SC98380

IN THE SUPREME COURT OF MISSOURI

THE EMPIRE DISTRICT ELECTRIC COMPANY, and WESTAR GENERATING, INC.,
Respondents,
v.

JOHN THOMAS SCORSE, both individually and in his capacity as Trustee under that certain Trust Agreement dated November 17, 1976,

Appellants.

On Appeal from the Circuit Court of Newton County
Honorable Kevin Selby, Circuit Judge
Case No. 15NW-CV02077

SUBSTITUTE BRIEF OF RESPONDENTS

ELLIS, ELLIS, HAMMONS & JOHNSON, P.C.

By: */s/ Todd A. Johnson*
Todd A. Johnson
Missouri Bar No. 38363
tjohnson@eehjfirm.com
2808 S. Ingram Mill, A104
Springfield, Missouri 65804
Telephone: (417) 866-5091
Facsimile: (417) 866-1064
Attorney for Respondents

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STATEMENT OF FACTS

This is a quiet title and adverse possession case. Respondent The Empire District Electric Company is in the business of generating and distributing electrical power in southwest Missouri and southeast Kansas. (D. 57 p.1; Tr. 48-50). Together with Respondent Westar Generating, Inc., (hereinafter collectively "Empire/Westar") they own and operate a power plant in Newton County, just outside Joplin, known as the State Line Generating Plant. (Tr. 49-50). In the late 1990's, Empire/Westar determined they needed an additional source of water for the plant. (Tr. 50). So, on September 1, 1999, they acquired approximately 200 acres of rural, undeveloped land from Carl and Grace Elkan, Co-Trustees of the Carl M. Elkan Revocable Trust. (R. App. R2; Tr. 51-53; D57 pp. 2-3; P.Ex. 1-5). This land extended south from the plant and provided direct access to Shoal Creek. (R. App. R2; Tr. 51-53; D57 pp. 2-3; P.Ex. 1-5).

The Disputed Property which is the subject of this case is the southern-most part of the land Empire/Westar acquired from the Elkans. It is 15.05 acres in size and is roughly rectangular in shape. It is outlined in red in a close-up aerial photograph stipulated to by the parties as Joint Exhibit 1[1]. (R. App. R1). The four corners are labeled

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[1] The versions of Joint Exhibits 1 and 2 submitted to this Court include lines placed on the exhibits by witnesses during trial. The only addition to Joint Exhibit 1 was a handwritten line from Point A to C made by Richard Swaim, and it was then marked as P. Ex. 29. (Tr. 367; R. App. R1) Three handwritten lines were added to Joint Exhibit 2 by Mr. Scorse, and it was then marked as P. Ex. 27. (Tr. 316; R. App. R2)

points A, B, C and D. (R. App. R1). A more distant aerial photograph was stipulated as Joint Exhibit 2, and it shows the location of the Disputed Property outlined in red, the property of Empire/Westar to the north outlined in blue, and the adjoining ranch land owned by Mr. Scorse and his family outlined in yellow. (R. App. R2).

In 2008 Empire/Westar was in the process of bulldozing a path and constructing a fence along the east boundary of the land they had acquired from the Elkans. (Tr. 194-95). This is shown as a cleared area extending down from the north immediately above Point B on Joint Exhibits 1 and 2. (R. App. R1-2). William Howell, manager of the Stateline Generating Plant, was in charge of the work for Empire/Westar. (Tr. 194). As the work neared Point B at the northeast corner of the Disputed Property, Mr. Howell encountered John Scorse ("Mr. Scorse"), whose family owns a large tract of ranch land that joins the Disputed Property to the west and south, where they conduct a cattle ranching operation. (Tr. 195-196; R. App. R2).

Mr. Scorse obtained a survey in 2009 and discovered that his family did not own record title to the Disputed Property. (Tr. 324). He then asserted that his family owned the Disputed Property by adverse possession. (Tr. 328 -329; Tr. 343-346).

On November 30, 2015, Empire/Westar filed their Petition in the Circuit Court of Newton County asserting a single claim against Mr. Scorse to quiet title to the Disputed Property. (D2). On February 19, 2016, Mr. Scorse filed his Answer denying Empire/Westar's quiet title claims, and asserting counterclaims for adverse possession, ejectment and trespass. (D5, 6). A bench trial was held before Judge Kevin Selby on March 26 and 27, 2018. (D61 p. 1; App. A1). Judge Selby ruled in favor of

Empire/Westar, issuing a 39-page Judgment containing detailed findings of fact and conclusions of law. (D61). The Judgment quieted title to the Disputed Property in favor of Empire/Westar and denied Mr. Scorse's claim of adverse possession. (D61 p. 39; App. A39). Mr. Scorse's post-trial motion was denied, and this appeal followed. (D78).

A. SUMMARY JUDGMENT MOTION BY MR. SCORSE AND RULE 74.04(D) FINDINGS BY THE COURT

On July 22, 2016, Mr. Scorse filed a Motion for Summary Judgment on his claim of adverse possession. (D7). The Trial Court denied the motion but ruled that certain of the seventy-two facts contained in Mr. Scorse's Statement of Uncontroverted Material Facts ("SOMF") were not in substantial controversy and were established in accordance with Rule 74.04(d). (D22). Empire/Westar subsequently filed two motions for reconsideration of the court's rulings. (D23, D33). Following hearings on the motions, the court amended its findings, and ruled that several of the statements of fact were in good faith controverted by Empire/Westar. (D30, p.2, ¶2-3; D52, p.2). The facts the Court ultimately deemed established under Rule 74.04(d) were paragraphs 1-4, 8, 9, 11, 13-15, 17, 18, 20, 22, 35, 37-40, 44, 47-49, 53, 55, 59-68 and 72. (D22; D30; D52).

Notably, the Trial Court ruled the statements of fact on the elements of adverse possession were controverted including hostility ("Fact No. 10") (D30, p.2, ¶3; D8, ¶10); actual possession (Fact No. 12) (D30, p.2, ¶3; D8, ¶12); open and notorious possession (Fact No. 56) (D30, p.2, ¶2; D8, ¶56); exclusive possession (Fact No. 50) (D30, p.2 ¶2; D8, ¶50); and continuous possession (Fact No. 52) (D52, p.2; D8, ¶52). The statements

of fact asserting enclosure of the Disputed Property with the Scorse ranch from 1975 to present were also controverted. (Fact Nos. 5-7) (D30, p.2, ⁋2; D8, ⁋⁋5-7).

B. EMPIRE/WESTAR'S EVIDENCE AT TRIAL

Robert Barchak

Robert Barchak was Manager of Land Administration for Empire from 2001 to 2017, and Supervisor of Right-of-Way from August 1982 to 2001. (Tr. 47-49). Mr. Barchak was responsible for acquisition of the tract of land from the Elkans in 1999 which included the Disputed Property. (Tr. 50-57). After being promoted to Manager of Land Administration in 2001, he was also responsible for inspection of Empire properties. (Tr. 60-61).

Mr. Barchak described the Disputed Property through a series of videos taken on January 10, 2016. (Tr. 62-65; P. Ex. 13, videos 2, 3, 4 and 5). Video 2 begins at point A on Joint Exhibit 1 and moves to the south toward point D. (Tr. 62; J. Ex. 1, P. Ex. 14; R. App. R1, R3). The property initially slopes downhill steeply to a ravine, then uphill and becomes gently sloping downward to the Empire power line easement. (Tr. 69-70). The property is heavily wooded with large trees, until reaching an Empire power line easement approximately one-half of the way to point D. (Tr. 74; P. Ex. 15; R. App. R4-10). The Empire power line easement is one hundred feet wide and is an open area of grass and weeds. (Tr. 59-60). The heavy timber resumes at the southern end of the Empire easement and continues to point D. (Tr. 74). Along this route there are occasionally old strands of barbed wire grown into trees and lying on the ground with old wood posts attached to them. (Tr. 74; P. Ex 15 - 2,3,4; R. App. R5-7). There is no

standing fence in this area and no fence that would hold cattle. (Tr. 74). Approximately three-fourths of the way to point D, the video descends down into a valley floor adjacent to Shoal Creek. (Tr. 75). The valley has large trees and downed timber, as well as weeds and brush. (Tr. 80, P. Ex. 15; R. App R4-10). On the west side of the line from point A to D, is John Scorse Farm 2, an open meadow with grass adjacent to Shoal Creek. (Tr. 80, P. Ex. 15 – 6, 7; R. App. R9, R10). There is a clear distinction and difference between the meadow on the John Scorse Farm 2 property and the large timber, downed trees and brush on the Disputed Property. (Tr. 85; J. Ex. 2). Seven ground level photographs of this route, showing the old fence (P.Ex 15, 3-4; R. App. R6,R7) and proceeding down to Point D and the valley next to Shoal Creek (P.Ex 15, 5-7;R. App. R8-10) were taken by Mr. Barchak on March 26, 2009 and May 4, 2009. (Tr. 78-80).

Video number 3 follows the course of a wet weather creek through the interior to the east side of the Disputed Property. (Tr. 83; J. Ex. 1; P. Ex. 14; R. App. R1, R3). It shows large timber and brush or weeds throughout this area. (Tr. 85; P. Ex. 16; R. App R11-17). The wet weather creek is approximately eight to twelve feet across and filled with gravel and rocks. (Tr. 86; P. Ex. 16-6; R. App. R16). A steep bluff rises to the south and becomes wider and more prominent as the video moves to the east. (Tr. 84; P. Ex. 16-3; R. App. R13). In the second half of the video 3, the Disputed Property to the north rises steeply. (Tr. 86; P. Ex. 16-4; R. App. R14). Video 3 concludes at the east side of the Disputed Property, at a fence across the wet weather creek erected in 2009 by Mr. Scorse. (Tr. 87; P.Ex. 16-4; R. App. R14). Seven ground level photographs taken by Mr.

Barchak on May 4, 2009 along this route were admitted into evidence. (Tr. 88; P. Ex. 16; R. App. R11-17).

Video 4 depicts the small area from where video 3 ended and proceeds north along the east side of the Disputed Property to Point B. (Tr. 90; J. Ex. 1; P.Ex. 14; R. App. R1, R3). It is a steep upward slope from the wet weather creek to point B. (Tr. 90). William Howell, former manager of the State Line Power Plant, testified that a path for a fence north of this area was bulldozed by Empire/Westar in 2008 and fencing work was performed. (Tr. 194 – 195). That work was halted around Point B in 2009 after discussions between Mr. Howell and Mr. Scorse, in which Mr. Scorse first asserted a claim of adverse possession ownership of the Disputed Property. (Tr. 195 – 196). Mr. Scorse then constructed a fence from Point B to C in 2009. (D61, p.37, ¶18). Prior to that time, no fence existed on the east side of the Disputed Property, between points B and C shown on Joint Exhibit 1. ((D61, p.38, ¶20 (A38);(Tr. 87, 92)).

Video 5 begins at point B and proceeds along the north side of the Disputed Property to point A. (Tr. 91; J. Ex. 1; P. Ex. 14; R. App. R1, R3). It shows a pipe corner at point B installed by Mr. Scorse in 2011, and five strand barbed wire fence installed by Mr. Scorse in 2011 and rebuilt in 2015. (Tr. 68, 92-93). The area along the route of video 5 is covered in large timber and drops steeply to the south along the entire route. (Tr. 94-95). The five strand barbed wire fence installed by Mr. Scorse in 2011 and 2015 between points A to B meanders along a heavily wooded ridgeline and follows roughly the same route as a dilapidated old fence believed by the parties to have been constructed decades earlier. (Tr. 97-98; D. 61, p. 10; App. A10).

Plaintiffs' Exhibit 17 are seven ground level photographs of the route shown in Video 5, starting at Point B, showing the old fence along this route supported by old wooden posts. (Tr. 97-99; P.Ex 17 - 2-7; R. App. R19-24). The fence is down in two of the photos (Tr. 97-99; P.Ex 17 - 2,6; R. App. R19, 23). Plaintiff's Exhibit 15 shows the corner of this fence at Point A when it was photographed by Mr. Barchak in March of 2009. (Tr. 78; P. Ex. 15-1; R. App. R4). These photographs were all taken by Mr. Barchak in March of 2009. (Tr. 99).

No buildings, houses, barns, sheds, corrals, livestock watering facilities, or improvements are present on the Disputed Property. (Tr. 86, 94). The undisputed evidence from all witnesses was that no structures or improvements of any kind were ever present on the Disputed Property during the period from 1954 to the present date. (Tr. 86; D 61 p. 10; App. A10).

