SC98380

IN THE SUPREME COURT OF MISSOURI

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

vs.

JOHN SCORSE, both individually and in his capacity as Trustee under that certain Trust agreement dated November 17, 1976,
Appellant.

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

SUBSTITUTE BRIEF OF THE APPELLANT

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Jurisdictional Statement

This is an appeal from a judgment of the Circuit Court of Newton County granting the plaintiffs' claim to quiet title to a disputed piece of property and denying the defendant's counterclaim for adverse possession.

This case does not fall within this Court's exclusive appellate jurisdiction under Mo. Const. art. V, § 3. So, the defendant timely appealed to the Missouri Court of Appeals, Southern District. This case arose in Newton County. Under § 477.060, R.S.Mo., venue lay within that district of the Court of Appeals.

After the Court of Appeals issued an opinion affirming the trial court's judgment, the defendant filed a timely motion for rehearing and application for transfer in the Court of Appeals, both of which were denied. The defendant then filed a timely application for transfer in this Court under Rule 83.04. The Court sustained that application and transferred this case.

Therefore, under Mo. Const. art. V, § 10, which authorizes this Court to transfer a case from the Court of Appeals "before or after opinion because of the general interest or importance of a question involved in the case, or for the purpose of reexamining the existing law, or pursuant to supreme court rule," this Court has jurisdiction.

Statement of Facts

A. The Disputed Property

This case concerns the title to a tract of land in Newton County, the "Disputed Property," which is located north of Shoal Creek near Missouri's border with Kansas, totals about 15 acres, and is legally described as:

> All of the West 700 feet of the Northwest Quarter of the Northeast Quarter of Section 26, Township 27 North, Range 34 West, Newton County, Missouri lying North of the main channel of Shoal Creek. ALSO part of the Southwest Quarter of the Southeast Quarter of Section 23, Township 27 North, Range 34 West, Newton County, Missouri, described as beginning at a found pipe at the South Quarter Corner of Section 23, thence S88°09'58"E 700.00 feet (m. 699.61 feet) to a found iron pin; thence N1°48'29"E 37.88 feet to a pipe post; thence N87°16'04"W 324.62 feet; thence N43°44'51"W 525.68 feet to the west line of said SW1/4 SE1/4; thence S1°46'18"W 410.90 feet to the point of beginning; containing in total 15.05 acres more or less.

(D8 p. 2; D22 p. 2; D30 p. 3; D52 pp. 1-2; D57 p. 2; App. A41, A47, A57-60).[1]

The Disputed Property is "Tract 3" on this inset from Defendant's Ex. A (D8 p. 2; D57 p. 2; App. A41, A47, A61), in which north is "up":

