

IN THE SUPREME COURT OF MISSOURI

No. SC90407

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STATE ex rel. BILLIE BARKER, Trustee of the Mary Almond Living Trust  
Defendant/Relator

v.

HONORABLE DAVID B. TOBBEN, Circuit Court Judge of Franklin County, Missouri

and

GLORIA J. KAPPLER, Trustee of the Gloria J. Kappler Living Trust  
Plaintiff/Respondents

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

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**RESPONDENTS' BRIEF IN OPPOSITION TO WRIT OF PROHIBITION**

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## **JURISDICTIONAL STATEMENT**

The present action involves a Petition filed by Relator seeking a writ of prohibition. The Missouri Constitution explicitly provides that the “supreme court and districts of the court of appeals may issue and determine original remedial writs”. Mo. Const., Art. V, Sec. 4.1. This Court, in *Thomas v. Mead*, 36 Mo. 232 (Mo. 1865), held “[t]hat the court has original jurisdiction to issue the writ of prohibition can scarcely be questioned.” *Id.* Therefore, pursuant to the Constitution of Missouri, this Court is deemed to have jurisdiction over the present action, and may hear and determine this original writ proceeding.

**POINTS RELIED ON**

**I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ORDERING THE SEVERANCE OF RELATOR'S CLAIM FOR TRESPASS FROM THE TRIAL OF THE EQUITABLE CLAIMS FILED BY BOTH PARTIES BECAUSE THE ORDER OF SEVERANCE WAS PROPER UNDER SUPREME COURT RULE 66.02 AND *STATE ex rel. LEONARDI v. SHERRY*, 137 S.W.3d 462 (Mo. 2004) IN THAT THE ORDER ALLEVIATED PREJUDICE TO PLAINTIFF AND PROMOTED PRACTICALITY, EFFICIENCY AND JUDICIAL ECONOMY AND THEREFORE RELATOR'S PETITION FOR WRIT OF PROHIBITION MUST BE DENIED.**

*State ex rel. Leonardi v. Sherry*, 137 S.W.3d 462 (Mo. 2004).

*De May v. Liberty Foundry Co.*, 37 S.W.2d 640 (Mo. 1931).

*Stephens v. Brekke*, 977 S.W.2d 87 (Mo. App. S.D. 1998).

*Martens v. White*, 195 S.W.3d 548, 555 (Mo. App. S.D. 2006).

Missouri Supreme Court Rule 66.02.

Federal Rules of Civil Procedure Rule 42(b).

**II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING RELATOR THE RIGHT TO A JURY TRIAL ON RESPONDENT'S ADVERSE POSSESSION AND BOUNDARY BY ACQUIESCENCE CLAIMS BECAUSE THE ORDER OF SEVERANCE WAS PROPER IN THAT, AS A MATTER OF LAW, CLAIMS OF ADVERSE POSSESSION AND BOUNDARY BY ACQUIESCENCE ARE CLAIMS FOR EQUITABLE RELIEF, TO WHICH PARTIES ARE NOT ENTITLED TO TRIAL BY JURY, AND THEREFORE RELATOR'S PETITION FOR WRIT OF PROHIBITION MUST BE DENIED.**

*State ex rel. Leonardi v. Sherry*, 137 S.W.3d 462 (Mo. 2004).

*Wolfersberger v. Hoppenjon*, 68 S.W.2d 814, 817 (Mo. 1933).

*Stephens v. Brekke*, 977 S.W.2d 87, 95 (Mo. App. S.D. 1998).

*Reyonlds v. Stepanek*, 99 S.W.2d 65, 68 (Mo. 1936).

W. W. Allen, Annotation, *Right to Jury Trial in Suit to Remove Cloud, Quiet Title or Determine Adverse Claims*, 117 A.L.R. 9 (1938).

### *Standard of Review*

Writs of prohibition are discretionary and only lie “to prevent ‘an abuse of judicial discretion, to avoid irreparable harm to a party, or to prevent exercise of extra-judicial power.’” *State ex rel. Rosenberg v. Jarrett*, 233 S.W.3d 757, 760 (Mo. App. 2007) (quoting *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 857 (Mo. 2001)). The burden rests with the petitioning party, and includes having to overcome “the presumption of right action in favor of the trial court’s ruling,” *State ex rel. Ford Motor Co. v. Westbrooke*, 12 S.W.3d 386, 392 (Mo. App. S.D. 2000) (quoting *State ex rel. Dixon v. Darnold*, 939 S.W.2d 66, 69 (Mo. App. S.D.1997)).

## ARGUMENT

- I. **The trial court did not abuse its discretion in ordering the severance of Relator’s claim for trespass from the trial of the equitable claims filed by both parties because the order of severance was proper under Supreme Court Rule 66.02 and *State ex rel. Leonardi v. Sherry*, 137 S.W.3d 462 (Mo. 2004) in that the order alleviated prejudice to plaintiff and promoted practicality, efficiency and judicial economy and therefore Relator’s Petition for Writ of Prohibition must be denied.**
- A. *Trial courts continue to have discretion under Missouri Supreme Court Rule 66.02 and State ex rel. Leonardi to proceed upon separate trials under certain circumstances.*

Missouri Supreme Court Rule 66.02 and *State ex rel. Leonardi* permit, in certain situations, that claims at law and claims in equity may be severed and tried separately.

Missouri Supreme Court Rule 66.02 provides as follows:

The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.

Mo. Sup. Ct. R. 66.02. The word “may” in the statute has been interpreted to provide the trial court with “broad authority” and discretion to order the separation of claims. *Shady Valley Park & Pool, Inc. v. Fred Weber, Inc.*, 913 S.W.2d 28, 36 (Mo. App. E.D. 1995).