No public roads are adjacent to or cross the Disputed Property. (Tr. 100 – 103; J. Ex 1,2; D 61 p. 10; App. A10; R. App. R1,2). State Line Road is approximately one-quarter mile to the east. (Tr. 100). Twentieth Street is over one mile to the north. (Tr. 103). It is an unknown but substantial distance to the south to any public street. (Tr. 101). To the east, new development occurred after 2009 with a house and road shown on J. Ex. 2. (Tr. 103; R. App. R2). Mr. Barchak testified, and it was undisputed, that no road was present in this area for a distance of at least one mile from 1954 to 2009. (Tr. 103). The parties agree that the Disputed Property was, and always had been, wild and undeveloped land. (Appellant's Brief, p. 38).

The Trial Court found the Disputed Property was remote and heavily timbered. (D. 61 p. 11; App. A11; J. Ex. 1, 2; R. App. R1, R2). It is bisected by a wet weather creek, two steep draws or valleys which intersect and form a "V" shape in the middle of the property. (Tr. 330; D. 61 p. 11; App. A 11; J. Ex. 1, 2; R. App. R1, R2). There is a steep bluff on the south side adjacent to Shoal Creek. (D. 61 p. 11; App. A11). The Disputed Property is also bisected by a one-hundred-foot-wide power line easement for an Empire electrical transmission line, which has been in place since the mid-1940's. (D. 61 p. 11; App. A1; J. Ex. 1, 2; R. App. R1, R2).

The Trial Court found the old fence on the north side of the Disputed Property from point A to B, was an old hog wire or woven wire fence attached to trees and old wooden posts. (D61 p. 11; App. A11). It included two strands of old galvanized wire and two newer strands of barbed wire. (D61 p. 11; App. A11). Mr. Scorse testified that the hog wire fencing and galvanized wire were constructed by an unknown person and were present before his family purchased the adjoining farms in 1975. (Tr. 332 -333). Robert Barchak testified that parts of the fence were on the ground and fallen over when he inspected the fence in March of 2009, as shown in P.Ex. 15, photograph 1 and P.Ex. 17, photograph 2 and 6. (Tr. 78, 97-99; P. Ex. 15 -1; P. Ex. 17 -2, 6; R. App. R4, 19, 23). William Howell testified to the same facts, that parts of the fence were up and usable, and parts were on the ground in 2009. (Tr. 201). Mr. Scorse testified that he and his father, Sidney Scorse, maintained the fence by cutting limbs and trees that fell on it and by repairing the fence when it was broken, but that it was in the woods and would sometimes be down for periods of time. (Tr. 275, 334). The Court found the testimony e

as to Mr. Scorse to not be credible, given the existing condition of the fence. (D61 p. 11; App. A11).

Mr. Barchak testified that Empire and Westar paid the property tax on the Disputed Property, and the remaining property that had been acquired by Empire and Westar from the Elkans, from the time of its purchase in 1999, to present. (Tr. 103). Mr. Barchak identified P.Ex. 7 and 8, which are records showing payment of property taxes by Empire and Westar. (Tr. 103 – 104). The Elkans paid the property taxes prior to Empire/Westar. (Tr. 147; P.Ex. 25). Neither Mr. Scorse nor his predecessors in title ever paid property taxes on the Disputed Property. (Tr. 324 -325).

Mr. Barchak testified that Empire's electrical transmission lines bisect the Disputed Property in the cleared area shown in Joint Exhibits 1 and 2. (Tr. 57 – 60; R. App. R1, R2). The width of the right-of-way is one hundred feet and a power line has existed in this area since the late 1940's. (Tr. 59-60, 139). It has been expanded most recently to increase the size to 161 KV transmission lines installed in the late 1990's. (Tr. 58 – 59). Empire performs annual inspection and maintenance on the lines and poles by having its employees physically view them by traveling along the right of way on foot or on four-wheelers, and by clearing brush as needed, in seven-year cycles. (Tr. 59 - 60). Empire seeds the right-of-way area when brush removal work is performed. (Tr. 60).

Mr. Barchak inspected the Disputed Property between ten to twelve times from 2009 through 2011, and again when a video was taken on January 10, 2016. (Tr. 100). Mr. Barchak never saw any cattle on the Disputed Property, never saw any improvements or buildings on the Disputed Property, never saw any member of the Scorse family, never

saw anyone present on a four-wheeler or horseback, and never saw any other person on the Disputed Property, except for Empire personnel and surveyors. (Tr. 86, 94).

Mr. Barchak identified Newton County plat books for 1965, 1986, 1994 and 2008 (Tr. 105 – 109; P.Ex. 9-12). Mr. Barchak testified that all of these plat books show Carl Elkan as the owner of the Disputed Property, and Empire as the owner in 2008. (Tr. 106 – 109). Neither Mr. Scorse, nor any member of the Scorse family, nor any prior owner of the Scorse property (Orville Jacobs or Richard Swaim, Sr.) are shown in the plat books as owners of the Disputed Property. (Tr. 106 –109). Mr. Barchak also identified the aerial photographs in P.Ex. 18 as accurately depicting the Disputed Property in its condition from 2010 through 2016. (Tr. 104 –105).

Mr. Barchak stated the Disputed Property has remained in the same condition during the time he has been familiar with it from 2009 to present, except for the fence constructed on the north side from Point A to B by Mr. Scorse in 2011 and rebuilt in 2015, the small area of fence on the east side from Point B to C constructed by Mr. Scorse after 2009, and the paths caused by wheeled vehicles that occurred after 2009. (D61, p.37-38, ⁋⁋ 18-20 (A37-38);(Tr. 84, 86, 87-88, 95, 100, 104, 194-195, 263, 328-335).

Mr. Scorse also testified the Disputed Property as shown in the videos was in the same condition from 1975 to present, except for the new north fence constructed by him in 2011 and rebuilt in 2015, and the small area fence on the east side from Point B to C constructed by him in 2009. (Tr. 332, 334-35).

The Court found Mr. Barchak's testimony, as well as the video and photographs he presented, were credible in their descriptions of the Disputed Property and Empire/Westar's actions in regard to the Disputed Property. (D. 61 p. 13; App. A13).

Ron Scott

Ron Scott was Ranch Manager of the Wildwood Ranch from 1971 through December 2005. (Tr. 150). The Wildwood Ranch consisted of approximately 2,400 acres, extending generally north and east of the Disputed Property. (Tr. 150) Wildwood Ranch was owned by Carl and Grace Elkan. (Tr. 153). The land sold to Empire in 1999, which included the Disputed Property, was deeded to Empire by Carl and Grace Elkan, as Trustees. (Tr. 153; P. Ex. 1 – 4).

Mr. Scott testified that the Disputed Property was hilly, rough and heavily timbered. (Tr. 154). He rode horses through this area approximately three to four times per year during the time that he was Ranch Manager, along with his wife, children and guests. (Tr. 154). The Disputed Property was not used in the cattle and farming operations of Wildwood Ranch because it had no agricultural value due to the fact that it was heavily timbered, had no pasture and was a steep and rocky area. (Tr. 154).

Mr. Scott gave permission to Don Stidham and his family to hunt on the Disputed Property and areas to the north and to the east of the Disputed Property. (Tr. 157). He also allowed approximately twenty-two other hunters to deer hunt on other areas of the Wildwood Ranch. (Tr. 156).

Mr. Scott never had any communication with Mr. Scorse or any member of the Scorse family about their claim to ownership of the Disputed Property, and it was never discussed between them. (Tr. 155).

Mr. Scott testified there were no buildings, corrals or any other structures on the Disputed Property, other than the Empire power lines. (Tr. 155). He never saw any cattle, nor did he ever see any other person present on the Disputed Property during the times he visited the property and was Ranch Foreman from 1971 through December 2005. (Tr. 155).

Mr. Scott was identified as a non-retained expert witness and testified that in his opinion, the Disputed Property was not suitable for keeping or grazing cattle because it was hilly, steep, heavily timbered, had virtually no grass for cattle to feed on and no open pasture ground. (Tr. 154).

Don Stidham

Don Stidham testified that he had permission to hunt the Disputed Property from Mr. Scott, Ranch Manager of Wildwood Ranch, from 1979 through 2005. (Tr. 175). Mr. Stidham, his wife and son, deer hunted on the Disputed Property and in areas immediately north and east of the Disputed Property. (Tr. 176). They deer hunted with a bow from October through January and with a rifle in November and hunted approximately two to three times per week during these times. (Tr. 177-78). They also turkey hunted in the spring, from mid-April through mid-May, and hunted mushrooms in the spring, and were on the Disputed Property at least two to three times per week during

these times. (Tr. 177-178). Mr. Stidham deer hunted from approximately dawn until noon and from 3:00 p.m. until dark, and turkey hunted from dawn until 1:00 p.m. (Tr. 178).

Mr. Stidham never saw any cattle on the Disputed Property, never saw Mr. Scorse or any member of the Scorse family, never saw anyone on four-wheelers or horseback, never saw any roads or paths through the Disputed Property, and never saw anyone else on the Disputed Property, other than one person, whom he knew and who was a trespasser. (Tr. 178 – 179).

Mr. Stidham identified the aerial photographs in P.Ex. 26, for the period from 1991 through 2002, and testified they accurately depicted the Disputed Property during the time he hunted on it. (Tr. 180 – 181). Mr. Stidham testified that the Disputed Property was in the same condition during the entire time that he hunted on the property. (Tr. 180 - 181).

Mr. Stidham testified that he had been engaged in the cattle business for most of his life, and more than forty years. He was familiar with ground that was suitable to graze and to keep cattle. (Tr. 182 – 83). Mr. Stidham testified that the Disputed Property was not suitable to keep or graze cattle because it was steep, heavily timbered, with no grass or open pasture areas. (Tr. 183).

William Howell

William Howell was employed by Empire as Manager of the State Line Power Plant, from 2000 through 2014, and from 1996 through 2000 as a Project Manager. (Tr. 193). Mr. Howell was familiar with the Disputed Property because he was responsible for directing the dozing work along the east side in 2008 and the fencing work in 2009 along

the east side of the Disputed Property on land owned by Empire/Westar. (Tr. 194 – 195). Mr. Howell testified there was no boundary or line along the east side of the land owned by Empire/Westar north of the Disputed Property until Empire bulldozed the path in 2008 and conducted fencing work in 2009. (Tr. 194-195).

Mr. Howell testified that he was familiar with the Disputed Property during the 2008 to 2009 time period, and that he never saw any cattle, never saw any paths or roads, and never saw any other person on the Disputed Property. (Tr. 196). He testified that the property was hilly, steeply sloping, covered in large timber, and a very rough piece of property. (Tr. 196).

Mr. Howell has been engaged in the cattle business all of his life and currently has a herd of sixty cows. (Tr. 197). He testified that he was familiar with the type of property suitable to keep and graze cattle, and that the Disputed Property was not suitable for this purpose. (Tr. 198). The reason that the Disputed Property is unsuitable is that the property was steeply sloped, covered in large trees, and had only acorns and leaves on the ground. (Tr. 198). There was no grass for the cattle to feed on and the property would not be useful to graze or keep cattle. (Tr. 198).

Holly Mitchell

Holly Mitchell is a Title Examiner employed by Newton County Abstract and Title Company for twenty-four years and licensed by the state of Missouri (Tr. 212 – 13; P.Ex. 20). Ms. Mitchell conducted a title search and issued an information report on the Disputed Property, utilizing the title plant of Newton County Abstract. (Tr. 214; P. Ex.

22). This title plant is annually certified and includes records extending back over one hundred years. (Tr. 215; P.Ex. 21).

Ms. Mitchell testified that she had conducted a title examination by running the legal description for the Disputed Property through the title plant to obtain all records, she searched deed records in the office of the Newton County Recorder of Deeds at the Courthouse, and reviewed tax records and judgment rolls. (Tr. 214).

Ms. Mitchell was identified as an expert witness to testify on behalf of Empire/Westar, and she testified that Empire held an undivided 60% interest and Westar held an undivided 40% interest in fee simple title to the Disputed Property. (Tr. 216 – 217). They hold record title to 100% of the Disputed Property, including that portion located in Section 23 and that portion located in Section 26. (Tr. 216). Ms. Mitchell testified that if this Disputed Property was sold by Empire and Westar, that Newton County Abstract, as agent for First American Title Insurance Company, would issue a policy of title insurance, insuring marketable fee simple title in Empire/Westar. (Tr. 216 –217; P. Ex. 22).

Ms. Mitchell identified the chain of title for the portion of the Disputed Property in Section 23 and testified the chain of title shows 100% of the fee simple title is vested in Empire/Westar. (Tr. 218; P.Ex. 23).

Ms. Mitchell also described the chain of title for the portion of the Disputed Property in Section 26. (Tr. 219–220; P.Ex. 24). She testified the chain of title shows fee simple title is vested in Empire/Westar. (Tr. 219; P.Ex. 24). Ms. Mitchell noted that a one-half interest in the Section 26 portion of the property had been deeded to "F.A.