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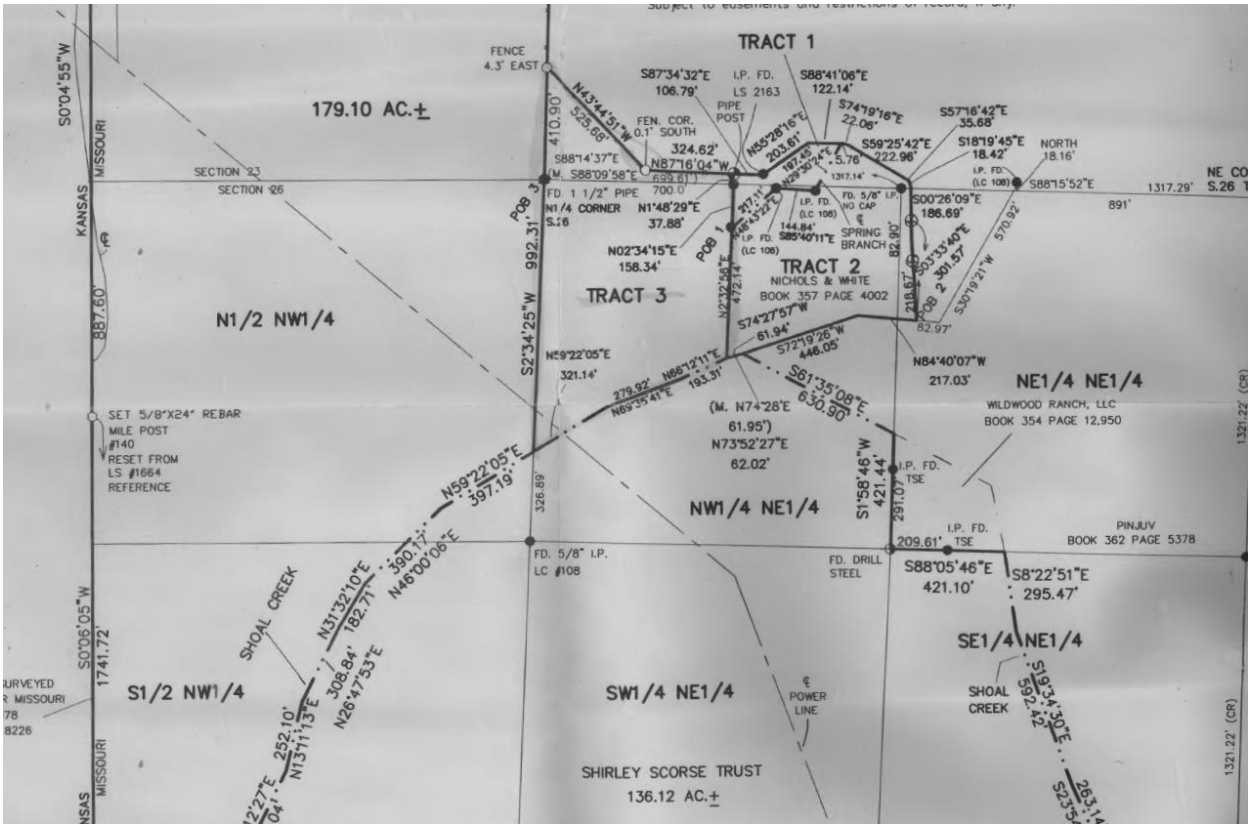
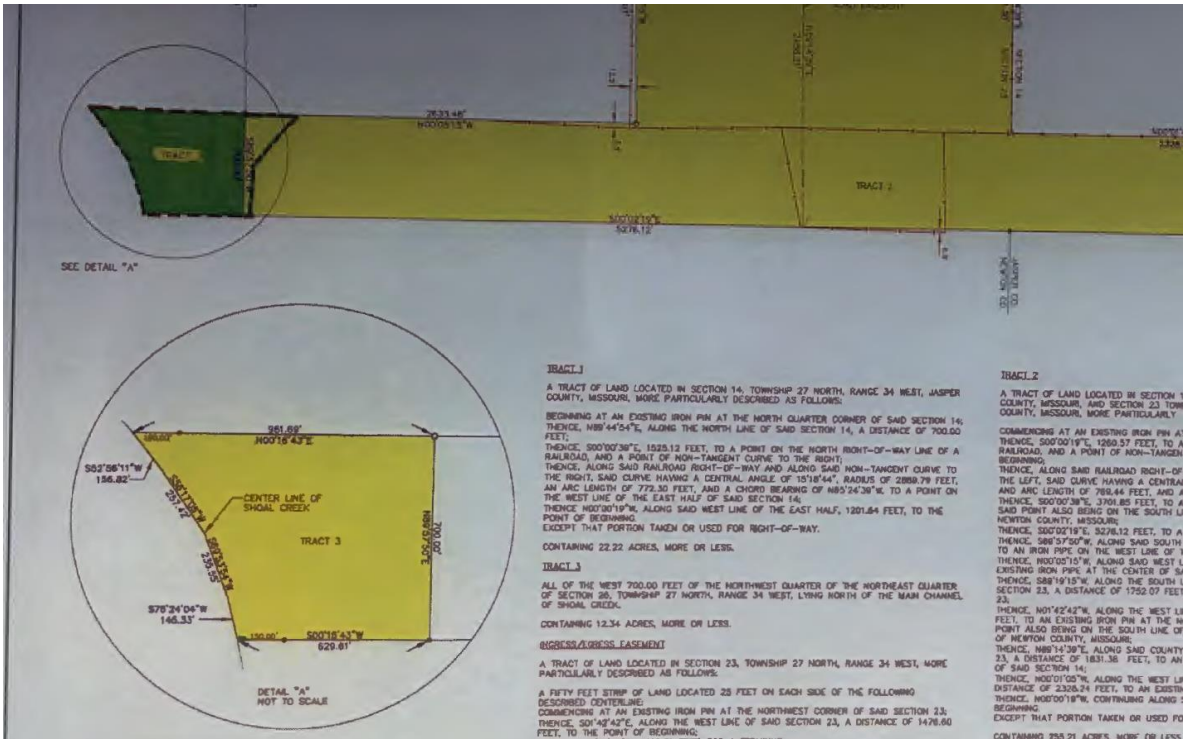
[1] Many facts are uncontested. First, under Rule 74.04(d) the trial court deemed a series of facts in the defendant's motion for summary judgment uncontroverted and established for all purposes (D22 p. 2; App. A57). It later reconsidered this for some, but left the remainder in place as uncontroverted and established for trial (D30 p. 3; D52 pp. 1-2; App. A58-60). *See* below at pp. 28-33 and 49-57. For ease of reference, after this first citation this brief only will refer to these facts by citing **D8**, which is reproduced in the appendix to this brief with these ultimately established paragraphs highlighted (App. A46-56). Second, the parties later entered into a joint stipulation of facts, **D57**, which also is reproduced in the appendix to this brief (App. A40).



The Disputed Property also is the area surrounded by the dotted line in this inset from Plaintiffs' Ex. 5 (D57 p. 3; App. A62), in which north is "right":



1. Title history

The northern, smaller part of the Disputed Property is in Section 23 and the southern, larger part is in Section 26 (Tr. 227; D. Ex. A; P. Ex. 5; App. A61-62).

For the portion of the Disputed Property on Section 23, evidence was presented of a chain of title beginning in 1873 and extending through to a purchase by Carl and Grace Elkan in 1957, which the Elkans later transferred to the Carl M. Elkan Revocable Trust (Tr. 218, 227-28; P. Ex. 23).

For the portion on Section 26, the title history was more complicated.

An expert for the plaintiffs, Holly Mitchell, testified to a title search she had done (Tr. 213-38). Ms. Mitchell said that the title to the portion of the Disputed Property in Section 23 originated in February 1903 with a patent from the federal government to William Lea (Tr. 219; D. Ex. 24). From there, the title was split in two (Tr. 219; D. Ex. 24).

Ms. Mitchell said that Gabriel Schmurch received a half interest from Mr. Lea in May 1903, but Mr. Schmurch lost that property in a tax sale in November 1940 (Tr. 220; D. Ex. 24). Newton County then issued a quitclaim deed over that interest to L.N. Barbee and K.E. Kimmel in August 1943 (Tr. 220; D. Ex. 24). In 1945, the Empire District Electric Company ("Empire") received a power line easement over the Section 26 portion of the Disputed Property from Bagdad Grocery, Eddie Daniel, Dan Murphy, L.N. and Mary Barbee, George and Faye Potter, and K.E. and Jean Kimmel (D57 p. 5; App. A44). Ms. Mitchell called this a "stray easement," because the individuals granting it were not in the property's chain of title (Tr. 220; D. Ex. 24). In

June 1957, L.N. Barbee and Rex Kimmel conveyed their respective interests via two quitclaim deeds to George Potter (Tr. 221-22; D. Ex. 24). George Potter and his wife then conveyed their interest to Carl and Grace Elkan via quitclaim deed in July 1957 (Tr. 222; D. Ex. 24). (Later, in August 1995, the Elkans transferred this interest by quitclaim deed to the Carl M. Elkan Revocable Trust (Tr. 223-24; P. Ex. 24).)

