides to submit, such instruction shall be given to the exclusion of any other instructions on the same subject. Where an MAI must be modified to fairly submit the issues in a particular case, or where there is no applicable MAI so that an instruction not an MAI must be given, then such modifications or such instructions shall be simple, brief, impartial, free from argument, and shall not submit to the jury or require findings of detailed evidentiary facts.

(emphasis added)

Supreme Court Rule 70.02(b). Additionally, Respondent's rationale completely overlooks the fact that Kappler's counsel supplied Respondent with her verdict-directing instruction based upon a case in the area of adverse possession, which was submitted at a May 14, 2009 pre-trial conference. Finally, Respondent's Order ignores the numerous cases in Missouri where a case involving adverse possession was tried to a jury.

This case before this Court is one that presents factual issues that are to be tried before a jury. Missouri has a historical preference for trial by jury and discretion by the court must, whenever possible, be exercised to preserve trial by jury. *State ex rel. Leonardi v. Sherry*, 137 S.W.3d 462 (Mo. banc 2004). Trials

should be conducted to a jury with the court reserving equitable claims for its own determination, which it should decide consistently with the factual findings made by the jury. *Id.*

Here, the questions presented in this case are clearly factual inquiries and they should therefore be tried to a jury.

CONCLUSION

Plaintiff's present case is a cause of action for claims that are pure actions at law, and not equitable claims. Thus, Relator has right to trial by jury. Additionally, Kappler's claims are factual and therefore should be tried before a jury. Respondent, in entering his Order on June 19, 2009, has acted, and unless now prohibited, will continue to act in excess of his jurisdiction, and will proceed to deny Relator herein of her right to trial by jury in violation and contravention of the constitution and laws of the State of Missouri.

This Court should enter its Order prohibiting Respondent herein from denying Relator to a trial by jury on Counts I and II of Kappler's Petition, ordering a jury trial on Relator's trespass claim, conducting only one trial on all issues and delineating the equitable claims which the Judge should handle individually.

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CERTIFICATE OF SERVICE OF BRIEF AND APPENDIX

A copy of the Brief in Support of the Writ of Prohibition, Appendix to Brief and Certificate of Service and a CD containing this Brief and Appendix were mailed first class, U.S. Mail, postage pre-paid or hand delivered on December 28, 2009 to:

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Relator's Brief includes the information required by Rule 55.03 and complies with the limitations contained in Rule 84.06(b). Relying on the word count and line count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 6,337 and that the total number lines of monospaced type in the brief is 761, exclusive of the cover, signature block, and certificates of service and compliance.

The undersigned further certifies that the disks filed with the Relator's Brief and served on respondent were scanned for viruses and found virus-free.

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