Dossman" in 1903, but it was dead end in the title and that no subsequent conveyances exist in the records. (Tr. 219 – 20). Furthermore, beginning with the conveyances from Barbee and Kimmel to Potter in 1957, the entire interest in the Section 26 portion of the Disputed Property was conveyed. (Tr. 221 –222). This continued through the conveyances to Carl and Grace Elkan and to Empire/Westar. (Tr. 222-223). Ms. Mitchell testified that due to the length of time since the Dossman conveyance of the one-half interest, and the fact that no subsequent conveyances of that one-half interest were shown in the title records, that Ms. Mitchell, as a Title Examiner, concluded that Empire/Westar held 100% of the fee simple title interest in the Section 26 land, and their fee simple interest was insurable as shown in the informational report of Newton County Abstract (Tr. 237; P.Ex. 22).

Ms. Mitchell also relied on the Affidavit by Carl and Grace Elkan dated August 26, 1999 in reaching her conclusions of ownership. (Tr. 237; P. Ex. 25). That affidavit had been recorded in the office of the Newton County Recorder of Deeds since September 8, 1999, and for more than ten years prior to trial. (P. Ex. 25). It describes the possession of the Disputed Property by the Elkans since 1957, and the payment of taxes by them. (P. Ex. 25).

Deposition Designations – Joe Ewing and Richard Swaim Jr.

Joe Ewing was the Ranch Manager of Wildwood Ranch from 1959 until approximately 1971. (Tr. 375). He testified that cattle from Wildwood Ranch would occasionally wander onto the Disputed Property. (Tr. 378). Otherwise, it wasn't used for anything except wildlife, and wasn't suitable for crops or anything agricultural use. The

property was steep, hilly and agriculturally it was worthless. (Tr. 379). There were never any houses, sheds or any improvements on the Disputed Property. (D. 74, pp. 3:5-25; 5:25 - 6:6; 18:5-10; 20:5 – 22:5).

Richard Swaim, Jr. lived on the property now owed by Mr. Scorse, adjacent to the west boundary of the Disputed Property, from the time that he was ten years old in 1953, until he left to go to college in 1962. (Tr. 349 –350). The property was owned and farmed by Mr. Swaim's father. (Tr. 349). Mr. Swaim testified that the Disputed Property was a rough, hilly piece of property, covered in big timber. (Tr. 369 -370). Mr. Swaim admitted that his family never did any disking, seeding, planting or logging on the Disputed Property. (Tr. 370; D 73, pp. 4:4-25; 11:23 – 12:20; 40:3-21).

C. MR. SCORSE'S EVIDENCE AT TRIAL

John Scorse

Mr. Scorse testified that his father, Sidney Scorse, purchased the property shown as "John Scorse 1, 2 and 3" on J.Ex. 1, in 1975. (Tr. 246 – 47). At that time, Sidney Scorse and Mr. Scorse walked around the property they were buying with the seller, Orville Jacobs. (Tr. 248). They walked along the perimeter of John Scorse 1, 2 and 3. (Tr. 248 – 49). They also walked along an old fence running from point A through point B and extending eastward off of the Disputed Property for an unknown distance to a rock dam known as the "Goat Dam."(Tr. 251). From this, it was Mr. Scorse's belief that his father purchased all of that area. (Tr. 254 –255). There was never any discussion or dispute between the Scorses and Mr. Elkan- the owner of Wildwood Ranch, Mr. Scott- Foreman

of Wildwood Ranch, or anyone else about who was the owner of the Disputed Property. (Tr. 335 -336).

Mr. Scorse testified that he did not discover the Disputed Property was not part of the property that had been deeded to father, Sidney Scorse, until after this dispute arose with Empire/Westar in 2008 and Mr. Scorse had a survey performed in 2009. (Tr. 328 – 329).

Mr. Scorse testified that he made no effort to locate any surveys of the Scorse property, designated as John Scorse 1, 2, and 3 in Joint Exhibit 2. (Tr. 323). He did not search for surveys in his father's records. (Tr. 323).

Mr. Scorse admitted that he had plat books of Newton County and that plat books show the location of properties and the owners of those properties. (Tr. 326 – 27). He further admitted that the plat books admitted as P.Ex. 9, 10, 11 and 12 show that for the period from 1965 through 2008, no member of the Scorse family is depicted as the owner of the Disputed Property on the plat books, and that Carl Elkan and Empire were shown as the owner. (Tr. 327).

With respect to the north fence from points A to B on J.Ex. 1, Mr. Scorse testified that this was an old fence that was in existence when his family purchased the property in 1975. (Tr. 332 – 33). He and his father added two strands of barbed wire. (Tr. 332 -333). Otherwise, Mr. Scorse testified that he and his father occasionally cut trees and limbs that fell on the old fence and would occasionally maintain or repair the fence. (Tr. 334). The Court did not find this testimony credible as it relates to Mr. Scorse, given the poor condition of the fence in 2009. (App. A11).

D.Ex. L shows the north fence in 2009 and D.Ex. M shows a portion of the fence in August of 2008. (Tr. 274-277). The fence was removed by Empire in 2010 or 2011 and rebuilt at that time by Mr. Scorse as a five-strand barbed wire fence with steel corners at points A and B with T posts between those corners. (Tr. 334). This fence was removed by Empire in 2015, and again rebuilt by Mr. Scorse within thirty to forty-five days after that. (Tr. 335). This 2015 fence is shown in P.Ex. 13, video number 5. (Tr. 332, 335; P. Ex. 13, video 5).

Mr. Scorse testified that the "primary use" he and his family made of the Disputed Property was for cattle ranching[2]. (Tr. 339). He presented evidence there was grass for pasturing cattle, and that it was useful for calving, for shelter from weather and for shade. (Tr. 280, 352; D61, p. 28; App. A28). However, his testimony was contradicted by several other witnesses who testified the Disputed Property was so steep, rocky and covered in large timber that it was "agriculturally worthless" and not suitable for keeping or grazing cattle. (Tr. 198, 182-183, 154). On cross examination, Mr. Scorse admitted that cattle could wander onto the Disputed Property "unpredictably and occasionally" only when confined to certain parts of the Scorse ranch, but cattle could not be confined on the Disputed Property due to the lack of fences. (Tr. 321). The Trial Court found the testimony as to cattle ranching and the fences on the Disputed Property to not be credible

[2] Mr. Scorse also testified that if he prevails in the case, he plans to build rental cabins on the Disputed Property for recreational uses by guests, and to allow cattle to graze around the rental cabins. (Tr. 328).

on the part of Mr. Scorse and his witness, Mr. Stewart. (D61, p. 21, 28; App. A21, 28). In his Substitute Brief, Mr. Scorse changes his position and now asserts the Disputed Property is not suitable for agriculture and has only limited uses. (Appellant's Substitute Brief, p. 44).

Mr. Scorse testified that cattle could access the Disputed Property from adjacent areas on Scorse Farm 1 and 2. (Tr. 311; J. Ex. 2; P.Ex. 27; R. App. R2). At the time the Scorse properties were purchased by Mr. Scorse's family in 1975, only one cross fence existed, which is designated as "1st fence" on P.Ex. 27. (Tr. 311- 12; J. Ex. 2/P. Ex. 27; R. App R2). Cattle north of the first fence had access to approximately one hundred acres on John Scorse 1 and thirty acres on John Scorse 2, as well the Disputed Property. (Tr. 313 –340). Mr. Scorse testified that cattle might occasionally go to the Disputed Property for short periods of time to have a calf, to find shelter from winter storms, or to find shade, and then return to the Scorse property. (Tr. 280, 321). Cattle could not be confined on the Disputed Property and they were not confined on the Disputed Property by Mr. Scorse at any time from 1975 to present. (Tr. 311). Mr. Scorse testified there were areas of timber on John Scorse 1 and 2 of more than thirty acres, or more than twice the size of the Disputed Property, as well as large open areas of pastureland. (Tr. 313 -314).

Approximately two to three years after Mr. Scorse's family purchased the property in 1975, the "2nd fence" was built as shown on P.Ex. 27. (Tr. 314; J. Ex. 2/P. Ex. 27; R. App. R2). Cattle confined between the first fence and second fence could then access the open pasture and wooded areas on John Scorse 1 and 2 and access the Disputed Property. (Tr. 315). With this change, the cattle still had access to large areas of pasture and areas

of timber of approximately thirty acres on John Scorse 1 and 2 for calving, shelter and shade. (Tr. 315).

Mr. Scorse presented no specific information about the number of cattle that visited or accessed the Disputed Property, the periods of time when those cattle were on the Disputed Property, or how long the cattle were on the Disputed Property. (D. 61 p. 21; App. A21). Instead, the cattle could move from the larger John Scorse 1 and 2 properties, access the Disputed Property, and then return to the Scorse properties. (Tr. 311 – 314). The Court found that due to the condition of the fencing on the Disputed Property in 2009, Mr. Scorse's testimony that the Disputed Property was used for his cattle operations was not credible. (D61 p. 21; App. A21). The Court also noted that the only location where the fence remained up was where the wire had grown into trees along the fence line and in all remaining areas the fence was laying on the ground. (D. 61 p. 21; App. A21).

Mr. Scorse testified about recreational uses of the Disputed Property for taking family photos, climbing to the bluff located along Shoal Creek to explore caves and throw rocks off the bluff, for burial of a hamster family pet, for picking ferns and as a place for Sidney Scorse to smoke. (Tr. 321). Mr. Scorse admitted these were occasional uses, for brief periods of time of one to four hours. (Tr. 321). He also testified that no one engaging in these activities would expect to be seen by anyone else when they were on the Disputed Property because there were no houses or other structures that were on or overlooking the Disputed Property. (Tr. 322).

Mr. Scorse testified that he hunted deer on the Disputed Property and allowed other people to hunt on the Disputed Property. (Tr. 321-322). In order to attract deer, they would sometimes throw rye or wheat seed on the ground to provide forage for deer, and this occurred in the Empire right-of-way area. (Tr. 331). No disking or preparation of the soil was done, and this was merely done by using a hand spreader to throw or broadcast seed on the ground. (Tr. 331).

Mr. Scorse never paid property tax on the Disputed Property, and admitted he had no evidence that his father had ever paid taxes on it. (Tr. 324 –325). Mr. Scorse admitted he learned in 2009 that the Disputed Property was not included within the deeds to his father. (Tr. 324). Mr. Scorse never attempted to pay property taxes or offered to do so until nine years later, on March 13, 2018 (less than two weeks before trial), Mr. Scorse offered to reimburse Plaintiffs for property taxes. (Tr. 324 – 325; P. Ex. 28). The Court noted that this offer occurred after the lawsuit was filed and on the eve of trial. (D61, p. 22; App. A22).

Mr. Scorse admitted that neither he nor his father, Sidney Scorse, filed any lawsuit to be declared the owner of the Disputed Property. (Tr. 329). One prior lawsuit to quiet title to the Disputed Property was filed by Empire against Sidney Scorse in 2009, and that lawsuit was dismissed when Sidney Scorse passed away. (Tr. 329; D36, p.2). A second lawsuit was filed against Mr. Scorse for trespass, ejectment and conversion for his actions of removing and constructing fences on the Disputed Property in 2011. (D36, 38; Tr. 329). The second lawsuit was not to quiet title to the Disputed Property, and the reference

to it as a quiet title action by Mr. Scorse in his Substitute Brief is erroneous. (Appellant's Substitute Brief, p.28).

Mr. Scorse admitted that neither he nor any of his family members ever took action to exclude Mr. Elkan or Mr. Scott from the Disputed Property, nor did they discuss with Mr. Elkan or Mr. Scott their claim to ownership of the Disputed Property. (Tr. 335 – 336).

Mr. Scorse testified that purple paint was applied to wire fencing along the north perimeter of the Disputed Property, from point A to B. (Tr. 273-274; 291). He testified that his brother began spraying the purple paint in the 1980's and they had repainted it a couple of times since then. (Tr. 273, lines 5-6). Mr. Scorse submitted small pieces of barbed wire into evidence which he claimed had small bits of purple paint on them. (Tr. 273-273; D.Ex. R). Mr. Scorse testified that he removed these pieces from one of the piles of old wire on his farm which he claimed were from the original old fence from point A to B. (Tr. 271-273). Mr. Scorse then submitted into evidence photographs of the old fence from point A to B taken by him in March of 2009. None of these photos showed any purple paint markings on fence wire, trees or fenceposts. (D.Ex, L, M).

The subject of purple paint was also the topic of one of the Statements of Fact contained in Scorse's SOMF, which the Court deemed established under Rule 74.04(d). Fact 37 stated:

> "37. Beginning at approximately the early 1990's, Defendant Scorse and his family painted various posts and trees on the Disputed Property with purple paint warning others not to trespass on the Disputed Property. **Exhibit 11**"

(D8, ¶37).

Fact 37 differs from Mr. Scorse's trial testimony in that it does not identify any location on the Disputed Property where the purple paint was applied, it does not refer to purple paint on wire fencing and it does not refer to the application beginning in the 1980's, as Mr. Scorse stated in his trial testimony.