Ms. Mitchell said that for the other half-interest, William Lea granted it to F.A. Dossman in May 1903 (Tr. 227-28; P. Ex. 24). The next record with respect to Mr. Dossman's 50% interest is a mortgage deed by Irwin Kern in August 1933 (Tr. 229, 398; P. Ex. 24). The next activity is a proof that Newton County published in 1989 indicating Mr. Kern owned an undivided one-half interest in the Disputed Property on which he had failed to pay taxes in 1986 and 1987 (Tr. 230-31; P. Ex. 24). Ms. Mitchell conceded this meant that from 1957 until 1989, the Elkans were not 100% title holders of the Disputed Property (Tr. 231). Then, in September 1999, the Elkans filed an affidavit with the Newton County Recorder warranting that they owned all of the Section 26 portion of the Disputed Property (Tr. 238; P. Ex. 25).

Ms. Mitchell said that based on this, 50% of the record title for the Section 26 portion of the Disputed Property was clearly vested in the Elkans as of 1957 (Tr. 236-37). As to the other 50%, she said that "given that the Elkans had owned it since 1957, there was an adverse possession affidavit filed, and it's been 60 plus years since then. We would be inclined to say that they are the owners of the property" (Tr. 237).

The 1965 Newton County Plat Book showed Richard Swaim's name on the property west of the Elkan property (Tr. 105, 304, 327; P. Ex. 9). The Disputed Property showed the names "Elkan" and "Kern" (Tr. 105, 304, 327; P. Ex. 9). The 1986 book showed Sidney Scorse's name on the property west of the Elkan property; the Disputed Property had no name on it, but the area above it had the name "Elkan" printed over Section 23 with a "land hook" indicating ownership across the line for the Disputed Property (Tr. 106, 327; P. Ex. 10). The 1994 book showed "Carl Elkan" printed over Section 23 with a "land hook" to the disputed property (Tr. 107, 327-28; P. Ex. 11).

2. The Scorses' 1975 purchase

Today, the Scorse Family Trust, of which John Scorse, a resident of Newton County, is Trustee, owns three farms, Scorse Farms #1, #2, and #3 (collectively "the Scorse Farms"), which are located immediately west of the Disputed Property (D57 pp. 2, 4; App. A41, A43). Scorse Farms #1 and #2 adjoin the Disputed Property's western boundary (D57 p. 4; App. A43).

The evidence at trial of the ownership and conveyance of the Scorse Farms began with a March 1954 warranty deed from Fred and Lyla Braun to Richard and Betty Swaim (D57 p. 4; App. A43). In March 1972, the Swaims transferred the Scorse Farms by warranty deed to Orville and Lucille Jacobs (D57 p. 4; App. A43). In June 1975, the Jacobses transferred them by warranty deed to Sidney and Shirley Scorse, who were Mr. Scorse's parents (D57 pp. 4-5; App. A43-44). In November 1976, Mr. Scorse's parents transferred them by warranty deed to the Sidney W. Scorse, Jr. Trust dated November 17, 1976, which in 2014 transferred them by trustee's warranty

deed to Mr. Scorse, who in turn transferred them by quitclaim deed in November 2015 to the Scorse Family Trust (D57 p. 4; App. A43). Another farm, the Shirley Scorse Farm, which is adjacent to the Scorse Farms, was acquired by warranty deed in December 1984 (D57 p. 5; Tr. 310; App. A44).

In the 1975 purchase from the Jacobses, Mr. Scorse's parents purchased approximately 180 acres within Sections 23 and 26 of Range 34 in Newton County, directly adjacent to the Disputed Property, which today are the Scorse Farms (D8 p. 2; Tr. 246, 248; App. A47). Since 1975, Mr. Scorse and his family have operated a cattle ranch on the Scorse Farms (D57 p. 5; Tr. 246, 248; App. A44). This later grew to include the Shirley Scorse Farm and two other farms in Kansas, #4 and #5 totaling 143 acres, which the Scorses acquired in the late 1980s or early 1990s (D57 p. 5; App. A44).

Before purchasing the Scorse Farms, Mr. Scorse and his father walked the entire property, including the Disputed Property, and Mr. Scorse believed the Disputed Property was part of the property being purchased (D8 p. 3; Tr. 246, 248-49, 253; App. A48). He did not see any evidence that anyone else had possession of the disputed property besides the seller, who represented that the Disputed Property was part of the property they were purchasing (D8 p. 3; App. A48). But the Disputed Property was not actually described in the deed from the Jacobses, nor was it described in any of the previous deeds in evidence for the Scorse Farms (D57 p. 5; App. A44).

3. Use of the Disputed Property between 1954 and 1975

Richard Swaim, Jr. testified that his family moved onto what is now the Scorse Farms in 1953 (Tr. 349). He said his family used the Disputed Property for pasture, despite it not being suitable for cattle because it had no grass and was very rocky (Tr. 352, 369-70).

Mr. Swaim said that an old fence started along the southeast corner of the Disputed Property and "went down the backside of the bluff and ran on … mostly north but a northwest [*sic*]" (Tr. 357). He said there also was a goat fence or goat dam behind the bluff, and to the north and east of the goat dam was the Wildwood Ranch (Tr. 360-61). He said that as far as he knew, his father owned the property to the south and west of the goat dam – the Disputed Property – and the fencing surrounding it, and he would go as far as the fence on its eastern side (Tr. 361, 363). He also said that he did not recall any fencing in the 1950s and 1960s that would have separated the Disputed Property from the Scorse Farms (Tr. 362).