Furthermore, an order of separation under Rule 66.02 is reviewed under the deferential abuse of discretion standard. *Id.*

Rule 66.02 sets forth several express grounds upon which a court may exercise its broad discretion in ordering separate trials. First, an order of severance and of separate trials may be necessary to “avoid prejudice”. Mo. Sup. Ct. R. 66.02. The avoidance of prejudice has been defined by looking to Federal Rule of Civil Procedure 42(b), which Missouri’s Supreme Court Rule 66.02 “substantially follows”. *B-W Acceptance Corp. v. Benack*, 423 S.W.2d 215, 217 (Mo. App. 1967). Rule 42(b) states as follows: “For convenience, to avoid prejudice, or to expedite or economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims.” Fed. R. Civ. P. 42(b) (emphasis added). In construing Rule 42(b), courts have held that “the kind of prejudice contemplated by Rule 42(b) does not come into play where the action is tried by the court.” *In re Paris Air Crash of March 3, 1974*, 69 F.R.D. 310, 319 (Dist. Cal. 1975). Second, Rule 66.02 also provides for separate trials in the furtherance of “convenience.” Mo. Sup. Ct. R. 66.02. Finally, a court may order separate trials under Rule 66.02 where it would be “conducive to expedition and economy.” *Id.*

In addition to Rule 66.02, this Court, in *State ex rel. Leonardi v. Sherry*, 137 S.W.3d 462 (Mo. 2004), held that certain situations would require claims at law and claims in equity to be severed and tried separately. *Leonardi* involved a claim asserted by a pharmaceutical company which sought injunctive relief to enforce a restrictive covenant against one of its physicians, Dr. Leonardi. As part of its action, the

pharmaceutical company also brought a claim for damages. While the trial court denied the company's request for a preliminary injunction, the trial court stated that the company's request for a permanent injunction and damages were still before it. Therefore, pursuant to the equitable cleanup doctrine, the trial court denied a jury trial and permitted both claims to proceed before the court. Dr. Leonardi filed a request for writ of prohibition in which he asserted violation of his right to trial by jury. In consideration of Dr. Leonardi's Petition, the Court announced a general rule to be applied in actions seeking mixed claims of equitable and legal relief.

Missouri trial courts have jurisdiction to try cases involving requests for equitable relief and damages in one proceeding. The trial court has discretion to try such cases in the most practical and efficient manner possible, consistent with Missouri's historical preference for a litigant's ability to have a jury trial of claims at law. Unless circumstances clearly demanded otherwise, trials should be conducted to allow claims at law to be tried to a jury, with the court reserving for its own determination only equitable claims and defenses, which it should decide consistently with the factual findings made by the jury.

*Id.* at 473 (emphasis added). The Court also recognized that there would be certain situations in which equitable and legal claims would need to be severed and tried separately. In furtherance of this understanding, the Court stated that,

If there should be cases where the availability of declaratory judgment or joinder in one suit of legal and equitable causes would not in all respects

protect the plaintiff seeking equitable relief from irreparable harm while affording a jury trial in the legal cause, the trial court will necessarily have to use its discretion in deciding whether the legal or equitable cause should be tried first (emphasis added).

*Id.* at 473 (citing, *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500 (1959)). In announcing the aforementioned, the Court went on to state that:

This procedure preserves the trial court's flexibility to try cases in the most practical and efficient manner possible. It also preserves and maintains the distinction between equitable relief and damages while respecting the historical preference for trial by jury. Furthermore, it escapes the inconsistent application of outdated historical theories inherent in our existing case law. It does not, however, enlarge or expand the right to a jury trial in this state. Equitable issues that traditionally have been tried to the court shall still be tried to the court.

*Id.* at 474 (emphasis added).

Based upon the foregoing, the Missouri Supreme Court has recognized, both in its Rules and through its written decisions, that equitable claims and claims at law need not be tried together in certain cases where the court's discretion is exercised appropriately. As has been shown, certain causes of action upon which relief is sought forced the trial court to protect plaintiff from prejudice and irreparable harm inherent in combining all claims asserted together in one jury trial.

***B. Respondent David B. Tobben did not abuse his discretion in ordering the severance of Relator’s claim for trespass damages pursuant to State ex rel. Leonardi and Missouri Supreme Court Rule 66.02.***

The Order of Severance entered by Respondent David B. Tobben was proper under both Rule 66.02 and *State ex rel. Leonardi*, both of which set forth several grounds upon which the trial judge may exercise his or her discretion in ordering the severance of equitable and legal claims and conducting separate trials.

First, Rule 66.02 and *State ex rel. Leonardi* provide for separate trials where there would be prejudice or irreparable harm. In the present case, were the equitable claims in Respondent Kappler’s First Amended Petition and the equitable and legal claims in Relator’s First Amended Counterclaim to go forward in a jury trial, the presentation of the evidence to prove and prevail under adverse possession would result in prejudice to Kappler in that she would be invariably inhibited from admitting the cumulative and forceful evidence required to establish the claim of adverse possession due to the fact that such evidence would also prove, and possibly magnify and increase, the trespass claim asserted by Relator below.

An action for quiet title by adverse possession requires the pleading party to demonstrate that possession was “(1) hostile<sup>1</sup>, (2) actual<sup>2</sup>, (3) open and notorious<sup>3</sup>, (4)

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<sup>1</sup> “The hostile element is satisfied by a possession that is antagonistic to the claims of all others, with an intent to occupy the disputed land as one’s own.” *Martens v. White*, 195 S.W.3d 548, 555 (Mo. App. S.D. 2006).

exclusive<sup>4</sup>, and (5) continuous<sup>5</sup> for the ten-year period prior to commencement of the action.” *Martens*, 195 S.W.3d at 554. A claim for trespass damages requires a party to demonstrate a “direct physical invasion” with that party’s property. *Doyle v. Fluor Corp.*, 199 S.W.3d 784, 789 (Mo. App. E.D. 2006). Although there is no MAI approved verdict director on trespass, the verdict directing instruction would likely follow § 537.340, RSMo., which requires the owner to prove the accused trespasser entered upon his land and cut trees, among other things. Furthermore, under Missouri law, one is held liable for trespass even though he has probable cause to believe the land trespassed upon is his own. See § 537.360, RSMo. Under such proof, the jury would be instructed to award.