Mr. Scorse testified that no trespassing signs were placed around the entire border of the Disputed Property. (Tr. 290). Mr. Scorse testified that a lot of those signs were still there on the date of his testimony at trial. (Tr. 290). However, Mr. Scorse did not provide examples or photographs of the signs, signs, did not show where these signs were located or if they were located on or near the Disputed Property, nor whether the signs identified the Scorses as the owners of the Disputed Property. The Trial Court found Mr. Scorse's testimony on the purple paint and no trespassing signs was not credible. (D61, p. 22, App. A22). The Court noted that while no trespassing signs could be easily removed, purple paint cannot be so easily removed, and no evidence was presented showing purple paint on any boundary of the Disputed Property. (D61, p. 22; App. A22).

Mr. Scorse admitted that Empire power lines bisected the Disputed Property from the central portion of the west boundary of the Disputed Property diagonally, to the south border and across Shoal Creek. (Tr. 258). Mr. Scorse admitted that Empire maintains these lines, and that in 1996 Empire crews performed work to enlarge the transmission lines and to perform bulldozer work on the Disputed Property. (Tr. 300 –331).

Mr. Scorse testified that he participated in discussions between Empire and his father in which Empire sought an easement across the Scorse property (John Scorse 1 and 2 on J. Ex. 2) to obtain access to Shoal Creek, a request that was refused. (Tr. 340 -341).

Mr. Scorse testified that it is a substantial concern on his part that Empire would access Shoal Creek and dump 95-degree heated water into Shoal Creek, so it is important to him for Empire not to have access to Shoal Creek. (Tr. 341).

Mr. Scorse admitted he does not hold record title to the Disputed Property, and it is not included within the deeds of John Scorse 1, 2 and 3 to him, nor in the deeds of any of his predecessors, as listed in paragraph 19 of the Joint Stipulation. (D57 p. 5; App. A7).

Richard Swaim, Jr.

Richard Swaim, Jr. moved to the farmhouse located on State Line Road on John Scorse 2, when he was ten years old, after his father purchased John Scorse farm 2 and 3, and lived on the property until he graduated from high school and went to college at age 18. (J. Ex. 2; Tr. 349). Mr. Swaim testified that there was no fence to prevent cattle from accessing from John Scorse farm 2 onto the Disputed Property, and the cattle would occasionally go there to have calves or for shelter in bad weather. (Tr. 354 – 355). His family would also drag dead cattle onto the Disputed Property and leave them there to decay in a "bone pile." (Tr. 355).

Mr. Swaim identified a fence that bisected the Disputed Property from point A to point C, as shown in P.Ex. 29/J. Ex. 1. (Tr. 367; J. Ex. 1/P.Ex. 29; R. App. R1). Mr. Swaim testified that he never went beyond the area of that fence line, nor did any cattle go beyond that fence line. (Tr. 360 – 61, 364, 367). Mr. Swaim testified that cattle would sometimes get lost in the Disputed Property and he would have to go find them and run them back out into the pasture on the Swaim farm. (Tr. 370).

Mr. Swaim testified that the portion of the Disputed Property that he went on was heavily timbered, hilly and was not at all suitable for cattle because it had no grass and was very rocky. (Tr. 369 -370).

Joe Ewing

Joe Ewing was Ranch Manager of the Wildwood Ranch from 1959 to 1971. (Tr. 375). He worked for Mr. Elkan and Mr. Elkan owned the Wildwood Ranch. (Tr. 375). Mr. Ewing testified that the Disputed Property was never used in the operation of the Wildwood Ranch because it had no agricultural value or use for cattle. (Tr. 378 – 379). It was steep, hilly, heavily timbered, rocky and had no grass or pasture. (Tr. 379). Mr. Ewing had no information about the ownership or boundaries of the Disputed Property. (Tr. 382).

Chuck Brown

Chuck Brown is an attorney in Joplin, Missouri, designated by Mr. Scorse as an expert witness to testify to matters about the title to the Disputed Property. (Tr. 388). Mr. Brown testified that he performed no title search, that he did not use any title plant to research records for the Disputed Property, or obtain any documents from the Newton County Recorder of Deeds, Assessor or any other source, and therefore formed no title opinion to the Disputed Property. (Tr. 403 -404). Therefore, the witness was not allowed to give a title opinion as to the Disputed Property. (Tr. 394). Mr. Brown gave testimony that the title opinion of Ms. Mitchell was flawed. (Tr. 396). The Court gave Mr. Brown's testimony consideration but concluded that Ms. Mitchell's title opinion was credible. (D61 p. 25; App. A25).

Dave Ewing

Dave Ewing is the son of Joe Ewing and lived on the Wildwood Ranch from the age of two to thirteen years of age, from 1959 until approximately 1970. (Tr. 407 – 408). Mr. Ewing admitted that he was a young boy at the time he lived on the Wildwood Ranch and he did not discuss with Mr. Elkan or his father the specific location of the boundaries to the Wildwood Ranch, nor was he concerned about the location of the boundaries of the ranch or the Disputed Property. (Tr. 417 – 418).

Mr. Ewing testified that on one occasion he saw cattle on the Disputed Property which he believed were the Swaim's cattle. (Tr. 415). Mr. Ewing provided no information about how he was able to identify those cattle or the number of cattle in this single instance. (Tr. 415). Mr. Ewing testified that he and the Swaim children would play on the Disputed Property and on the Goat Dam located to the east and off of the Disputed Property. (Tr. 411 – 413).

Ted Meador

Ted Meador testified that he deer hunted on the Disputed Property from 1989 to 2000. (Tr. 422). Mr. Meador testified that he was given permission by Sidney Scorse to hunt on the Disputed Property, all of the property shown as John Scorse 1, 2 and 3, as well as the Shirley Scorse property shown on J.Ex. 2, which consisted of over 490 acres. (Tr. 437).

Mr. Meador never saw any other hunter or any other person while he was on the Disputed Property. (Tr. 431) Mr. Meador never saw any cattle on the Disputed Property, never saw anyone on horseback or four-wheelers on the Disputed Property, and never

saw any buildings or improvements on the Disputed Property. (Tr. 437). Mr. Meador testified that there were no roads or established pathways on or through the Disputed Property, and it was a heavily timbered, hilly, rough piece of land that was good for deer hunting. (Tr. 437).

Shannon Morey

Shannon Morey is married to Christina Morey, granddaughter of Sidney and Shirley Scorse and he considers Mr. Scorse to be a close family member. (Tr. 442-43, 452). Mr. Morey testified that he had permission from Sidney and Mr. Scorse to hunt all the Scorse property, including John Scorse 1, 2, 3 and the Shirley Scorse property shown on J.Ex. 2. (Tr. 442, 456-57). Mr. Morey also testified that he hunted on the Disputed Property, and that his hunting activities occurred from 1995 to present. (Tr. 444-445). Mr. Morey only rifle hunts for deer during the two-week rifle season in November of each year. (Tr. 442).

Mr. Morey admitted that in 2009 he was informed that a survey had been performed which showed that the Disputed Property was not included within the deeds to the Scorse family. (Tr. 445). However, he continued to hunt on the Disputed Property from 2009 to present because he considered it to "be in dispute." (Tr. 451). Mr. Morey never saw anyone else when he was hunting on the Disputed Property, never saw Mr. Meador or Mr. Stidham, and never saw any cattle on the Disputed Property. (Tr. 451-52, 457).

Mr. Morey also testified that he and his children would occasionally ride four-wheelers on paths that would pass through the Disputed Property and then back onto the

Mr. Scorse's property. (Tr. 444). Mr. Morey admitted that these four-wheeling excursions would be for a brief period of time and that he did not expect to be seen by anyone while he was on the Disputed Property. (Tr. 444, 458).

Christina Morey

Christina Morey is the granddaughter of Shirley and Sidney Scorse. (Tr. 466). She testified that from 1980 to 1985, when she was ten to fourteen years old, she spent four to six weeks living with her grandparents at the Scorse house shown on J.Ex. 1. (Tr. 462, 465-66). She would go over to the Disputed Property about once a week to explore and play. (Tr. 464). She also buried a pet hamster at the base of the bluff on the Disputed Property. (Tr. 464).

Ms. Morey also testified that she rode horses and played on all of the other Scorse property, John Scorse 1, 2 and 3 and the Shirley Scorse property shown on J.Ex. 2. (Tr. 468). This included horseback riding that would sometimes include riding on the Disputed Property. (Tr. 468). Ms. Morey admitted that when she was on the Disputed Property it was only for a few hours at a time, and that she did not expect to be seen by anyone when she was on the Disputed Property. (Tr. 466).

The parties stipulated that Curtis Wade received permission from the Scorse family to ride horses on their property. (Tr. 471). They rode from the Scorse property onto the Disputed Property and down to Shoal Creek, where they swam. (Tr. 471). It is unknown how frequently this occurred. (Tr. 471).

Defendant submitted the deposition of Robert Stewart, who worked as a ranch hand for Sidney Scorse from approximately 1994 to 2000. (D58 p. 4; D. 61 p. 28; App.

A28). Contrary to the other witnesses, Mr. Stewart testified that cattle grazed on grass on the hillsides of the Disputed Property. (D61 p. 28; App. A28). The Court found Mr. Stewart's testimony to be inconsistent with all other testimony given on the issues and found his testimony not credible as to the use of the disputed land. (D61 p. 28; App. A28).

The Trial Court entered Judgment on August 14, 2018, quieting title to the Disputed Property in favor of Empire/Westar and denying Mr. Scorse's adverse possession claims. (D61 p. 39; App. A39). The Court made detailed conclusions of law, explained the reasoning for its decision and set forth the facts which supported its legal conclusions. (D61 p. 29-39; App. A29-39). The description of the Judgment and post-trial proceedings on pages 35-37 of the Statement of Facts contained in Mr. Scorse's Substitute Brief are generally accurate will not be restated.

POINT RELIED ON

The Trial Court properly denied Mr. Scorse's claim of adverse possession *because* it correctly applied the law that allowing cattle to access a tract of wild and undeveloped land, performing maintenance work on an old fence and engaging in recreational activities are merely occasional trespasses insufficient to establish adverse possession, *in that* the evidence was insufficient to establish adverse possession based on such activities and merely showed occasional trespasses by Mr. Scorse on the Disputed Property.

Shanks v. Honse, 364 S.W.3d 809 (Mo. App. S.D. 2012)

Murphy v. Holman, 289 S.W.3d 234 (Mo. App. W.D. 2009)

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

White v. Director of Revenue, 321 S.W.3d 298 (Mo. banc 2010)

ARGUMENT

A. STANDARD OF REVIEW

In a court-tried case, an appellate court must affirm the trial court's judgment unless no substantial evidence supports it, it is against the weight of the evidence, it erroneously declares the law, or erroneously applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). "All evidence favorable to the judgment and all inferences to be drawn from the evidence are accepted as true, and all contradictory evidence is disregarded." *Murphy v. Holman*, 289 S.W.3d 234, 237 (Mo. App. W.D. 2009)(quoting *Underwood v. Hash*, 67 S.W.3d 770, 774 (Mo. App. S.D. 2002)).

In applying this standard, the appellate court defers to the trial court's credibility determinations and views the evidence and permissible inferences in the light most

favorable to the judgment, disregarding all contrary evidence and inferences. *Shanks v. Honse*, 364 S.W.3d 809, 811 (Mo. App. S.D. 2012). "Appellate courts defer to the trial court on factual issues because it is in a better position not only to judge the credibility of the witnesses and the persons directly, but also their sincerity and character and other trial intangibles which may not be completely revealed by the record." *White v. Director of Revenue*, 321 S.W.3d 298, 312 (Mo. banc 2010). When the facts relevant to an issue are contested, the reviewing court defers to the trial court's assessment of the evidence. *Id.*

The issues and facts before the Trial Court were contested in this case. Contrary and conflicting evidence was presented, and the Trial Court made determinations of the credibility of the parties and witnesses.

> "The appellate court's role is not to reevaluate testimony through its own perspective. *Id* at 653. Rather, the appellate court confines itself to determining whether substantial evidence exists to support the trial court's judgment, *Id*; whether the judgment is against the weight of the evidence – "weight" denoting probative value and not the quantity of evidence, *O'Shea v. Pattison-McGraf Dental Supplies*, 180 S.W.2d 19, 23 (1944); or whether the trial court erroneously declared or misapplied the law, *Murphy*, 536 S.W.2d at 32."

Id at 309.

An appellate court presumes the trial judge knew and properly applied the law in rendering its judgment. *Evergreen National Corp. v. Carr*, 129 S.W.3d 492, 497 (Mo. App. S.D. 2004)(citing *Harrison v. Coomber Realty and Investment Co.*, 224 S.W.2d 63, 64 (Mo. 1949); *C.A.W. v. Weston*, 58 S.W.3d 909, 914 (Mo. App. 2001)(citing *Dycus v. Cross*, 869 S.W.2d 745, 751 (Mo. Banc 1994)).