Joe Ewing testified that Carl Elkan hired him as the Wildwood Ranch manager from 1959 to 1971, during all of which he lived on the Elkans' property (Tr. 375). He said that the Wildwood Ranch – the Elkans – did not use the Disputed Property that would be south and west of the fencing that went over the goat dam (Tr. 378-79). He said he never went into the Disputed Property because he "had no reason to be over on that" (Tr. 383). He also said the goat dam on the east side of the Disputed Property with the fencing on it was what "this old gentleman that took me down there that time and indicated that that was the property line" (Tr. 384-85; D. Ex. V).

Mr. Ewing also described a fence separating the Disputed Property from the Elkans' property: "it came a little bit into an angle from the north end, and then kind of squared and went past to the tree and went across the dam and went up over – straight off the dam up over the bluff" (Tr. 385). He said he built lots of fence and repaired lots of fence but never touched the fence separating the Disputed Property from the Elkans' property (Tr. 386).

David Ewing testified that he and the Swaim children would play on the Disputed Property and on the goat dam (Tr. 444). He said he did not have a specific memory regarding whether the fence went over the goat dam (Tr. 414). But he said that "there was some wire over the top of it and then fence going out away from it" (Tr. 441). He said he never crossed it to go into the Disputed Property because "[i]t wasn't [W]ildwood's place" (Tr. 416).

4. The Scorses and the Disputed Property between 1975 and 1999

a. Uncontested facts and Mr. Scorse's testimony

In 1980, Mr. Scorse's family built a residence on their land within a short walking distance of the Disputed Property, where Mr. Scorse now lives (D8 p. 4; Tr. 279; App. A49). The Disputed Property is contiguous to the backyard of that residence (D8 p. 4; Tr. 279; App. A49).

From 1975 to the present, Mr. Scorse and his family intended to possess the Disputed Property and to do so regardless of record ownership (D8 p. 3; App. A48). During that same time, they also intended to exclude all others from possession and ownership of the Disputed Property (D8 p. 7; App. A52). At no time from 1975 to the present did Mr. Scorse see any evidence or have any knowledge that the Elkans were occupying, possessing, or using the

Disputed Property, nor did the Elkans ever give any indication to Mr. Scorse or his family that they owned the Disputed Property (D8 p. 3; App. A48). From 1975 to the present, Mr. Scorse and his family had unfettered access to the Disputed Property (D8 p. 4; App. A49). During that same time, no one gave Mr. Scorse or his family permission to possess and occupy the Disputed Property (D8 p. 8; App. A53).

Over the years from 1975 to the present, Mr. Scorse and his family have built or maintained multiple deer stands on the Disputed Property (D8 p. 4; App. A49). Over that same time, they also have drawn and removed water from the Disputed Property for irrigation purposes (D8 p. 5; App. A50), removed rocks and stones from the Disputed Property for decorative purposes, fished in Shoal Creek from the Disputed Property, and explored various caves on the Disputed Property (D8 p. 6; App. A51). Beginning in the early 1990s, Mr. Scorse and his family painted various fence posts and trees on the Disputed Property with purple paint warning others not to trespass on the Disputed Property (D8 p. 6; Tr. 273, 291; App. A51). Mr. Scorse said that the Elkans did not object once (Tr. 290-91). Fencing enclosed the Disputed Property along with the property that Mr. Scorse's family purchased in 1975 (D8 p. 7; App. A52).

From 1975 to the present, the Elkans never objected to Mr. Scorse or his family to the fencing serving as the boundary line between Mr. Scorse's property and property the Elkans owned to the north and east of the Disputed Property (D8 p. 6; App. A51). Mr. Scorse described the work that he and his family had done over 1975 to 1999 on that fence, and he said he spent

about 80 to 100 hours maintaining and working on it (Tr. 268-72, 291; D. Ex. R). He said his father primarily maintained this fence until 2004, when he had a tractor accident, after which "the fence did get into a little bit of disrepair for a few years" (Tr. 275).

Mr. Scorse said that the fence that enclosed the Disputed Property along with Scorse Farms began on the northeastern corner of Scorse Farms and traversed east on the northern boundary up to a tree, where the fence then turned south toward Shoal Creek (Tr. 250-55; D. Ex. O; App. A66). He said it "had the same type of fencing with the hog wire, the old hog wire, barbed wire and two new strands, newer strands" (Tr. 251). He said he and his family added two more strands of barbed wire over the entire distance within two or three years after the 1975 purchase (Tr. 261-62, 333-334). He said one could see where the previous owner's cows had been on the Disputed Property (Tr. 254, 261, 331-32).

Mr. Scorse said that in all the time he had contact with the Disputed Property, there had "never been a viable fence at all that you can find" separating his property and the Disputed Property, and instead the disputed property always had been enclosed with the other property his family owned (Tr. 260-62). He said there were basically "four pasture units when Dad purchased the property in '75" and no cross fencing to keep out of the Disputed Property (Tr. 289, 310). Because of this, he and his family used the Disputed Property as part of the cattle operation ever since they put cows on there in 1975 or 1976 (Tr. 280).