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<sup>2</sup> “Actual possession is the present ability to control the land and the intent to exclude others from such control.” *Martens*, 195 S.W.3d at 555.

<sup>3</sup> “The open and notorious element of adverse possession is satisfied by exercising visible acts of ownership on the disputed property. Maintaining and improving the property are examples of such visible acts of ownership.” *Martens*, 195 S.W.3d at 555.

<sup>4</sup> “[E]xclusive possession, which means that the claimant holds the land for himself and not for another.” *Martens*, 195 S.W.3d at 555.

<sup>5</sup> “The fifth and final element of adverse possession is that the possession be continuous for the statutory period of ten years. The ten years must be consecutive, uninterrupted, and without lapse.” *Martens*, 195 S.W.3d at 555.

In the present case, were the equitable and legal claims ordered to proceed in one jury trial, Respondent Kappler would be inhibited from presenting evidence she knew a jury could later use to find in favor of Relator upon a claim of trespass, and therefore, Kappler would be prejudiced. In order to prevail upon her claim of quiet title by adverse possession, Kappler will and must present evidence that she entered upon the subject property, openly and obviously, that her occupation of the property included the cutting and removing of trees, that her occupation and use of the property was for her own benefit and continued for 10 years, and that she excluded the title owner from the property. Under such proof, a jury would be instructed to find a trespass occurred.

This same evidence would also support Relator's claim for trespass damages because it would demonstrate a physical invasion of the other party's property. The more flagrant and obvious Kappler's use and occupation are shown to be, the more likely the court would otherwise rule that adverse possession exists. Regrettably, the same evidence may allow the jury to find treble damages under trespass and inhibit the court from entering judgment in favor of Kappler under *Leonardi*. If the jury is instructed to award damages where trespass is proven, the jury is left with no choice but to do so. At this point, the trial judge will be impaled by Morton's Fork: either the trial judge must enter judgment consistent with the jury's verdict, thereby violating *Leonardi*, or the trial judge must correctly enter judgment in favor of Respondent below because she conclusively proved a claim of adverse possession, which would be inconsistent with the jury's verdict.

On the other hand, were this Court to uphold Respondent Tobben's severance of the equitable and legal claims in the present case, this Court would be avoiding the exact type of irreparable harm identified in Rule 66.02 and in *State ex rel. Leonardi*. By conducting a separate bench-tried case on the equitable claims and counterclaims for title, the court would necessarily determine the question of property ownership – an equitable determination traditionally made by a judge sitting in equity, not a jury. The only proper manner in which to reconcile the unique problem confronting the parties in this case in order to avoid prejudice to Kappler, is to sever the equitable and legal causes of action, and have the adverse possession claim and Relator's counterclaim to quiet title decided first by the court. After all, the trial on the trespass cause of action will be unnecessary in the event the equitable determination of title is made in favor of Respondent Kappler.

Practicality, efficiency and judicial economy are also recognized by Rule 66.02 and *State ex rel. Leonardi* as grounds upon which a trial court may exercise its discretion in ordering the separation of legal and equitable claims and the conducting of separate trials. Specifically, Rule 66.02 states that “[t]he court...when separate trials will be conducive to expedition and economy, may order a separate trial of any claim”. Mo. Sup. Ct. R. 66.02 (emphasis added). This Court stated in *State ex rel. Leonardi* that the discretion afforded judges in ordering the separation of claims “preserves the trial court's flexibility to try cases in the most practical and efficient manner possible.” 137 S.W.3d at 474. In the present case, the severance of Relator's claim for trespass damages from the remaining equitable claims in Respondent Kappler's First Amended Petition and in

Relator's First Amended Counterclaim supports and promotes the interests of practicality, efficiency and economy for a number of reasons.

First, a significant amount of time, expense and inconvenience to jurors associated with conducting a jury trial can be reduced and avoided by conducting a bench trial upon the numerous equitable claims presented in the underlying case, and thereafter, if necessary, conducting a jury trial on the single issue of trespass damages. The trial before Judge Tobben, as originally set below, was expected to exceed four days in length. (*Respondents' Return to Preliminary Writ, November 4, 2009, p 11.*) The entirety of the time at trial is expected to be dedicated to evidence of use, occupation and possession, and only if the court finds the evidence favors Relator, will the issue of trespass damages arise. In such a situation, were this case to proceed in one trial as requested by Relator, the jurors will be required to attend multiple days of trial and hear evidence relevant to only the equitable issue of title, of which the jury can make no determination. Impaneling a jury would also come at a significant cost and effort to the Jefferson County court system. Finally, requiring a jury trial will also extend the length of the trial due to certain procedures only required for jury trials, such as motions in limine, voir dire, sidebars during the proceedings, jury instruction conferences, deliberations, and the numerous evidentiary issues that arise. Every trial lawyer is sensitive to the presence of a jury in order to avoid a mistrial, and takes extra time and effort to carefully address issues with the court – issues that, in a judge-trying case, never arise or that can be ignored by the court. Moreover, were this Court to uphold Respondent Tobben's Order of Severance, the need for a jury, if any, may not arise, and if necessary, a jury would be impaneled

only after the equitable claims concerning title were properly determined by the court. In the event a jury trial would be required on Relator's trespass claim, the trial could be later conducted in less than a single day.