In this appeal, Mr. Scorse is asking this Court to reevaluate the evidence, to reassess the credibility of the parties and witnesses, and reach a different decision from the one made by the Trial Court. This is clearly contrary to the standard of review and inconsistent with the single point relied on in Mr. Scorse's brief. While Mr. Scorse couches this appeal as an alleged "misapplication of the law," it is nothing of the sort. He is instead asserting that Mr. Scorse's trial testimony as well as the testimony of other witnesses should be ignored, that principal reliance should be placed on the Rule 74.04(d) findings and this Court should reach an entirely different outcome and rule in favor of Mr. Scorse on his adverse possession claim. This is clearly a challenge to the sufficiency of the evidence to support the Judgment of the Trial Court. However, Mr. Scorse failed to include a separate point relied on challenging the weight or sufficiency of the evidence. *Ivie v. Smith*, 439 S.W.3d 189, 199 n. 11 (Mo. banc 2014)(a party may not raise multiple claims of error in the same point relied on); Rule 84.04(d).

In his single point relied on, Mr. Scorse asserts only an alleged misapplication of the law. For this reason, his arguments relating to the sufficiency of the evidence should be disregarded, and this appeal should be dismissed. *Id.*

B. THE TRIAL COURT DID NOT MISAPPLY THE LAW OF ADVERSE POSSESSION IN REACHING ITS JUDGMENT

The primary argument advanced by Mr. Scorse is the Trial Court misapplied the law in deciding his adverse possession claim, because the Court did not rely on cases in which the property in controversy was "not cultivatable" and otherwise subject to limited uses. (Appellant's Substitute Brief, p. 43-45).

This argument requires a brief review of the evidence and the theory advanced by Mr. Scorse at trial to support of his adverse possession claim, and the law relied on by the Trial Court.

The evidence of the uses of the Disputed Property presented by Mr. Scorse consisted of: (1) cattle ranching; (2) repairing and maintaining the old fence on the north side of the property; and (3) occasional recreational uses for exploring, hunting, family photos and similar activities. (D61 p. 35, App. A35).

Mr. Scorse testified the primary use of the Disputed Property was for cattle ranching. (Tr. 339). He stated the property had both good and bad qualities for ranching, and that it was useful for cattle to use for calving, for shelter from weather and for shade. (Tr. 280). Mr. Scorse also presented evidence that it was used for grazing on grass supposedly found on the hillsides of the Disputed Property. (Tr. 352; D. 61 p. 28; App. A28). On cross examination, Mr. Scorse admitted that cattle would wander onto the Disputed Property "unpredictably and occasionally" only when confined to certain parts of the Scorse ranch, but cattle could not be confined on the Disputed Property due to the lack of fences. (Tr. 321). The Trial Court found the testimony as to cattle ranching and the fences on the Disputed Property to not be credible on the part of Mr. Scorse and his witness, Robert Stewart. (D61 p. 21, 28; App. A21, A28).

Mr. Scorse also testified that he and his family maintained a fence along the north boundary of the Disputed Property extending from Point A through B and onward to the east of Point B, off the Disputed Property, to what was referred to as the "Goat Dam". (Tr. 251; J. Ex. 1; R. App. R1). This was an old dilapidated fence, constructed long

before the Scorse family purchased their adjoining property in 1975. (D. 61 p. 11; App. A11). It was undisputed the fence extended from tree to tree in a meandering fashion, and it was shown in several photos to be laying on the ground and not in a condition to serve any purpose for cattle ranching. (P. Ex. 15-1; P. Ex. 17-2,6; Tr. 332 – 34, 337 – 339; D.Ex. K, O; App. A65-66; R. App. R4, R19, R23). Mr. Scorse admitted the fence would be down for periods of time but claimed that he and his father maintained it by removing limbs that would fall on it, reattached it to fence posts and added two strands of barbed wire. (Tr. 268 – 269, 275, 334). The Court found Mr. Scorse's testimony not credible as to the condition or maintenance of the fence, given the condition of the fence as shown in 2009. (D61 p. 20; App. A20).

Finally, Mr. Scorse and other witnesses testified about recreational activities they occasionally engaged in on the Disputed Property. This included riding four-wheelers, exploring caves, fishing, hunting, horseback riding, burial of a family pet and similar activities. (Tr. 321-322, 411-413, 437, 444-445, 464-468). Mr. Scorse and his witnesses admitted these activities were occasional and lasted for brief periods of one to four hours, and none of these individuals expected to be observed while engaged in these activities because the Disputed Property was remote, with no houses or other structures overlooking it. (Tr. 321-322, 444, 458, 466).

Based on these facts, the Trial Court correctly determined that Mr. Scorse failed to establish his adverse possession claim, and the uses described in the evidence constituted nothing more than occasional trespasses. (D61, p. 37; App. A37). The Court identified three cases involving facts and circumstances closely similar to the case before it. (D61,

p.36; App. 36) (citing *Murphy*, 289 S.W.3d at 240; *Harris*, 940 S.W.2d 42, 47 (Mo. App. 1997); and *Shanks*, 364 S.W.3d at 816). Each concerned rural tracts of land used for cattle. In each case, an old fence was located on an adjacent property, and the neighbor claimed ownership of the encroaching strip to the fence by adverse possession – the same situation present in this case.

In *Murphy v. Holman*, the Western District Court of Appeals reversed a trial court finding of adverse possession and directed entry of judgment in favor of the record title owner, where the evidence of the actions of the alleged adverse possessor (Holman) were as follows:

> "Holman testified that she never mowed, removed hay, cleared brush, or cut timber from the disputed parcel, and she never paid taxes on it. Allowing cattle to graze on the disputed property, repairing the old wire fence constructed by a predecessor, constructing and using a makeshift pallet fence on a small portion of the disputed parcel for corralling livestock, and giving permission to others to hunt and occasionally remove hay from the property is not substantial evidence to establish title by adverse possession. Holman's own activity on the disputed parcel amounts to nothing more than occasional trespasses which do not establish adverse possession."

Murphy v. Holman, 289 S.W.3d 234, 240 (Mo. App. W.D. 2009). The trial court ruled that Holman's activities on the disputed parcel amounted to nothing more than occasional trespasses, which failed to establish actual possession. *Id.*

Likewise, in *Harris v. Lynch*, the claim of adverse possession was denied where the claimant allowed cattle and horses to have access to the land in dispute, extended a portion of an old existing fence, and maintained the fence. *Harris v. Lynch*, 940 S.W.2d

42, 47 (Mo. App. 1997). The court ruled: "There was no evidence that plaintiff or her predecessors engaged in any other acts of possession such as clearing the disputed land, cultivating it, managing it for pasture, or building any structures on it." *Harris* , 940 S.W.2d at 47. Thus, the Plaintiff failed to prove actual possession and the adverse possession claim was denied. *Id.*

Finally, in *Shanks v. Honse*, the claimant routinely grazed cattle, repaired fences, sporadically ran machinery on the disputed property, operated four wheelers to check on cattle and cut logs from the disputed property. *Shanks*, 364 S.W.3d at 816. The court cited *Murphy* and ruled the activities of the claimant on the disputed property failed to establish the element of actual possession. *Id.*

In primary reliance upon these three cases, the Trial Court identified and applied the five established elements of adverse possession. The possession must be: (1) actual; (2) hostile and under a claim of right; (3) open and notorious; (4) exclusive; and (5) continuous for a period of ten years. *Id* at 812. The Trial Court correctly recognized that actual possession requires physical possession of the entire area claimed through continued acts of occupying, clearing, cultivating, pasturing and building fences or other improvements, and payment of taxes. *Murphy v. Holman*, 289 S.W.3d 234, 237 (Mo. App. W.D. 2009). The Trial Court ruled that Mr. Scorse did not meet these criteria.

In the case of wild and undeveloped land, where the claimant occupies the land without color of title, he must show physical possession of the entire area claimed. *Id* at 238. A mere mental enclosure of land is not sufficient, and it does not constitute the requisite actual possession. *Id*. Use of a disputed tract to pasture livestock, for recreation,

hunting and other occasional uses is insufficient to establish adverse possession, and constitutes nothing more than occasional trespasses. *Id*; *Shanks*, 364 S.W.3d at 816. Furthermore, "[t]here is a presumption that the record owner of wild and vacant land is the actual owner." *Id* (quoting *Eime v. Bradford*, 185 S.W.3d 233, 236 (Mo. App. E.D. 2006).

> "There is no obligation upon an owner to reassert his ownership by an actual taking of possession nor may an owner be divested of his title in default of physical occupancy. The adverse claimant prevails, not because the title owner has failed to exercise dominion, but because the claimant has proved his actual and continuous possession and that of those under whom he claims."

*Id. (*quoting *J. C. Nichols Co. Powell*, 641 S.W.2d 780, 783-84 (Mo. App. W.D. 1982)).

The Trial Court correctly applied the law of adverse possession to the claims asserted by Mr. Scorse and denied those claims. Thus, Mr. Scorse's argument the Trial Court misapplied the law is meritless and must be disregarded.

1. **The primary use of the Disputed Property asserted by Mr. Scorse was cattle ranching, and Mr. Scorse never claimed the property was not suitable for cattle ranching or that it had limited uses.**

Mr. Scorse argues in this appeal that his evidence established adverse possession because the Disputed Property was "…not cultivatable and only subject to limited uses." (Appellant's Substitute Brief, p. 44). Mr. Scorse cites two cases in support of this argument, *Whiteside v. Rottger* and *Tiemann v. Nunn*. This argument must be rejected for three reasons.

First, Mr. Scorse asserted that cattle ranching was the "primary use" he and his family made of the Disputed Property. No argument was presented to the Trial Court that the Disputed Property was not useful for cattle ranching (i.e. not cultivatable), or that it was only subject to limited uses. In fact, the opposite was true. An issue is not preserved for judicial review if the matter was not previously presented to the trial court. Rule 78.07(b); *Brown v. Brown*, 423 S.W.3d 784, 788 (Mo. banc 2014). In *Brown*, this Court held that failure to raise an issue in the trial court deprived the trial court of the opportunity to rule on the question and failed to preserve any issue for appellate review. *Id* at 787. Because Mr. Scorse never raised the issue that the Disputed Property was not suitable for cattle ranching or that it was only subject to limited uses, that issue is not preserved for appellate review and should be disregarded.

Second, the cases relied on by Mr. Scorse are readily distinguishable. *Whiteside v. Rottger*, 913 S.W.2d 114 (Mo. App. 1995), concerned an 18-acre tract of land known as "Kings Lake." *Id.* at 117. Although the lake was no longer present at the time of trial, a large drainage canal bisected the property. *Id*. The adverse possession claimant showed the entire property was subject to repeated flooding and was not suitable for construction of any buildings. The claimant constructed a new fence around the property, drilled a well, pastured cattle, cut trees, restricted access, hunted and fished on the property. The trial court ruled these actions established adverse possession, due to the nature of the property and the limitations on its use due to flooding, and the appellate court affirmed. *Id*. at 121. The claimant clearly engaged in more activities than Mr. Scorse by drilling a well, installing new fencing around the property and by cutting logs from the property.

In the present case no evidence was presented to show the Disputed Property was subject to flooding. Buildings can be constructed on the Disputed Property and Mr. Scorse testified that his plan if he succeeds in this case is to build several rental cabins and allow his cattle to graze in and among them. (Tr. 328). Furthermore, Mr. Scorse did not construct any new fencing on the Disputed Property until 2009 and after, but those activities occurred within six years of the filing of this case and failed to satisfy the ten-year period required for adverse possession. (D61, p.37-38, ¶¶ 18-20; App. A37-38). Thus, *Whiteside* is readily distinguishable.

The other case relied on by Mr. Scorse, *Tiemann v. Nunn*, 495 S.W.3d 804 (Mo. App. E.D. 2016), concerned a tract of land in northeast Missouri adjacent to the Fabius River. The adverse possession claimant established that he and his family used a portion of the disputed property for a long period of time for row crop farming, as part of their larger adjacent crop field. *Id.* at 807. The other part of the disputed property was a low-lying wooded area adjacent to the river that was subject to repeated flooding and not suitable for buildings or improvements. The claimant built and maintained a levy in the area, removed debris after flooding events, hunted and controlled the only access to the property. *Id*. at 810. The trial court ruled this evidence was sufficient to establish the adverse possession claim, and the appellate court affirmed. *Id*. This case is distinguishable because no evidence was presented in the present case of flooding, and the evidence showed that buildings can be constructed on the Disputed Property. Moreover, the claimant in *Tiemann* engaged in activities of building and maintaining a

levy, row crop farming and exclusive control of the only access to the property, facts and evidence that were not present in the case now before this court.