Mr. Scorse said that in 1994, Empire had asked his father about putting a power line on the Disputed Property, but his father did not like the idea (Tr. 300). He said Empire contacted his father again in 1996 about replacing the poles on top of the bluff on the east side of the Disputed Property (Tr. 300-01). He said his father took Empire's contractors "up the path, up this, through the rock dam. And once you go up past the rock dam, this slope and terrain is a little bit easier so they were able to drive their dozer back up and we cut the fence again up here on the top side and let them drive down on top of the bluff area where they could drive the dozer down" (Tr. 301). He said the fence, which enclosed the Disputed Property with the Scorse Farms, was not repaired, so he contacted William Howell at Empire asking for somebody to go down and fix the fence, after which the fence was repaired (Tr. 301-02).

Mr. Scorse described how his family used the Disputed Property for their cattle operation and recreational activities, as well as the terrain of the Disputed Property (Tr. 281-85, 290; D. Ex. P). He said that since 1975, there never had been a time when his family did not utilize the disputed property (Tr. 297-98). He explained how he conducts his cattle operation to improve the ground, including on the Disputed Property (Tr. 287-89, 315-17). He described the location of one of the original deer stands his older brother constructed on the Disputed Property (Tr. 282-83, 331; D. Ex. P). He testified to a photograph taken inside the Disputed Property with his family about 13 or 15 years before trial (Tr. 295-96; D. Ex. T).

b. Others' testimony

Ron Scott, the manager of the Elkans' Wildwood Ranch from 1971 through December 2005, said he lived at the ranch headquarters a mile or so from the Disputed Property for 33 years (Tr. 150, 152, 153, 160). He said he had friends who hunted deer and mushrooms on the Disputed Property from 1988 to 2004 (Tr. 156-58, 164, 177). He said he also gave Don Stidham and his family permission to hunt within the Disputed Property and 15 acres east of there (Tr. 164-165). He said a fence had been put in by Mr. Jacobs, who had owned Scorse Farm #1 (Tr. 165). He said he did not recall a northern boundary fence of the Disputed Property, but if there was one, he never did any work on it (Tr. 165-66). He said he recalled about halfway along that boundary and running east "was just wire that was there to mess up a horse if you didn't know it was there. It was in poor shape" (Tr. 159-60).

At trial, Mr. Scott said he did not recall a north-south fence along the eastern boundary of the Disputed Property (Tr. 160). But on Defendant's Exhibit H, he drew in red ink a north-south fence on the western side of Section 23 that did not reach all the way down to Shoal Creek but instead turned east toward Section 25 north of the Disputed Property (Tr. 166-67; App. A63). He said he did not do any work on that fence, either (Tr. 166-67).

Mr. Scott said that the east-west fence he drew in Section 26 near Shoal Creek running on the southern edge of the disputed property was in total disrepair (Tr. 167; D. Ex. H; App. A63). He said he would cut holes in it sometimes but did not do anything to repair it (Tr. 168). After being shown photographs from 2009 showing the northern boundary fence, he said it had

not been there when he was there (Tr. 170). He said he was not aware of any buildings, corrals, or livestock on the Disputed Property, and never saw any cattle or other person on it (Tr. 155). He also said the fence on Defendant's Exhibit I was not the fence he had cut (Tr. 171).

Don Stidham testified that he lived next to Wildwood Ranch and became friends with Ronald Scott after they had made a deal that he "would get to watch the bottom from where we lived at back over to the west along the property line down along Shoal Creek. I'd keep everybody off that side because Ron was way up on the north side and, you know, he couldn't watch both places" (Tr. 173, 175). Mr. Stidham said he hunted in the Disputed Property from 1978 to 2005 about two or three times a week during season (Tr. 156, 174-75, 177). He said he spent about 70 percent of his hunting time either along the boundaries or on the Disputed Property (Tr. 191).

Mr. Stidham drew nine Xs on a map where he said he had deer stands when he was hunting on Wildwood Ranch (Tr. 186; D. Ex. J; App. A64). He also demarcated the general location of his home from the late 1970s to the early 1980s (Tr. 187). He also placed an X where he believed the Scorses' house was located on the map (Tr. 187). He said he knew the Scorses did not want anyone from Wildwood Ranch hunting on his property, and he stayed away from where he thought the Scorses' property was (Tr. 187-88). On Defendant's Exhibit K, the yellow portion represents the Disputed Property (Tr. 189-90). Mr. Stidham said he did not have to cross any fences from the east side of that highlighted area until reaching the west side of the Disputed Property, which was the east side of the Scorse property (Tr. 190).

5. The Elkans' 1999 sale to the Utilities

Empire is a Kansas corporation authorized to do business in Missouri and that does so as an electrical utility regulated by the Missouri Public Service Commission (D57 p. 1; App. A40). Westar Generating, Inc. ("Westar") is a Kansas corporation that is authorized to do business in Missouri (D57 p. 1; App. A40). This brief refers to these entities together as "the Utilities."

In September 1999, the Elkans deeded three adjoining tracts of land in Section 26 to the Utilities, with an undivided 60% interest to Empire and 40% to Westar (D57 pp. 2-3; D8 p. 8; Tr. 218-227-28; App. A41-42, A53). This included some 200 acres, and purported to include the Disputed Property (D8 p. 8; App. A53). Plaintiffs' Ex. 5 (App. A62) shows the three tracts the Elkans purported to deed to the Utilities (D57 pp. 2-3; App. A41-42). Tracts I and II are shown in yellow and Tract III is shown in green, with the Disputed Property surrounded by dotted lines (D57 p. 3; App. A42, A62). The total purchase price was $715,080, including $22,575 ($1,500 per acre) for the Disputed Property (P. Ex. 6; D57 p. 3; App. A42).