Second, a jury trial and Relator's claim for trespass damages are wholly dependent upon a determination of the equitable claims in Respondent Kappler's First Amended Petition and in Relator's First Amended Counterclaim. In the present case, both Respondent Kappler and Relator requested relief in their pleadings for the trial court to quiet title to the property in their respective favors. Specifically, Kappler requested the court to "enter Judgment in Plaintiff's favor... [that] Plaintiff be decreed the rightful owner of the subject property." (*Resp't Kappler's First Am. Pet.*, p 15.) Relator's First Amended Counterclaim requested "the Court enter an order quieting title to said real property in Defendant." (*Relator's First Am. Countercl.*) Based upon both pleadings, not only was it clear that title was not settled, but it was also apparent that both Kappler and Relator properly requested the trial court to make the determination of title. Were title quieted in favor of Kappler, no jury would be necessary because Relator's claim for trespass damages would have become moot. The Supreme Court has in the past traditionally supported this regime. In *Moss v. James*, 411 S.W.2d 104 (Mo. 1967), the Supreme Court considered an appeal based upon a petition for damages and a counterclaim asserting adverse possession. *Id.* at 105. The trial court, without a jury, entered judgment against plaintiffs on their claim for trespass, and in favor of defendants under adverse possession. *Id.* This Court, in affirming the court's judgment stated that "[t]his case was tried by the trial court without a jury. We review it 'upon both the law

and the evidence as in suits of an equitable nature.’” *Id.* at 108. Therefore, even in the context of a counterclaim, this Court recognized that a claim for adverse possession is one in equity under which a court must render a determination.

Based upon the foregoing, and in consideration of the aforementioned grounds set forth by Missouri Supreme Court Rule 66.02 and *State ex rel Leonardi* for the separation of claims, Respondent Tobben did not abuse his discretion in ordering the severance of Relator’s trespass damages claim from the remaining equitable claims in Kappler’s First Amended Petition and in Relator’s First Amended Counterclaim. Therefore, this honorable Court should deny Relator’s Petition for Writ of Prohibition.

***C. Both Respondent Kappler’s First Amended Petition and Relator’s First Amended Counterclaim assert equitable causes of action for which Missouri law has never recognized the right to a trial by jury.***

It is beyond question that in Missouri, the right to a jury trial granted under the Missouri Constitution has never been extended to claims seeking equitable relief. *See, De May v. Liberty Foundry Co.*, 37 S.W.2d 640, 648 (Mo. 1931) (“[i]t is well and thoroughly settled in this state and jurisdiction that actions or proceedings in equity are not triable by jury, as a matter of constitutional right”); *see also, Wolf v. Hartford Fire Ins. Co.*, 263 S.W.846, 847 (Mo. 1924) (“the Constitution guarantees a jury, if one is desired, in all actions at law and that it does not give a right to a jury trial in suits in equity”); *State ex rel. Duggan v. Kirkwood*, 208 S.W.2d 257, 262 (Mo. 1948) (“Section 22, Article 1 of the 1945 Missouri Constitution, Mo.R.S.A., states ‘that the right of trial by jury as heretofore enjoyed shall remain inviolate.’ This constitutional provision does

not give a trial by jury in an equity action”); *Fein v. Schwartz*, 404 S.W.2d 210, 228 (Mo. 1966) (“[t]he instant suit is one in equity in which a trial by jury did not exist at common law and never has as a matter of right in this state”); *State ex rel. Willman v. Sloan*, 574 S.W.2d 421, 422 (Mo. 1978) (“there is no right to trial by jury in a case in equity”); *State ex rel. Diehl v. O’Malley*, 95 S.W.3d 82, 85 (Mo. 2003) (“[t]he right to a trial by jury exists in actions at law but not in actions in equity”); and *Nitro Distributing, Inc. v. Dunn*, 194 S.W.3d 339, 352 (Mo. 2006) (“[i]n civil actions, of course, the right to trial by jury attached only to actions at law for which damages may be awarded, not to suits in equity”). This principal has remained constant throughout Missouri’s history, and Court’s decision in *State ex rel. Leonardi*, did not alter or change its force or applicability.

As previously stated in Subsection A, *State ex rel. Leonardi* involved a petition for writ of prohibition in which the Petitioner alleged he had been denied his right to a trial by jury. In addressing Dr. Leonardi’s petition, this Court reiterated the conclusively established rule of law that “Missouri’s Constitutional guarantee to a jury trial has never been applied to claims seeking equitable relief.” *Id.* at 472. *Leonardi* has subsequently been cited as authority by the Missouri Courts of Appeal for this exact principal. *See, Savannah Place, Ltd. v. Heidelberg*, 164 S.W.3d 64, 66 (Mo. App. S.D. 2005) (“Missouri’s constitutional guarantee to a jury trial has never been applied to claims seeking equitable relief”); *see also, Turnbull v. Car Wash Specialties, LLC*, 272 S.W.3d 871, 873 (Mo. App. E.D. 2008) (“Missouri’s constitutional right to a trial by jury does not apply to equitable causes of action”).

It is the petition which determines the nature of the cause of action and relief being sought. *Wolfersberger v. Hoppenjon*, 68 S.W.2d 814, 817 (Mo. 1933). “When equitable relief to dispel a cloud on title is integral to the relief requested, the petition invokes a court’s equitable power and the right to a jury trial does not accrue.” *Stephens v. Brekke*, 977 S.W.2d 87, 95 (Mo. App. S.D. 1998) (citing *Pipes v. Sevier*, 694 S.W.2d 918, 923 (Mo. App. W.D. 1985)). A counterclaim cannot alter the nature of the action so as to create a right to trial by jury. *Id.* “A right to a jury trial does not accrue merely because adjudgment of money damages are incident to an equitable action.” *Id.*

In the present case, each and every claim contained in Respondent Kappler’s First Amended Petition is equitable in nature, and is not afforded the right to be tried by a jury as a matter of Missouri constitutional law. Respondent Kappler’s First Amended Petition includes two counts – quiet title by adverse possession and boundary by acquiescence. (*Respondent Kappler’s First Amended Petition attached to Relator’s Appendix to Brief in Support of Writ of Prohibition at pp. A29-A32.*) As will be discussed more fully below in Section II, both counts are equitable causes of action under Missouri law. Respondent Kappler’s First Amended Petition renders the present case one in equity only, and therefore no right to a jury trial exists for this equitable action.