The properties at issue in the two cases cited by Mr. Scorse were very different from the Disputed Property, and the uses of those properties were different. By comparison, the properties and uses described in the *Murphy*, *Shanks and Harris* cases were closely analogous to the Disputed Property in this case, and as a result they provided directly applicable authority for deciding this case.

Finally, the *Whiteside v. Rottger* and *Tiemann v. Nunn* decisions are "of little or no value" because the trial court ruled in favor of the adverse possessor in both cases. *Shanks*, 364 S.W.3d at 811, n. 4. The standard of review required the appellate courts in those cases to accept as true the evidence favorable to the judgment of adverse possession and disregard all contrary evidence. *Id.* In this case, the opposite is true. This Court is required to accept as true all evidence favorable to the judgment against Mr. Scorse's adverse possession claim, and to disregard all evidence favorable to his claim. *Id;* *Murphy*, 289 S.W.3d at 237.

In *Shanks*, the plaintiff's (Mrs. Shanks) claim of adverse possession was denied by the trial court. However, in her brief she cited and relied upon cases in which the trial court ruled in favor of the adverse possessor. This Court rejected this approach, stating:

> "Such comparisons are of little or no value here because the reviewing court in those cases was required to accept as true the evidence favorable to the judgment and disregard all contrary evidence and inferences. In a case where the adverse possession claim is denied, the converse is true; we are required to disregard all evidence favorable to the claim. *Bowles*, 217 S.W. 3d at 404. Mrs. Shanks' position is that

> while this court must defer to the trial court "Where credibility of the witnesses is involved" the reviewing court need not do so where "A disputed question is not a matter of direct contradiction by different witnesses." . . . We disagree. . .. When evidence is contested by disputing a fact in any manner, this court defers to the trial court's determination of credibility. *Id* [citing *White*, 321 S.W.3d at 308]. … When the burden of proof is placed on a party for a claim that is denied, the trier of fact has the right to believe or disbelieve that party's uncontradicted or uncontroverted evidence. *Id* at 305."

Shanks, 364 S.W.3d at 811, n. 4.

For these reasons, the *Whiteside v. Rottger* and *Tiemann v. Nunn* decisions do not support Mr. Scorse's argument. Thus, his arguments should be rejected, and the judgment of the Trial Court should be affirmed.

2. <u>The old wire fence on the north side of the Disputed Property was not shown to be a boundary.</u>

Mr. Scorse's second argument concerns the significance of the old fence on the north side of the Disputed Property, from Point A to B on J.Ex. 1. (J. Ex. 1; R. App. R1). Mr. Scorse argues that fence established a boundary and adverse possession, despite the Trial Court's conclusion to the contrary. (Appellant's Substitute Brief, p. 46-48).

Under Missouri law, maintenance of a pre-existing old wire fence is insufficient to establish the fence as a boundary line or to establish adverse possession up to that alleged boundary. *Murphy*, 289 S.W.3d at 238; *Harris*, 940 S.W.2d at 46. The court recognized in *Harris* that a landowner may place an interior fence on his property, inside his boundary line, and he does not thereby lose title to the land on the other side. Such a loss would only occur if his neighbor takes possession of the land on the other side of the

fence and satisfies all requirements of adverse possession for the requisite period of ten years. *Id*. The mere location of a fence in the interior of a record owner's property does not, in the absence of an agreement that it establishes a boundary line, establish a boundary line because a fence may be placed on property for other purposes. *Id*; *Dambach v. James*, 587 S.W.2d 640, 643 (Mo. App. S. D. 1979).

Mr. Scorse is asserting a theory of boundary by acquiescence, a species of adverse possession. The elements include: (1) an uncertain or disputed boundary between adjoining landowners; and (2) acquiescence of the adjoining landowners in a definite and certain dividing line. *Weiss v. Alford*, 267 S.W.3d 822, 827 (Mo. App. E.D. 2008). A boundary line may not be established by acquiescence unless there is some contention between two landowners over the location of the line as a result of which a boundary is established in which the landowners subsequently acquiesce. *Harris v. Divine*, 272 S.W.3d 478, 486 (Mo. App. S.D. 2008)(some contention between the parties and subsequent agreement on a boundary is required to establish a boundary by acquiescence claim).

Mr. Scorse testified that he never discussed with Mr. Elkan, his ranch manager, Mr. Scott or anyone else, the location of the boundaries between the Scorse property and the Elkan property/Wildwood Ranch. (Tr. 335-336). Likewise, he never discussed this issue with representatives of Empire/Westar until 2008 and 2009, when Empire/Westar were dozing and building fences along the boundaries of the Disputed Property. (Tr. 328 –329). The latter discussions occurred well within the ten-year period prior to the commencement of this case, filed on November 30, 2015. (D2). Thus, there was no basis

in the evidence presented at trial or in the findings by the Trial Court to conclude the north fence was established as a boundary.

Mr. Scorse argues the Trial Court misapplied the law by allegedly applying non-boundary line fence cases. Mr. Scorse asserts the *Murphy*, *Shanks* and *Harris* cases did not concern a fence that was alleged to be a boundary. This is incorrect. In each of those cases, the adverse possessor asserted that a fence located in the interior of the record title owner's property constituted the boundary of the land claimed by the alleged adverse possessor. *Murphy*, 289 S.W.3d at 236; *Harris*, 940 S.W.2d at 45-46; *Shanks*, 364 S.W.3d at 812. Thus, Mr. Scorse's effort to distinguish these cases on the grounds they concerned fences that were not alleged to be boundaries of the disputed properties is meritless and must be disregarded.

Mr. Scorse also misinterprets the meaning and effect of the Trial Court's Judgment. The Trial Court ruled that the north fence of the Disputed Property was not a boundary fence. (D61 p.36; App. A36) The Court also ruled that Mr. Scorse's evidence of maintenance of that fence, as well as his uses of the Disputed Property, were insufficient to establish that fence as a boundary by adverse possession. These were disputed issues at trial, and they were decided in part based on the trial judge's determinations of the credibility of the witnesses who testified on these issues. Mr. Scorse's citations to *Crane v. Loy*, 436 S.W.2d 739 (Mo. 1968) and *Heigert v. Londell Manor, Inc.*, 834 S.W.2d 858 (Mo. App. 1992) are misplaced because the trial court ruled that adverse possession was established in both cases. The standard of review in those cases was entirely different than in the case at bar, in which the reviewing court is

required to accept as true all evidence and inferences favorable to the judgment denying the adverse possession claim, and disregard all contrary evidence. *Shanks*, 364 S.W.3d at 811.

Crane and *Heigert* concerned lots in developed areas in which a boundary fence was constructed inside the record owner's lot. After the neighbor continuously possessed and used the property within the fence line for the requisite period of time, the trial court held the adverse possession claims were established to the fence line. Those cases have no application here because, in the face of conflicting and disputed evidence, the trial court found the north fence of the Disputed Property was not a boundary. Mr. Scorse does not challenge the sufficiency of the evidence to support this conclusion, and, therefore, his argument must be rejected.

For these reasons, the Trial Court did not err in applying the law to the claims by Mr. Scorse relating to the north fence of the Disputed Property. The Judgment of the Trial Court should be affirmed.

C. The Trial Court properly included in its Judgment those facts necessary to support its Judgment, and the court was not required to include all of the facts established through the Rule 74.04(d) process.

In Section C of his Argument, Mr. Scorse contends the Trial Court ignored the thirty-six statements of fact it previously deemed established under Rule 74.04(d). (Appellant's Substitute Brief, p. 49). Mr. Scorse also complains the Trial Court never gave advance notice to him at trial that it was revisiting its Rule 74.04(c) rulings, and

allegedly faulted him not re-proving some of those facts at trial. (Appellant's Substitute Brief, p. 52).

These arguments are meritless. Mr. Scorse has failed to properly describe the limited scope and relevance of the Rule 74.04(d) facts to the Trial Court's ultimate Judgment in this case. Mr. Scorse has also failed to inform the court of the substantial trial testimony voluntarily provided by Mr. Scorse and his witnesses which dealt directly with the subject matter of the Rule 74.04(d) facts, and often provided more detail or different information from that contained in the Rule 74.04(d) facts. For example, Mr. Scorse presented evidence on two different occasions during his direct examination at trial about placement of purple paint on the Disputed Property (Tr. 272, 290-91; Fact 37; App. A51), building and installing tree stands for deer hunting (Tr. 282-83, 334; Fact 22; App. A49), and repairing, constructing and removing fences (Tr. 268, 275, 334; Facts 47-49; App. A52), to name a few.

The existence of admitted facts does not automatically entitle a movant to summary judgment. *State v. Spilton*, 315 S.W.3d 350, 356 (Mo. banc 2010)(admission of statements of fact resulting from failure to properly deny those facts, does not automatically entitle a movant to summary judgment); *Jordan v. Peat*, 409 S.W.3d 553, 558 (Mo. App. W.D. 2013)(a motion for summary judgment must still be denied if the admitted facts are not sufficient to entitle the movant to judgment as a matter of law). Instead, the movant must establish that under the admitted facts, he is entitled to judgment in his favor as a matter of law. *Id.*

Mr. Scorse's argument, reduced to its essence, is that the Trial Court was required to include each of the Rule 74.04(d) facts in its Judgment regardless of whether they were relevant to the legal conclusions in the Judgment, and regardless of the testimony and evidence presented at a subsequent trial. This is incorrect. Rule 74.04(d) does not mandate inclusion of all such facts in a final judgment following a subsequent trial. Instead, a trial court is only required to include in its judgment those specific findings which are material to the lawsuit, and relevant or necessary to the conclusions of law contained in the judgment. *Thummel v. King*, 570 S.W.2d 679, 688 (Mo. banc 1978); *Evergreen National Corporation v. Carr*, 129 S.W.3d 492, 497 (Mo. App. S.D. 2004).

Admitted facts that do not require or lead directly to a legal conclusion are not material or relevant to a trial court's judgment. *Jordan*, 409 S.W.3d at 558. For example, admitted facts may be immaterial, superfluous or mere background, and such facts are insufficient to support any conclusion of law. *Id*. Furthermore, legal conclusions and conclusory statements are not "facts" and whether deemed admitted or not, cannot support a judgment. *Id* at 560. See *Metropolitan National Bank v. Commonwealth Land Title Insurance Company*, 456 S.W.3d 61, 68 (Mo. App. S.D. 2015). Admitted facts of these types can and should be excluded from a judgment. *Jordan*, 409 S.W.3d at 558.

Applying these legal principles, the Trial Court did not err in making the findings in its Judgment, nor did it err in the manner in which it addressed the Rule 74.04(d) facts.

1. Fact 37 was ambiguous and did not provide relevant and material facts, and Mr. Scorse voluntarily provided substantial additional testimony at trial on the alleged application of purple paint.

Only one of the Rule 74.04(d) facts is argued or even mentioned in Mr. Scorse's brief. That is Fact 37, which states:

> "37. Beginning at approximately the early 1990s, Defendant Scorse and his family painted various fence posts and trees on the Disputed Property with purple paint warning others to not trespass on the Disputed Property. **Exhibit 11**."

(D8, ¶37; App. A51)("Fact 37").

In the context of this case, Fact 37 is so general and ambiguous that it leads to no legal conclusions relevant or material to the issue of adverse possession by Mr. Scorse. Furthermore, Mr. Scorse voluntarily testified at trial about the application of purple paint, and he did so in a manner so substantially different than the substance of Fact 37 and he attempted to provide so much additional information not contained in Fact 37, that he abandoned any reliance on that fact.

In Missouri, purple paint may be applied "around the area to be posted" to give notice to others not to trespass on a tract of land. §569.145, RSMo. Purple paint markings "shall be readily visible to any person approaching the property" and must be placed no more than 100 feet apart or, in the case of marks on posts not more than 36 feet apart. §569.145, RSMo. The presence or absence of purple paint is sometimes a part of the evidence presented in adverse possession cases. *Walton v. Gilton*, 175 S.W.3d 170, 172 (Mo. App. S.D. 2005); *Stephens Cemetery v. Tyler*, 579 S.W.3d 299, 304 (Mo. App. S.D.

2019); *Shanks v. Honse*, 364 S.W.3d 809, 813 (Mo. App. 2012). However, the presence or absence of purple paint is not conclusive proof of any element of adverse possession, and it is simply one fact of many a court may consider. *Murphy*, 289 S.W.3d at 237-238 (adverse possession claims are highly fact dependent and each case must be decided on its own peculiar facts).

The primary limitation on the relevance of Fact 37 is that it contains no information about where the purple paint on the trees and fence posts was located. It only states it was "on the Disputed Property." It contains no information to show that purple paint was placed "around the area to be posted" as required by §569.145, RSMo., nor that purple paint was placed on any of the perimeters of the Disputed Property. (D8, ¶37; App. A51).