The Utilities made the purchase from the Elkans in order to gain access to Shoal Creek (D8 p. 8; App. A53). Section 26 of the Disputed Property is the only portion of those 200 acres that borders Shoal Creek (D8 pp. 8-9; App. A53-54). Robert Barchak, Empire's land administration manager from 2001 to 2017 and right-of-way supervisor from August 1982 to 2001, said he was responsible for the acquisition from the Elkans (Tr. 48-49, 121-22; P. Ex. 6; D. Ex. C). He said he was "contacted by the plant manager at the state line generating plant and asked to try to seek rights to get down

to Shoal Creek to potentially take water from Shoal Creek for cooling those units" (Tr. 50). He said that Empire needed a water source for its plant and its first preference was to try to get a water lien easement, rather than buying any land to have access to Shoal Creek (Tr. 119-20).

Mr. Barchak said that previously, he and another person from Empire had met with the Scorses to discuss Empire's plans and discussed running a pipeline along their east property line (Tr. 109-10). He said that after several months of negotiation they were unable to come to an agreement (Tr. 110-11). He said that only then, after the failed negotiations, did he contact the Elkans about having access to Shoal Creek (Tr. 120).

The Utilities did not physically inspect the Disputed Property before purchasing it in 1999 (D8 p. 9; App. A54). Mr. Barchak said he never went out to inspect the land before 2001 because it was not part of his duties (Tr. 112-13). He conceded that Empire did not conduct any inspection of the property, which would have given them some information about the status of the fencing on the property, including adverse possessors (Tr. 135-36, 137).

The Disputed Property was the only portion of the 200 acres that the Elkans transferred by quitclaim deed, rather than warranty deed (D8 p. 9; D57 p. 3; App. A42, A54). The green area on Plaintiffs' Exhibit 5 was conveyed via quitclaim deed while the area in yellow was conveyed under the warranty deed (Tr. 146; P. Ex. 5 and 6; App. A62). The Utilities understood that a quitclaim deed meant the Elkans made no warranty or guarantee that they had good title to Section 26 of the Disputed Property (D8 p. 9; App. A54). Mr. Barchak said he was aware of the difference between a warranty deed

and a quitclaim deed before purchasing property from the Elkans (Tr. 119, 126). The Utilities' title insurance policy on the 200 acres excludes from coverage any discrepancies caused by fencing that was not located on a property line (D8 p. 10; Tr. 234-36; App. A55).

William Howell had worked for Empire for 38 years and from 2000 through 2014 was manager of its State Line power plant, which was located about one to two miles north of the Disputed Property (Tr. 193, 198). He said he became familiar with the Disputed Property when Empire acquired land from the Elkans "as part of the combined cycle expansion" in which access to Shoal Creek "was a piece of the reason" for the purchase (Tr. 194, 199).

Mr. Howell said he did not conduct any physical inspection of the Disputed Property before the closing date in September 1999, and he became acquainted with the Disputed Property when Empire began bulldozing work along its east side in 2008 and fencing work there in 2009 (Tr. 195, 199-200). He said the Utilities "basically cleared a path on our side of the property line so we could have access to put a fence in" (Tr. 195). He also said that around 2008, he walked the east fence line all the way to the bluff in the south-east corner of the Disputed Property, where Shoal Creek is (Tr. 196). He described the Disputed Property as unsuitable for grazing and keeping cattle and pointed out the transmission right-of-way that crossed it (Tr. 197).

Mr. Howell said that around 2008, "there was a very dilapidated barbed wire fence that you could simply step across and in places was laying on the ground" running east and west along the Disputed Property's northern boundary (Tr. 201). He said he did walk the western fence but not on the

western boundary of the Disputed Property near Shoal Creek (Tr. 200). He also said it was possible that Empire did something to the fence (Tr. 202). He said the fence had one or two strands of barbed wire on it and primarily lay on the ground, and he never saw any woven wire or hog paneling fence on that fence (Tr. 202).

Mr. Howell identified the photographs on Defendant's Exhibit L dated March 2009 (Tr. 203). He said they showed one strand of old barbed wire and several strands of newer barbed wire, and the newer barbed wire had grown into a dogwood tree, meaning the fence had been repaired (Tr. 204-05; D. Ex. L). He compared the photographs on Defendant's Exhibit L with those on Defendant's Exhibit M (Tr. 207-210). The photographs showed the tree had grown into multiple strands of a fence, which he said showed the fence has "been there for an extended period of time" (Tr. 210). He also said, "It looks like it's been spliced back together -- twisted back together" when asked about a tree that had fallen near or on the fence (Tr. 206-07). He said that on Plaintiffs' Exhibit 17, photographs two and six depict the condition of the fence along the northern boundary of the Disputed Property (Tr. 210-11).

From 2005 onward, the Utilities were assessed and paid the property taxes for the Disputed Property (D57 p. 5; P. Ex. 7; P. Ex. 8; App. A44). Mr. Scorse said he always had assumed he and his family were paying the taxes on the Disputed Property, because they always had paid taxes on the property they purchased from the Jacobses, which they had believed included the Disputed Property, but during this litigation he realized they had not

paid them (Tr. 303-04). He said he offered Empire to reimburse the taxes Empire had paid on the Disputed Property (Tr. 304, 324-25).

Mr. Barchak said that after the 1999 purchase, Empire did nothing to possess or use the Disputed Property, including constructing any fences (Tr. 136-37). He said Empire would conduct annual inspections of the transmission lines and maintain its power lines (Tr. 59-60). He said that regardless of whether Empire owned the Disputed Property, it would continue to maintain its power lines and would send crews in to clear out brush and trees and trim the trees up the sides of its easement (Tr. 59-60, 138-39). Mr. Scorse's claims in this case do not extend to seeking to eliminate or affect Empire's power lines or easement over the Disputed Property (D57 p. 5; App. A44).

B. Events leading to the proceedings below

Mr. Scorse said he did not learn that ownership of the Disputed Property was disputed until 2008, when Empire was bulldozing the area around its northern boundary, which caused him to call Mr. Howell (Tr. 263, 328). He admitted he had not gone through his father's records to find any surveys of the Scorse Farms or the Disputed Property (Tr. 322).