Furthermore, each of Relator’s claims within his First Amended Counterclaim, save one, are equitable claims, and therefore Relator is not entitled to a trial by jury. Relator’s First Amended Counterclaim contains the following claims: quiet title (Count I), injunctive relief (Count II), ejectment (Count III), trespass (Count IV) and conversion

(Count V)<sup>6</sup>. (*Relator's First Amended Counterclaim attached to Relator's Appendix to Brief in Support of Writ of Prohibition at pp. A42-A49.*) With the exception of Count IV, each and every other count seeks equitable relief. Relator properly cites *Rains v. Moulder*, 90 S.W.2d 81 (Mo. 1936) for the rule that whether an action to quiet title is at law or in equity is determined by the pleadings. (*Relator's Br., p. 15.*) Relator's prayer in Count I requests the court to "enter an Order quieting title to said real property in Defendant, [and] declaring that Plaintiffs, her heirs, successors and assigned have no right, title or interest in and to said property." (*Relator's First Am. Countercl., Relator's App., p. A43.*) As will be set forth and discussed more fully below, where, as here, "equitable relief to dispel a cloud in title is integral to the relief requested, the petition invokes a court's equitable power and the right to a jury trial does not accrue." *Stephens*,

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<sup>6</sup> Relator is not entitled to a trial by jury upon Count V, the conversion count, of his First Amended Counterclaim. Respondent Kappler filed a Motion to Dismiss Count V of Relator's Amended Counterclaim on August 21, 2007. This motion was granted on May 27, 2009, with the trial court granting Relator time to amend his counterclaim. (*See, Respondent Tobben's Order dated May 27, 2009, Respondents' Appendix, A11.*) Following Relator's filing of his First Amended Counterclaim, Respondent Kappler filed another Motion to Dismiss Count V, the conversion count. On June 19, 2009, the trial court entered its order thereby dismissing Count V of Relator's First Amended Counterclaim. (*See, Respondent Tobben's Order dated June 19, 2009, Respondents' Appendix, A12.*)

977 S.W.2d at 95. Therefore, Count I of Relator’s First Amended Counterclaim is equitable in nature and does not afford Relator a right to a trial by jury as a matter of law.

Second, Count II of Relator’s First Amended Petition requests relief in the form of an injunction. (*Relator’s First Am. Countercl., Relator’s App., p. A44.*) Specifically, Relator requests the court to “enter a permanent injunction”. (*Relator’s First Am. Countercl., Relator’s App., p. A44.*) Under Missouri law, injunctions are equitable remedies. *Bates v. Webber*, 257 S.W.3d 632, 635 (Mo. App. S.D. 2008) (*citing, Inman v. Missouri Dept. of Corrections*, 139 S.W.3d 180, 185 (Mo. App. 2004)) (“[i]ssuance of an injunction is an equitable remedy”). Therefore, Count II of Relator’s First Amended Counterclaim seeks equitable relief for which there is not right to trial by jury.

Third, Count III of Relator’s First Amended Counterclaim seeks on order of ejectment. Specifically, Relator requests the court to “enter its order ejecting GLORIA J. KAPPLER, Trustee, her heirs, agents, servants, employees, and those persons in active concert with Plaintiff, from the aforescribed real estate”. (*Relator’s First Am. Countercl., Relator’s App., p. A45.*) “[E]quitable relief may be invoked in ejectment suits by pleading title and facts invoking affirmative equitable relief.” *Reyonlds v. Stepanek*, 99 S.W.2d 65, 68 (Mo. 1936) In such a situation, Missouri courts hold that a court may then “hear and determine the matter as an equitable proceeding and grant full and complete relief.” *Id.* In support of Count III, Relator states that “Defendant has the immediate right of possession of the real property.” (*Relator’s First Am. Countercl., Relator’s App., p. A45.*) Such statement was made in support of title being vested in

Relator. As such, Relator's count for ejectment is equitable and not entitled to a jury trial.

With the exception of Relator's Count IV for trespass, all remaining claims within Respondent Kappler's First Amended Petition and within Relator's First Amended Counterclaim are causes of action seeking equitable relief. Therefore, this honorable Court should deny Relator's Petition for Writ of Prohibition.

**II. The trial court did not abuse its discretion in denying Relator the right to a jury trial on Respondent's adverse possession and boundary by acquiescence claims because the order of severance was proper in that, as a matter of law, claims of adverse possession and boundary by acquiescence are claims for equitable relief, to which parties are not entitled to trial by jury, and therefore Relator's Petition for Writ of Prohibition must be denied.**

***A. A claim for adverse possession is one in equity under Missouri law for which there is no right to a trial by Jury.***

It has been conclusively held by this Court that no constitutional right to a jury trial exists for claims seeking equitable relief. *State ex rel. Leonardi*, 137 S.W.3d at 472. Missouri courts are clear that an action for adverse possession is equitable in nature and, therefore, the right to jury trial does not exist. *Wolfersberger*, 68 S.W.2d at 817, supports this rule of law. *Wolfersberger* involved a petition which included a count for quiet title and a count for damages. The action was treated as one at law, and resulted in a jury verdict for the plaintiff. On appeal, the Supreme Court held that "the trial court erred in treating this proceeding as wholly an action at law" because the case sought to "set aside

deeds and to remove a cloud on respondent's title- 'a matter of equitable cognizance.'" *Id.* at 818. In support of its holding, the Court cited to several cases. First, *Hudson v. Wright*, 103 S.W.8 (Mo.1907), was cited for the rule of law that "the statute to quiet title did not oust the ancient jurisdiction of courts of equity to remove clouds of title, to declare resulting trusts, and to vest out of one person and into another title to land." *Id.* at 817. Second, *Wolfersberger* cited *Stone v. Perkins*, 117 S.W. 717 (Mo. 1909), involving a statutory proceeding to quiet title, for the premise that a trial under the statute to quiet title is for the court and not the jury. *Id.* Third, *Hutchinson v. Patterson*, 126 S.W. 403 (Mo.1910), was cited in *Wolfersberger* for its statement that "an action under the [quiet title statute] is a statutory proceeding and therefore strictly speaking cannot be called a suit in equity, yet the nature of the proceeding is such that it often involves matters that a court of equity alone is qualified to consider, to examine titles and to determines questions of law that affect their validity." *Id.* at 818. Based upon the aforementioned, *Wolfersberger* held that a claim to determine title is one in equity, properly triable to the court; not a jury.