This is significant because purple paint along the west perimeter of the Disputed Property from Point A to B, or the south perimeter from Point D to C would actually defeat Mr. Scorse's claims, because it would serve as notice to Mr. Scorse (as the adjoining landowner in those areas) not to trespass onto the Disputed Property. §569.145, RSMo. (J.Ex. 2; R. App. R2).

The east perimeter from Point B to C was not treated as any sort of boundary until 2008-09, when Empire/Westar began bulldozing, clearing and building a fence coming down from the north. (J.Ex. 1, 2; R. App. R1, R2). At this time Mr. Scorse testified that he first became aware of his adverse possession claim. (Tr. 328 -329; Tr. 343-346). He responded by building a fence along the east boundary from Point B to C in 2009. (D61, p.37, ¶18). Until this 2008-09 time period, Mr. Scorse believed that he or his family

owned all of the land south of an old fence line from Point A, through Point B, and extending some undisclosed distance east of point B to a "Goat Dam." (Tr. 304-305). Mr. Scorse could not have, and would not have, placed purple paint from Point B to C at any time prior to 2008-09 because it was not considered a perimeter or boundary by him.

The only location where purple paint could arguably serve as notice of Mr. Scorse's claim of adverse possession to Empire/Westar, or to their predecessor the Elkans, would have been along the north perimeter of the Disputed Property from Point A to B. This is the only place where the Disputed Property connects to the other land owned by Empire/Westar. (J. Ex. 2; R. App. R2). However, Fact 37 does not state that purple paint was placed along the north perimeter of the Disputed Property. It does not identify any location other than it was applied on "various fence posts and trees on the Disputed Property." (D8, ¶37; App. A51). This could literally be anywhere across the entire 15.05 acres.[3] (P. Ex. 29; J.Ex 1; R. App. R1).

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[3] The reference to purple paint on fence posts does not give rise to an inference that it was applied on the north perimeter of the Disputed Property. Mr. Scorse presented evidence that a fence line also bisected the interior of the Disputed Property from point A to C. (Tr. 367; P. Ex. 29/ J. Ex. 1; R. App. R1). Because Mr. Scorse did not hold any record title to the Disputed Property, he was required to prove possession "of the entire area claimed." *Shanks*, 364 S.W.3d at 816, and purple paint on fence posts along this interior fence would fail to satisfy this requirement. Mr. Scorse also presented evidence of old

Mr. Scorse recognized the lack of probative value of Fact 37 because he chose to testify about the application of purple paint two different times during the course of his direct examination at trial. (Tr. 273, 291). Mr. Scorse and his counsel clearly made a deliberate, strategic decision not to rely on Fact 37, and his trial testimony differed significantly from Fact 37.

First, Mr. Scorse testified that purple paint was applied to a specific location, along the north perimeter from Point A to B. (Tr. 271; 274-275). Second, the time period was lengthened by ten years, and he testified that purple paint was first applied "In the 80's and I know we've repainted a couple of times since then." (Tr. 273, lines 5-6). Third, Mr. Scorse submitted into evidence ten ground level photographs taken by him along the north perimeter from point A to B, to support his testimony. (D.Ex. L, M). The photographs were taken in 2009, and they showed the old fence line before it was removed, and the surrounding area. (D.Ex. L, M). This is the area where, according to Mr. Scorse's trial testimony, purple paint had supposedly been applied to fence posts and trees. (Tr. 272, 290-91). However, none of the photos show any purple paint and certainly not on any of the fence posts or trees. (Tr. 274-278; D. Ex. L, M). These photographs were consistent with other photographs of the old fence and surrounding area submitted by Mr. Scorse and by Empire/Westar, none of which showed any purple paint markings anywhere. (D.Ex. I; P.Ex. 16; R. App. R11-17).

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fence posts between Points A and D, and Mr. Scorse installed fencing in 2009 from points B to C. (Tr. 264; D61, p.37, ¶18).

Finally, Mr. Scorse submitted small pieces of barbed wire into evidence as Defendant's Exhibit R, which he claimed had purple paint on them. (Tr. 271-272). He testified that he removed these from one of the piles of old wire on his farm which he claimed were from the original old fence from Point A to B. (Tr. 271-273). This differed from Fact 37 because it did not state that purple paint was applied to barbed wire, but instead that it was applied to fence posts and trees.

The Trial Court made findings on the purple paint issue based on Mr. Scorse's trial testimony, and found that testimony not to be credible:

> "83. John Scorse testified that purple paint was applied to trees and no trespassing signs were erected. However, Mr. Scorse did not provide examples of the signs, did not show where these signs were located or if they were located on or near the Disputed Property, nor whether those signs identified the Scorses' as owners of the Disputed Property. Based upon the evidence presented, the Court finds this testimony not credible. The Court notes that while signs can be easily removed, purple paint cannot be so easily removed. No evidence was presented showing purple paint on any boundary of the Disputed Property."

(D61, p. 22, ¶ 83; App. A22).

The Trial Court's focus was clearly upon the credibility of Mr. Scorse's trial testimony. That included whether purple paint was placed on any "boundary" of the Disputed Property, a very specific and relevant inquiry in an adverse possession case, and a disputed fact in this fact. The specific location was not addressed in Fact 37.

By choosing to testify on the subject of application of purple paint to the boundary of the Disputed Property from Point A to B, Mr. Scorse placed his credibility directly at issue. The Trial Court was fully authorized to consider all of his testimony as well as the

other facts and evidence in the case, in determining his credibility and deciding the contested issue of adverse possession. *Mitchell v. Kardesch*, 313 S.W.3d 667, 675 (Mo. banc 2010)(credibility of a testifying witness is always a relevant issue to be determined by the trier of fact); *White v. Director of Revenue*, 321 S.W.3d 298, 308 (Mo banc 2010)(trial court is authorized to evaluate witness credibility and relative evidentiary weight on contested issues).

A recent Missouri case, *Land Clearance for Redevelopment Authority of the City of St. Louis v. Osher*, 2020 WL 1921081 (Mo. App. E.D. April 21, 2020), presented similar issues to the present case. The parties stipulated to facts that a taking of land in Missouri was a "homestead taking," but the landowner testified at trial to facts which showed that his residence was in another state. The trial court denied the homestead allowance, and the landowner appealed, claiming the trial court's judgment "… improperly found his testimony the Property was his primary place of residence 'not credible' even though both parties stipulated to the evidence … regarding Appellant's entitlement to such an allowance…" Id. at p. 16. The Eastern District Court of Appeals began its analysis by discussing the unique role of a trial court in evaluating the credibility of witnesses and parties who testify at trial, and appellate court deference to such determinations. *Id.* The court concluded:

> "Where facts essential to an element of a case are derived from non-live sources and are in conflict, appellate courts give deference to the trial court's conclusions about those facts." *Thompson*, 90 S.W.3d at 200 (citing *Jarrell*, 41 S.W.3d at 46[9]). Because we defer to the circuit court's conclusions about the facts alleged in the Joint Statement of Facts, and we defer to the circuit court's determinations regarding credibility

> of Appellant's trial testimony, we find the circuit court's judgment is supported by substantial evidence and is not against the weight of the evidence."

Id at p. 17. The court denied the allegation of error and affirmed the judgment of the trial court. *Id*.

By voluntarily presenting his own testimony on the issue of purple paint, Mr. Scorse did not rely on Fact 37, and Empire/Westar was no longer bound by the court's Rule 74.04(d) finding. *Hobbs v. Director of Revenue*, 109 S.W.3d 220, 222 (Mo. App. E.D. 2003)(a party is not bound by an admission where, instead of relying on the admission, an opponent introduces evidence on the subject); *Jenni v. Gamel*, 602 S.W.2d 696, 699 (Mo. App. E.D. 1980)(admission in a pleading is not binding on a party when an opponent introduces contrary evidence at trial). Other decisions hold that a party that presents evidence on an issue admitted by an adversary, which tends to disprove that party's own case, does not rely on the admission and the issue becomes disputed and one for the trier of fact to decide. *Ray Klein, Inc. v. Kerr*, 272 S.W.3d 896, 901 (Mo. App. S.D. 2008); *Killian Construction Company v. Tri-City Construction Company*, 693 S.W.2d 819, 827 (Mo. App. W.D. 1985). Mr. Scorse's testimony disproved his own case because he submitted ten photographs of the fence line in the area where he allegedly applied purple paint, but none is shown anywhere in those photographs or the photographs of the same area submitted by Empire/Westar. Furthermore, Mr. Scorse's testimony went far beyond the facts contained in Fact 37 by adding an additional ten years; identifying a specific boundary location where the purple paint was applied; testifying the purple paint was reapplied several times; and testifying that purple paint

was applied to wire fencing (as opposed to the trees and fence posts identified in Fact 37). Mr. Scorse voluntarily testified to these facts as part of his trial strategy and thereby clearly expressed his intention not to rely upon the admission of Empire/Westar as contained in Fact 37.

Finally, Paragraph 83 of the Judgment addressed Mr. Scorse's trial testimony on the subject of his supposed installation of "no trespassing signs". (D61, p. 22, ¶ 83; App. A22). Importantly, none of the Rule 74.04(d) facts dealt with no trespassing signs, or whether such signs had been installed on the Disputed Property by Mr. Scorse. At trial, Mr. Scorse testified that no trespassing signs had been installed around the entire border of the Disputed Property and "A lot of them are still there" as of the date of his testimony on March 26, 2018. (Tr. 290, lines 17-23). However, none of the signs or pictures of them were submitted into evidence by Mr. Scorse, and none are seen in any of the photographs of the Disputed Property from 2009.[4] This was a contested issue, which the court was fully authorized to decide based on its evaluation of Mr. Scorse's credibility, the lack of supporting evidence, and the other evidence presented. *White*, 321 S.W.3d at 312.

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[4] Mr. Scorse did testify and submit photographs of no trespassing signs erected by Empire/Westar along the west perimeter of the Disputed Property from Point A to D. (Tr. 286; D.Ex. Q). Scorse testified these signs were erected in 2009 or 2010, and he immediately removed them and gave them to his attorney to return to Empire. (Tr. 286).

In conclusion, the Trial Court properly evaluated and determined Mr. Scorse's credibility on the issue of purple paint based on his testimony at trial and the other evidence submitted during the course of the trial. The Trial Court was not required to include Fact 37 in its Judgment in the face of Mr. Scorse's trial testimony on that issue, and because of the ambiguous and non-specific information about the location of purple paint markings in Fact 37. Thus, Mr. Scorse's arguments should be rejected.

2. Many of the Rule 74.04(d) facts were included in the Judgment or were simply undisputed.

Mr. Scorse's second argument is a general assertion the Trial Court ignored all of the Rule 74.04(d) facts in its Judgment. (Appellant's Substitute Brief, p. 56). While this is a demonstrably incorrect statement for the reasons stated below, such a broad assignment of error in a single point relied on fails to properly present the issue for judicial review. *Thummel*, 570 S.W. 2d at 688-689 (denying review where appellant attempted to include all of the proposed findings that were rejected by the trial court in a single point relied on).

The information contained in twenty-seven of the thirty-six total facts the court established under Rule 74.04(d) were either included in the Judgment, or they were simply undisputed facts that were not material to the Judgment. These are listed in the chart below, as well as the location where they can be found in the Judgment.

Fact No.	**Location**
1	Judgment (D61, ¶ 7 (A4))
2	Judgment (D61, ¶ 4 (A4))
3	Judgment (D61, ¶ 11 (A5))
4	Judgment (D61, ¶¶ 14, 15 (A5))
8	Judgment (D61, ¶ 69 (A18))
17	Judgment (D61, ¶¶ 74, 79 (A20-21), ¶¶ 14-16 (A35-37))
18	Judgment (D61, ¶ 12 (A5), J EX 1, R. App. R1)
20	Judgment (D61, ¶ 12 (A5), J EX 1, R. App. R1)
35	Undisputed, but general and not specific. Merely shows occasional trespasses. Immaterial to conclusions of law in the judgment. (Judgment (D61, ¶¶ 16, 17 (A37))
38	Undisputed. See No. 35.
39	Undisputed. See No. 35.
40	Judgment (D61, ¶ 77 (A21))
47	Judgment (D61, ¶ 73 (A20); ¶ 18 (A38))
48	Judgment (D61, ¶ 18 (A37))
49	Judgment (D61, ¶¶ 18-20 (A37-38))
55	Judgment (D61, ¶¶ 69, 70 (A18-19))
59	Judgment (D61, ¶ 11 (A5))
60	Undisputed background fact.
61	Judgment (D61, ¶¶ 4, 5 (A4))

62	Judgment (D61, ¶ 12 (A5), J.Ex 1, R. App. R1)
63	Judgment (D61, ¶¶ 9, 12 (A5))
64	Judgment (D61, ¶ 8 (A5))
65	Judgment (D61, ¶ 8 (A5))
66	Judgment (D61, ¶ 8 (A5))
67	Judgment (D61, ¶ 8 (A5))
68	Judgment (D61, ¶¶ 24, 40 (A7, A12))
72	Undisputed background fact.