In 2009, Mr. Scorse immediately repaired the fencing the Utilities had cut, and re-enclosed the Disputed Property with his (D8 p. 7; App. A52).

Mr. Barchak said the plant manager informed him of the dispute in either 2008 or 2009, when Mr. Scorse objected to the Utilities attempting to build fences on the Disputed Property and asserted ownership (Tr. 60-61). He said he "went to the property with [Mr. Scorse] and a few others, and we

walked the westerly border of the [D]isputed [P]roperty, and then from the north, walked all the way down what we assumed was the property line, and then also followed that – the fence line, the old fence line along the northern boundary of what's shown as the [D]isputed [P]roperty" (Tr. 61, 68, 114).

Mr. Barchak conceded there was a fence that ran along the northern boundary of the Disputed Property when he first saw it in 2009, and that Empire destroyed that fence knowing there was a dispute about ownership (Tr. 142). He took photographs of it (Tr. 168; D. Ex. I). He said he inspected the property from 2009 to 2011 around ten to 12 times (Tr. 100, 114). He also said there "were remnants of a fence" along the Disputed Property's western boundary, but he was not saying a north-south fence was there (Tr. 143).

In 2011, the Utilities attempted to build a north-south fence separating the Disputed Property from the property Mr. Scorse's family purchased in 1975 (D8 p. 7; Tr. 143; App. A52). Mr. Scorse immediately removed that fencing and returned the materials to the Utilities so that the Disputed Property continued to be enclosed by fencing with the property that Mr. Scorse's family purchased in 1975 (D8 p. 7; Tr. 255, 335; App. A52).

C. Proceedings below

1. Initial proceedings

In February 2009, the Utilities filed a petition in the Circuit Court of Newton County to quiet title to the Disputed Property against Mr. Scorse's father (D5 p. 5; D64 p. 38). *See Empire Dist. Elec. Co. v. Scorse*, No. 09NW-CV00246. The Utilities voluntarily dismissed the suit during discovery in September 2010 (D5 p. 5; D64 p. 38).

The Utilities filed a new petition to quiet title to the Disputed Property in July 2011, this time against Mr. Scorse (D5 p. 6; D64 p. 39). *See Empire Dist. Elect. Co. v. Scorse*, No. 11NW-CV01382. That suit was dismissed without prejudice in December 2011 on Mr. Scorse's motion objecting to improper service (D5 p. 6; D64 p. 39). Mr. Scorse admitted that despite these two suits, neither he nor his father ever tried to initiate any proceeding to be declared the owner of the Disputed Property (Tr. 329-30).

In November 2015, the Utilities filed another petition against Mr. Scorse, stating one count to quiet title to the Disputed Property (D2). Mr. Scorse timely answered, denying the Utilities' claims (D5). He also stated counterclaims against the Utilities asserting one count of ownership of the Disputed Property by adverse possession as well as counts for ejectment and trespass (D6). The Utilities denied Mr. Scorse's counterclaims but did not assert any affirmative defenses (D31). Mr. Scorse later abandoned his claims for ejectment and trespass (D61 p. 39; App. A39).

2. Summary judgment proceedings and Rule 74.04(d) findings

Mr. Scorse moved for summary judgment on adverse possession (D7). While the court denied his motion, holding there were material facts in dispute, it also exercised its authority under Rule 74.04(d) to deem a series of facts in it uncontroverted and established for all purposes (D22 p. 2; App. A57). On the Utilities' motions, it later reconsidered this for some of those facts, but left the remainder in place as uncontroverted and established (D30 p. 3; D52 pp. 1-2; App. A58-60).

The factual statements in D8 that the court ultimately deemed uncontroverted are paragraphs 1, 2, 3, 4, 8, 9, 11, 13, 14, 15, 17, 18, 20, 22, 35, 37, 38, 39, 40, 44, 47, 48, 49, 53, 55, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, and 72 (D22 p. 2; D30 p. 3; D52 p. 2; App. A57-60). These are highlighted in the appendix to this brief (App. A46-56), and are repeated here:

> 1. Defendant John Scorse filed a Counter-Petition in this matter against Plaintiffs The Empire District Electric Company and Westar Generating, Inc. on or about February 19, 2016 claiming, among other things, adverse possession to real property located in Newton County to which Plaintiffs alleged they became title owners of in September 1999.
>
> 2. The property in dispute lies within Sections 23 and 26 of Township 27 of Range 34 in Newton County, Missouri north of Shoal Creek and is described more specifically as follows ("the disputed property"):
>
> > All of the West 700 feet of the Northwest Quarter of the Northeast Quarter of Section 26, Township 27 North, Range 34 West, Newton County, Missouri lying North of the main channel of Shoal Creek.
> >
> > ALSO a part of the Southwest Quarter of the Southeast Quarter of Section 23, Township 27 North, Range 34 West, Newton County, Missouri, described as beginning at a found pipe at the South Quarter Corner of Section 23, thence S88°09'58"E 700.00 feet (m. 699.61 feet) to a found iron pin; thence N1°48'29"E 37.88 feet to a pipe post; thence N87°16'04"W 324.62 feet; thence N43°44'51"W 525.68 feet to the west line of said SW1/4SE1/4; thence S1°46'18"W 410.90 feet to the point of beginning; containing in total 15.05 acres more or less.
>
> 3. Plaintiffs alleged they purchased the disputed property from Carl M. Elkan and Grace M. Elkan, Co-Trustees of the Carl

M. Elkan Revocable Trust by way of a warranty deed and a quit-claim deed (henceforth "the Elkans").

4. In 1975, Defendant Scorse's family purchased approximately 180 acres within Sections 23 and 26 of Township 27 of Range 34 in Newton County, Missouri north of Shoal Creek that is directly adjacent to the disputed property. …

8. Prior to purchasing the property in 1975, Defendant Scorse and his father walked the entire property, including the disputed property, and Defendant Scorse believed the disputed property was part of the property being purchased.