Furthermore, in *Stephens v. Brekke*, it was held that "[w]hen equitable relief to dispel a cloud in title is integral to the relief requested, the petition invokes a court's equitable power and the right to a jury trial does not accrue." *Stephens*, 977 S.W.2d at 95. Such is the exact nature of the relief requested under a claim for adverse possession. "As to the land, adverse possession for the statutory period establishes an indefeasible legal title in the possessor, the title of the record owner is divested and, unlike the easement cases, that title is not lost by abandonment or mere failure to assert title after it

has been perfected.” *La Grange Reorganized School Dist. No. R-VI v. Smith*, 312 S.W.2d 135, 139 (Mo.1958).

As stated above in Section I, this Court has further addressed the issue of adverse possession and the lack of a right to a jury trial in the context of asserting adverse possession as a counterclaim. In *Moss v. James*, this Court upheld a judgment by a trial court vesting title in the defendant and declaring the defendant had established title by adverse possession. *Id.* at 106. Therefore, even in the context of a counterclaim, this Court recognized that a claim for adverse possession is one in equity under which a court must render a determination.

Despite the foregoing, and Relator’s own recognition that a claim for quiet title can be equitable, Relator attempts to argue in his brief that “an adverse possession case in Missouri is one of fact to be determined by a jury.” (*Relator’s Br.*, pp. 15; 24.) This is not, and has never been the law in Missouri. In support of his argument, Relator cites to several cases. First, Relator cites *Erwin v. City of Palmyra*, 119 S.W.3d 582 (Mo. App. E.D. 2003), for the premise that where a quiet title action does not seek affirmative equitable relief, but only a determination of existing title, then it is an action at law. (*Relator’s Br.*, p. 15.) Furthermore, Relator alleges that *Erwin* stands for the premise that affirmative equitable relief only occurs in the form of an injunction or specific performance. (*Relator’s Br.*, p. 15.) Not only does the *Erwin* opinion completely lack language as to the second contention, but *Erwin* involved a petition alleging both quiet title and trespass, and was tried by the court. *Id.* at 584. Therefore, *Erwin* does not stand for the premise that a claim for adverse possession creates a right to trial by jury.

Next, Relator cites *Massachusetts General Life Ins. Co. v. Sellers*, 835 S.W.2d 475 (Mo. App. S.D. 1992), for the premise that “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 notice or deed of trust, or setting aside some other instrument. (*Relator’s Br.*, p. 19.) Relator misstates the law in *Massachusetts General Life* in that the opinion does not require such forms of relief to be sought in order for an action to be equitable in nature. While the opinion cites such forms of relief as examples of equity, the Court does not hold that these are the only forms of relief which are equitable. Therefore, Relator cannot rely on *Massachusetts General Life* for the premise that an adverse possession is one at law which creates a right to trial by jury. Whether an action is equitable or at law is determined by the pleadings. *Wolfersberger v. Hoppenjon*, 68 S.W.2d at 817 (Mo. 1933). Both Relator and Respondent Kappler have requested equitable relief in their pleadings.

Relator also relies upon the case of *Benoist v. Thomas*, 27 S.W. 609 (Mo. 1894). As stated by Relator, *Benoist* involved an action for partition. (*Relator’s Br.*, p. 22.) Although Relator attempts to argue that the present case is similar to *Benoist*, an action for partition is a statutory action only, and therefore not the same as an action for adverse possession. Therefore, *Benoist* cannot stand for the premise that an action for adverse possession is entitled to a trial by jury.

Relator also heavily relies upon the case of *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.* The case was tried before the court, which entered judgment for the Defendant. *Id.* Relator seizes upon language in the opinion that “plaintiff’s claim of title by statute of limitations, or by abandonment, if available at all, presented issues properly triable by jury.” *Id.* at 890. Relator is misguided in relying upon this language as a pronouncement of the law in Missouri. The Court in *Hatton* noted that the action had proceeded below in front of the trial court, and not before a jury. Therefore, the *Hatton* Court did not even condone the procedure suggested by Relator to be the law in Missouri.

Relator next cites to the case of *Kansas City v. Smith*, 141 S.W.1103 (Mo. 1911). Relator’s reliance upon *Kansas City* however, is wholly inapplicable to the present case in that *Kansas City* did not involve a claim for adverse possession, but rather, the enforcement of a grading ordinance and the abundant of a road.

Relator also cites to *Frowein v. Poage*, 132 S.W. 241 (Mo. 1910). (*Relator’s Br.*, p. 25.) *Frowein* involved a petition praying the court to ascertain and determine title of a plaintiff and a defendant in certain land created by the Mississippi River. *Id.* The Court recognized that the “issue was one of accretion alone: Was it an accretion to plaintiff’s lands on the east shore of the river, or was it an accretion to Defendant’s island?” *Id.* at 424.

Finally, Relator’s brief states that “[s]cores of Missouri cases have held that a cause of action involving adverse possession is factual in nature and for a jury to determine.” (*Relator’s Br.*, p 26.) In his brief, Relator cites to *Adams v. Wright*, 187 S.W.2d 216 (Mo. 1945). No where in *Adams* does the Court state that a claim for

adverse possession creates a right to a trial by jury. Instead, the Court merely stated that the evidence adduced during trial was sufficient to create “a submissible issue on the question of payment”. *Id.* at 219. Relator also cites *Hearod v. Baggs*, 169 S.W.3d 198 (Mo. App. S.D. 2005) for the premise that the issue of hostility is one for the jury. (*Relator’s Br.*, p 26.) *Hearod* is distinguishable from the present case in that the petition only asserted an action for ejectment, and the claim of adverse possession was raised as an affirmative defense. *Hearod*, 169 S.W.2d at 200.