Thus, Mr. Scorse's argument that the Rule 74.04(d) facts were not included in the Judgment is incorrect, and his arguments should be disregarded.

3. The remaining Rule 74.04(d) Facts were not relevant or material to the conclusions of law in the Trial Court's Judgment.

Facts 8, 9, 11, 13, 14, 33 and 53 merely state the subjective beliefs or perceptions of Mr. Scorse that he believed the Disputed Property was included in the land his family purchased in 1975, that he did not see evidence that anyone else had possession of the Disputed Property and that he and his family intended to possess the Disputed Property. (Fact numbers 8, 9, 11, 13,14, 33, 53)[5]. However, simply because Mr. Scorse possessed

[5] Mr. Scorse also testified about these opinions or subjective beliefs at trial. (Tr. 266-267, 285-286, 321-322).

these subjective beliefs or perceptions, did not compel the Trial Court to enter judgment in his favor on adverse possession or to include these facts in its Judgment. Missouri courts have ruled that subjective beliefs that one owns a disputed parcel is insufficient to show actual possession because it is a "mere mental enclosure of land." *Murphy*, 289 S.W.3d at 239; *Harris*, 940 S.W.2d at 45. Thus, Facts 8, 9, 11, 13, 14,33, and 53 were not relevant or material to the legal conclusions in the Trial Court's Judgment and were not required to be included in the Judgment. *Jordan*, 409 S.W.3d at 560-61.

Fact number 15 stated "From 1975 and continuing thereafter to present, the Elkans never gave any indication to Defendant Scorse and his family that they owned the Disputed Property." (D8, ¶15; App. A48). Importantly, none of the Rule 74.04(d) facts established the Elkans were aware of the Mr. Scorse's claim to ownership of the Disputed Property – an obvious prerequisite for Fact 15 to be relevant to this case. Mr. Scorse admitted at trial that he and his family never discussed their claim to ownership of the Disputed Property with the Elkans, with ranch manager Mr. Scott or anyone else, and never asserted any claim of adverse possession to the Elkans. (Tr. 335-336). Under Missouri law, there is a presumption that the record owner of wild and vacant land is the actual owner. *Shanks*, 364 S.W.3d at 811-12. The Elkans, as the prior record owners of the Disputed Property, had no obligation to re-assert their ownership or to affirmatively inform the Scorses that the Elkans owned land which the Scorses believed they owned by adverse possession.

> "There is no obligation upon an owner to reassert his ownership by an actual taking of possession nor may an owner be divested of his title in default of physical occupancy. The adverse claimant prevails, not because the title owner has failed to exercise dominion, but because the claimant has proved his actual and continuous possession and that of those under him who he claims."

Id. (quoting *Eime v. Bradford*, 185 S.W.3d 233, 236 (Mo. App. E.D. 2006).

Substantial evidence was also presented to show the Elkans did not know the Scorses claimed an interest in the Disputed Property. This includes the Affidavit of Possession made and recorded by the Elkans in 1999 at the time they conveyed the Disputed Property to Empire/Westar, and their deeds to the Disputed Property to Empire/Westar. (P. Ex. 25). Fact 15 is an unsupported and conclusory statement, that had no relevance to the legal conclusions reached by the Trial Court, and the Court had no obligation to include it in the Judgment. *Jordan*, 409 S.W. 3d at 560-61.

Fact 22 stated: "Over the years from 1975 to present, Defendant Scorse and his family have built and/or maintained multiple deer stands on the Disputed Property." (D8, ¶22; App. A49) ("Fact 22"). Mr. Scorse testified at trial that he placed portable deer stands on the Disputed Property and that his brother constructed one deer stand on the property. (Tr. 282, 284). The one photograph which supposedly depicted the deer stand, offered into evidence by Mr. Scorse, simply showed a tangled mess of brush and tree limbs that was apparently the remnants of a dilapidated tree stand. (D. Ex. P; R. App. R25, R26; Tr. 282-284). Substantial evidence was presented that a number of other people deer hunted on the property and used deer stands on the Disputed Property with permission from Mr. Scott, Ranch Manager for the Elkans. Mr. Scorse presented

evidence of the tree stands in an apparent effort to prove to the Trial Court that he constructed permanent improvements on the property sufficient to establish actual possession. However, a negligible improvement such as a dilapidated deer stand is insufficient to establish adverse possession, and merely shows an occasional trespass. See *Murphy*, 289 S.W.3d at 240 (constructing and using a makeshift fence for corralling livestock, giving permission to others to hunt, removing hay, allowing cattle to graze and repairing an old wire fence on a disputed property is insufficient to establish adverse possession). The Trial Court was not required to include this fact in its Judgment because it was not relevant or material to the legal conclusions reached by the Trial Court. *Jordan*, 409 S.W.3d at 560-61.

Fact 44 states that "From 1975 and continuing thereafter to present, the Elkans never objected to Defendant Scorse or to his family to the fencing serving as the boundary line between Defendant Scorse's property and the property the Elkans owned to the north and east of the Disputed Property." (D8, ¶44; App. A51) ("Fact 44"). Again, the Rule 74.04(d) facts did not include the prerequisite facts that the Elkans knew the Scorses considered "the fencing" (presumably referring to the old fence from Point A to B) to be a boundary between their properties. For the same reasons as stated for Fact 15 above, this fact was not relevant or material to any of the conclusions of law made by the court, and the Trial Court was not required to include it in the Judgment. *Jordan*, 409 S.W.3d at 560-61.

Fact 49 states "Defendant Scorse immediately removed the fencing that Plaintiffs' attempted to build and returned the materials to Plaintiffs so that the Disputed Property

continued to be enclosed by fencing with the property Defendant Scorse's family purchased in 1975." (D8, ¶49; App. A52) ("Fact 49). This fact does not refer to any specific time period when Mr. Scorse removed the fencing, and the timing is essential to understanding the relevance of this fact. Fact 49 is part of a sequence of statements of fact about building and removing a fence between the Disputed Property and the Scorse ranch[6]. Paragraph 48 begins by stating that in 2011 Empire/Westar attempted to build a north south fence that separated the Disputed Property from the Scorse property. (D8, ¶48; App. A52). Paragraph 49 then describes Mr. Scorse's removal of that fence, which obviously had to occur in 2011 or later. (D8, ¶49; App. A52). In the Judgment, the Court specifically referred to acts of installing and removing fences by the parties from 2009 to 2015, which are the subject of Fact 49. (D61, p. 37-38; App. A37-38). While the Court credited those to Mr. Scorse as sufficient actions to establish adverse possession, it correctly ruled that such actions fell short of the ten-year durational requirement to establish adverse possession under Missouri law. (D61, p. 38; App. A38).

The reference to enclosure of the Disputed Property in Fact 49 was also included in the Judgment. (D61, p. 37-38, ¶¶18-19; App. A37-38). In 2009, Mr. Scorse constructed a fence along the east perimeter of the Disputed Property from Point B to C. Mr. Scorse also rebuilt the fence along the north perimeter from point A to B in 2010 or

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[6] This refers to the west boundary of the Disputed Property from Point A to D, where the Disputed Property abuts the Scorse property. Mr. Scorse testified to the same facts at trial. (Tr. 255:23 – 257:20).

2011. (Tr. 334-335). The effect of these fencing activities was that by 2010 or 2011, the Disputed Property was enclosed for the first time with the Scorse property. As a result, when Mr. Scorse removed the fence along the west perimeter from Point A to D, installed by Empire in 2011, it did result in enclosure of the Disputed Property with the Scorse ranch as described in Fact 49. This is specifically referenced in paragraph 20 of the Judgment. (D61, p. 38, ¶20; App. A38). Thus, contrary to Mr. Scorse's arguments, the information in Fact 49 was specifically included in the Judgment and credited to Mr. Scorse as acts of adverse possession. However, the claim still failed because the ten-year durational requirement of adverse possession was not satisfied. Thus, Mr. Scorse's arguments as to Fact 49 are meritless.

In conclusion, the Trial Court included the information contained in the Rule 74.04(d) facts in its Judgment where those facts were relevant and material to the legal conclusions reached by the court. The Trial Court was not required to include facts that were irrelevant or immaterial to its Judgment, that were conclusory, or those on which Mr. Scorse presented testimony at trial. Mr. Scorse's arguments to the contrary should be rejected and the Trial Court's Judgment should be affirmed.

4. <u>The federal summary judgment decisions cited by Mr. Scorse have no application to resolution of the issues presented in this case.</u>

Mr. Scorse argues that this Court should adopt the approach of several federal decisions and find that facts established following denial of a summary judgment motion should be treated as "an entry of partial summary judgment as to those facts."

(Appellants Sub. Brief, p. 53) This would be contrary to Missouri law and inconsistent with Rule 74.04.

Under Rule 74.04, summary judgment may only be entered upon a "claim, counterclaim or cross-claim." Rule 74.04. The rule does not authorize or permit summary judgment to be entered on facts. Rule 74.04. Moreover, admissions may only be to "facts" and conclusions of law may not be the subject of an admission. *Jordan*, 409 S.W.3d at 560-561. The Missouri procedural rules, law and decisions of its courts, as set forth above, provide a sufficient basis to decide the issues presented in this case. There is no reason to adopt federal decisions decided under a federal rule of civil procedure. The arguments advanced by Mr. Scorse should, therefore, be rejected.

D. The Trial Court properly applied the law of adverse possession to the facts and evidence

The remainder Mr. Scorse's argument in Section D of his substitute brief is dedicated to re-arguing each of the elements of adverse possession for the period from 1975 to 1999. Mr. Scorse relies almost entirely on his own interpretation and assembly of the Rule 74.04(d) facts and ignores his own testimony and the trial court's repeated findings that he was not a credible witness. Mr. Scorse also ignores the evidence, and the Trial Court's conclusions, that the very acts Mr. Scorse relies on as conclusive on the issue of adverse possession, were nothing more than occasional trespasses. *Murphy*, 289 S.W.3d at 238 (occasional trespasses are insufficient to establish adverse possession).

While Mr. Scorse couches his arguments on the assertion the Trial Court misapplied the law, it is actually nothing more than re-argument of the evidence and

application of the same five elements of adverse possession that were applied by the Trial Court in its Judgment. These arguments should be disregarded because Mr. Scorse has failed to identify any misapplication of the law and because this portion of his brief represents nothing more than re-argument of the disputed issue of adverse possession decided adversely to him by the Trial Court. *White*, 321 S.W.3d at 312.

The facts, evidence and credibility determinations that supported the Trial Court's decision are fully set forth in the Judgment, and in this brief, and will not be re-argued here. (D61 p. 1-39; App. A1-A39) The Trial Court properly concluded that Mr. Scorse failed to establish his claim of adverse possession. Thus, the arguments by Mr. Scorse in part D of his Brief should be disregarded.

CONCLUSION

In conclusion, for the reasons stated in this Brief, the Judgment of the Circuit Court of Newton County, Missouri, denying Mr. Scorse's claim of adverse possession, and quieting title to the Disputed Property in Empire (60%) and Westar (40%), should be affirmed.

Respectfully submitted,

ELLIS, ELLIS, HAMMONS & JOHNSON, P.C.

/s/ Todd A. Johnson
Todd A. Johnson #38363
901 St. Louis Street, Suite 600
Springfield, MO 65806-2505
Telephone: (417) 866-5091
Facsimile: (417) 866-1064
Email: tjohnson@eehjfirm.com
ATTORNEYS FOR RESPONDENTS
THE EMPIRE DISTRICT ELECTRIC COMPANY
AND WESTAR GENERATING, INC.

CERTIFICATE OF COMPLIANCE

I certify that I prepared this brief using Microsoft Word for Office 365 in 13-point Times New Roman font. I further certify that this brief complies with the word limitations of Supreme Court Rule 84.06(b), as this brief contains 19,098 words.

/s/ Todd A. Johnson
Todd A. Johnson

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of July, 2020, I electronically filed a true and correct copy of this document with the Clerk of the Court for the Missouri Supreme Court, by using the Missouri eFiling System. Participants in the case who are registered users will be served by the Missouri eFiling System.

Jonathan Sternberg
Jonathan Sternberg, Attorney, P.C.
2323 Grand Blvd., Suite 1100
Kansas City, MO 64108

Andrew Patrick Wood
Johnson & Wood
119 South Washington Street
P.O. Box 276
Neosho, MO 64850

William E. Peterson
1105 East 32nd Street, Suite 5
P.O. Box 1582
Joplin, MO 64802

/s/ Todd A. Johnson
Attorney of Record