Not only do the authorities cited by Relator’s Brief fail to properly state the law in Missouri regarding adverse possession, but Relator’s prior pleadings submitted with this Court failed to do so as well. In his Suggestions in Support of Petition for Writ of Prohibition, which was concurrently filed with the Petition for Writ of Prohibition on September 17, 2009, Relator cited to just under fifty Missouri Supreme Court and Courts of Appeal cases, which he alleges stand for the right to a trial by jury on claims of adverse possession. (*Relator’s Suggestions in Support of Petition for Writ of Prohibition*, ¶¶ 10, 11.) Not only does Relator’s reliance on these cases misapply and misstate the law in Missouri, but such cases are distinguishable from the present case. This has been conclusively set forth and fully discussed in Respondents’ Suggestions in Opposition to Relator’s Petition for Writ of Prohibition, filed with this Court on September 23, 2009. (*Respondents’ Suggestions in Opposition to Relator Billie Barker’s Petition for Writ of Prohibition*, pp. 9-13.)

Relator further suggests that a jury instruction submitted by Respondent Kappler to the judge upon the judge’s request is an admission by Kappler of the right to a jury

trial. (*Relator's Br.*, p. 27.) While Kappler did submit such an instruction at the court's request, Relator fails to apprise this Court of the full facts surrounding the instruction. Docket entries from February 14, 2005 ("NON-JURY"), December 12, 2005 ("NONJURY"), July 5, 2006 ("Court Trial Scheduled"), November 17, 2006 ("Court Trial Scheduled") and February 11, 2009 ("Court Trial"), reflect the mutual understanding that this case was to proceed as a bench-tried case. (*See, Docket, Relator's App.*, A13, A15, A17, A18 and A24.) It was not until Relator filed his Request for Jury Trial on March 9, 2007, that the issue of a jury trial was first raised. (*See, Request for Jury Trial, Relator's App.*, A50.) Relator's Request, however, was never granted.

Furthermore, Relator is deemed to have waived a jury trial under Missouri Missouri Revised Statute Section 510.190 and Supreme Court Rule 69.01(b)(4). Both § 510.190, RSMo and Rule 69.01(b)(4) expressly provide that: "[p]arties shall be deemed to have waived trial by jury by entering into trial before the court without objection." § 510.190, RSMo.; Mo. Sup. Ct. R. 69.01(b)(4). In *Licare v. Hill*, 879 S.W.2d 777, 779 (Mo, App. E.D. 1994), the Court held that "since appellant entered into trial without objecting to the absence of a jury, appellant waived any possible right to a jury trial." *Id.* In the present case, the parties, including Relator, appeared before Judge Patterson for a non-jury trial on August 17, 2006. (*See, Docket, Relator's App.*, A17.) Although the trial court, by its own motion, continued the case, Relator's appearance for a non-jury trial was a waiver of any right to a trial by jury.

Based upon the pleadings and the aforementioned facts, Respondent Kappler never intended or understood this case was to be tried by a jury. In June of 2009, in

preparing for the June 22, 2009 trial date, Respondent became aware that the case was set by the clerk to proceed as a jury trial. (*See, Email to Kathleen Westhoff, Courtroom Clerk, Franklin County, dated June 17, 2009, Respts' App., A14.*) Respondent Kappler thereafter filed her Objections to Relator's Request for Jury Trial and her Waiver of Jury Trial. (*See, Objections to Jury Trial and Waiver of Jury Trial, Relator's App., A55-59.*) Based upon the above facts, Relator cannot now allege that Respondent Kappler desired a trial by jury.

Based upon the foregoing, and upon the holdings of *Wolfersberger, Stephens* and *State ex rel. Leonardi*, the law in Missouri is clear that actions for adverse possession are equitable in nature and do not create a right of trial by jury. Therefore, Respondent Tobben did not abuse his discretion in ordering the severance of Relator's trespass damages claim from the remaining equitable claims in Kappler's First Amended Petition and in Relator's First Amended Counterclaim, and this Court should deny Relator's Petition for Writ of Prohibition.

***B. The prevailing view in the United States is that a claim for adverse possession is one in equity for which there is no right to a trial by jury.***

The prevailing view among the states is that, where the pleading party is in possession of certain real property, there is no right to a jury trial on a claim for adverse possession. Specifically, the American Law Reports provide that: “[i]n an ordinary suit, statutory or otherwise, to quiet title, remove cloud, or determine adverse claims, brought by one in possession of land, there is, in most jurisdictions, no right to a jury trial”. *See, W. W. Allen, Annotation, Right to Jury Trial in Suit to Remove Cloud, Quiet Title or*

*Determine Adverse Claims*, 117 A.L.R. 9 (1938); *see also*, *Loomis v. Union Pac. R. Co.*, 544 P.2d 299, 304 (Idaho 1975) (“[i]n suits to quiet title to real property, no right to trial by jury exists”); *Bradley v. Burkhardt*, 115 N.W. 597, 598 (Iowa 1908) (“[a]n action to quiet title is an equitable one, and should not be tried to a jury”); *Foresman v. Foresman*, 176 P. 147, 148 (Kan. 1918) (“a claimant in possession, to whom ejectment is not available, may maintain an action to quiet title, and his opponent is not guaranteed a jury merely because the controversy involves the ownership and in a sense and remotely the right of possession”); and *Johnson v. Peterson*, 97 N.W. 384 (Minn. 1903) (“all the ordinary rules governing suits in equity to quiet title apply to this action, and it was triable by the court and not by a jury”). Furthermore, as it pertains to Missouri, the A.L.R. provides that,

Although the Missouri rule is that a suit to quiet title is determined by the character of the issues, if the case is one where the plaintiff in possession claims the equitable title only, or if the relief demanded additional to the quieting of title is peculiarly equitable, there is not right to a jury trial.

117 A.L.R. 9 (*citing*, *Hudson v. Wright*, 103 S.W. 8 (Mo. 1907); *Withers v. Kansas City Suburban Belt R. Co.*, 126 S.W. 432 (Mo. 1910); and *Stafford v. Shinabargar*, 81 S.W.2d 626 (Mo. 1935)). In the present case, the generally accepted view throughout the United States is that no right to a jury trial exists on adverse possession claims. Therefore, this Court should deny Relator’s Petition for Writ of Prohibition.

***C. Under Missouri law, a claim for boundary by acquiescence is one in equity for which there is no right to trial by jury.***

A claim for boundary by acquiescence is recognized under Missouri law as seeking relief by ejectment. *Adams v. White*, 488 S.W.2d 289, 291 (Mo. 1972). Relator's brief acknowledges this in citing *Carroz v. Kaminiski*, 467 S.W.2d 871, 872 (Mo. 1971). (*Relator's Br.*, p. 21.) As stated above in Section I, "equitable relief may be invoked in ejectment suits by pleading title and facts invoking affirmative equitable relief." *Reynolds*, 99 S.W.2d at 68. Courts may then "hear and determine the matter as an equitable proceeding and grant full and complete relief." *Id.* Therefore, an action for boundary by acquiescence is one in equity for which there is no right to a trial by jury.

In the present action, Respondent Kappler's First Amended Petition states a claim for quiet title by boundary by acquiescence as alternative relief to her claim for adverse possession. (*Resp't Kappler's First Am. Pet.*) The boundary by acquiescence count requests the trial court to "declare the boundary between Plaintiff's property and Defendant's property to be established in accordance with the Exhibit attached to the Petition". (*Resp't Kappler's First Am. Pet.*, p 4.) This request for affirmative equitable relief is proper under Missouri law, and renders the claim one in equity. Therefore, Respondent Tobben did not abuse his discretion in ordering the severance of Relator's trespass damages claim from the remaining equitable claims in Kappler's First Amended Petition and in Relator's First Amended Counterclaim, and this Court should deny Relator's Petition for Writ of Prohibition.

**REQUEST FOR DENIAL OF PETITION FOR WRIT OF PROHIBITION**

The trial court did not abuse its discretion in properly ordering the severance of Relator Billie Barker's, Trustee of the Mary Almond Living Trust, claim for trespass damages from the remaining equitable claims of Respondent Gloria J. Kappler's, Trustee of the Gloria J. Kappler Living Trust, First Amended Petition and of Relator's First Amended Counterclaim, and Respondents request that this Court deny Relator's Petition for Writ of Prohibition.

Respectfully Submitted,

SAUERWEIN, SIMON & BLANCHARD, P.C.

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**Certificate of Service**

The undersigned hereby certifies that a true and accurate copy of the foregoing was mailed, postage prepaid, this 18<sup>th</sup> day of January, 2010, along with a CD-Rom containing a copy of Respondents' Brief in Microsoft<sup>®</sup> Word<sup>®</sup> format to:

Stanley D. Schnaare  
Steven A. Waterkotte  
The Schnaare Law Firm, PC  
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Hillsboro, Missouri 63050  
**Attorneys for Relator**

\_\_\_\_\_

SUBSCRIBED AND SWORN to before me this 18th day of January, 2010.

\_\_\_\_\_  
Notary Public

IN THE MISSOURI SUPREME COURT

STATE ex rel. Billie Barker, )  
Trustee of the Marty 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, )  
 )  
Respondents. )

Case No: SC90407

**CERTIFICATE OF COMPLIANCE PURSUANT TO  
MISSOURI SUPREME COURT RULE 84.06(c)**

COMES NOW William L. Sauerwein, counsel for Respondents the Honorable David B. Tobben, Judge of the Circuit Court of Missouri in Franklin County, Missouri and Gloria J. Kappler, Trustee of the Gloria J. Kappler Living Trust, and for his Certificate of Compliance pursuant to Missouri Supreme Court Rule 84.06(c), states to the Court as follows:

1. To the best of my knowledge, information and belief, Respondents’ claims, defenses, requests, demands, objections, contentions and arguments, as set forth in Respondents’ Brief were formed after reasonable inquiry under the circumstances.

Moreover:

(a) Respondents' claims, defenses, requests, demands, objections, contentions and arguments, as set forth in Respondents' Brief are not presented or maintained for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(b) Respondents' claims, defenses, requests, demands, objections, contentions and arguments, as set forth in Respondents' Brief are warranted by existing law or by non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of the new law;

(c) The allegations and other factual contentions in Respondents' Brief have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(d) The denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

2. Respondents' Brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b).

3. Respondents' Brief contains 859 lines of text and 8,656 words.

SAUERWEIN, SIMON & BLANCHARD, P.C.

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IN THE MISSOURI SUPREME COURT

STATE ex rel. Billie Barker, )  
Trustee of the Marty Almond )  
Living Trust, )  
 )  
Relator, )  
 )  
v. ) Case No: SC90407  
 )  
Honorable David B. Tobben )  
Judge, Division )  
Circuit Court, )  
Franklin County, Missouri )  
 )  
and )  
 )  
GLORIA J. KAPPLER, Trustee of the )  
Gloria J. Kappler Living Trust, )  
 )  
Respondent. )

**CERTIFICATE OF COMPLIANCE PURSUANT TO  
MISSOURI SUPREME COURT RULE 84.06(g)**

COMES NOW William L. Sauerwein, counsel for Respondents the Honorable David B. Tobben, Judge of the Circuit Court of Missouri in Franklin County, Missouri and Gloria J. Kappler, Trustee of the Gloria J. Kappler Living Trust, and for his Certificate of Compliance pursuant to Missouri Supreme Court Rule 84.06(g), states to the Court as follows:

1. Respondents file contemporaneously herewith a CD-Rom which contains the Respondents' Brief.
2. Respondents' Brief was created using Microsoft® Word®.

3. Respondents have scanned the enclosed CD-Rom with PC-Cillin 2000 software and said CD-Rom is virus-free.

SAUERWEIN, SIMON & BLANCHARD, P.C.

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**APPENDIX**

Missouri Constitution, Article V, Section 4.1 ..... A1

Section 510.190, RSMo..... A2

Section 537.340, RSMo..... A3

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Respondent Tobben’s Order dated May 27, 2009..... A10

Respondent Tobben’s Order dated June 19, 2009..... A11

Email to Kathleen Westhoff dated June 17, 2009 ..... A13