9. After walking the disputed property in 1975, Defendant Scorse did not see any evidence that anyone else had possession of the disputed property other than the seller representing that it was part of the property being purchased. …

11. From 1975 and continuing thereafter to present, Defendant Scorse and his family have intended to possess the disputed property. …

13. From 1975 and continuing thereafter to present, Defendant Scorse and his family intended to own the disputed property regardless of record ownership.

14. In 1975 and continuing thereafter to present, Defendant Scorse did not see any evidence or have any knowledge that the Elkans were occupying, possessing, or using the disputed property.

15. 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. …

17. From 1975 and continuing thereafter to present, Defendant Scorse and his family have had unfettered access to the disputed property.

18. In 1980, Defendant Scorse's family built a home residence on property within a short walking distance of the disputed property. …

20. The disputed property is contiguous to the backyard of Defendant Scorse's home residence. …

22. Over the years from 1975 to present, Defendant Scorse and his family have built and/or maintained multiple deer stands on the disputed property. …

35. Over the years from 1975 to present, Defendant Scorse and his family have drawn and removed water from the disputed property for irrigation purposes. …

37. Beginning in 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.

38. Over the years from 1975 to present, Defendant Scorse and his family have removed rocks and stones from the disputed property for decorative purposes.

39. Over the years from 1975 to present, Defendant Scorse and his family have fished in Shoal Creek from the disputed property.

40. Over the years from 1975 to present, Defendant Scorse and his family have explored various caves on the disputed property. …

44. From 1975 and continuing thereafter to present, the Elkans never objected to Defendant Scorse or his family to the fencing serving as the boundary line between Defendant Scorse's property and property the Elkans owned to the north and east of the disputed property. …

47. Defendant Scorse immediately repaired the fencing that Plaintiffs cut and re-enclosed the disputed property.

48. In approximately 2011, Plaintiffs attempted to build a north-south fence that separated the disputed property from the property purchased by Defendant Scorse's family in 1975.

49. 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. …

53. From 1975 and continuing thereafter to present, Defendant Scorse and his family intended to exclude all others from possession and ownership of the disputed property. …

55. From 1975 and continuing thereafter to present, nobody gave Defendant Scorse and his family permission to possess and occupy the disputed property. …

59. Plaintiffs purchased approximately 200 acres from the Elkans in 1999 that Plaintiffs allege includes the disputed property.

60. Plaintiffs purchased the property from the Elkans in order to gain access to Shoal Creek.

61. The disputed property constitutes a small portion of the approximately 200 acres Plaintiffs purchased from the Elkans in 1999.

62. Section 26 of the disputed property is the only portion of the approximate 200 acres that borders Shoal Creek.

63. Section 26 of the disputed property was a very important part of the purchase since it borders Shoal Creek and the point of the entire purchase was to access Shoal Creek.

64. Section 26 of the disputed property was the only portion of the property that was transferred by the Elkans by quitclaim deed.

65. All of the other property was transferred by the Elkans by a warranty deed.

66. Plaintiffs understood that a quitclaim deed meant the Elkans made no warranty or guarantee that they had good title to Section 26 of the disputed property in 1999 that bordered Shoal Creek.

67. Plaintiffs understood that of the approximate 200 acres transferred by the Elkans the only part to which the Elkans

> made no warranty or guarantee that they had good title to was the portion of the disputed property that bordered Shoal Creek.
>
> 68. Plaintiffs did not physically inspect the disputed property before allegedly purchasing it in 1999. …
>
> 72. The title insurance policy concerning Plaintiffs' purchase of land from the Elkans in 1999 excludes from coverage any discrepancies caused by fencing that was not located on a property line.

(D8 pp. 1-10; App. A46-56) (citations to summary judgment exhibits omitted).

3. Trial and judgment

The case then was set for a jury trial (D1 p. 30) until February 2018, when the parties jointly waived a jury trial (D53), after which the case was set for a bench trial (D1 p. 32). Both parties then requested findings of fact and conclusions of law (D54; D55). Mr. Scorse's request stated that the judgment had to "include the following material facts that have been deemed not in substantial controversy and established for all purposes of the litigation pursuant to the Court's earlier Orders in this matter," and then restated all the paragraphs in the court's Rule 74.04(d) order set forth above (D54 pp. 2-7). The parties also entered into a joint stipulation of facts (D57; App. A40).

The case proceeded to a two-day bench trial in March 2018 (Tr. 2-3). The witnesses were Mr. Barchak, Mr. Scott, Mr. Stidham, Mr. Howell, Ms. Mitchell, Mr. Scorse, Mr. Swaim, Mr. Ewing, an attorney who Mr. Scorse tried to introduce as an expert witness, and three witnesses – Ted Meador, Shannon Morey, and Christina Morey – who said they also used the Disputed Property with the Scorses' permission (Tr. 2-3). In his opening statement at the beginning of trial, Mr. Scorse's counsel reminded the court of the Rule

74.04(d) order, stating, "I should also mention here … [a]ll those facts from the summary judgment proceedings that have been established as uncontroverted, a lot of important integral facts there that are in this case that are established" (Tr. 44).

The court entered its judgment in August 2018 (D61; App. A1). It began by restating the paragraphs of the parties' stipulation, but it did not restate any of the other facts deemed uncontroverted from the Rule 74.04(d) order anywhere in its judgment (D61 pp. 3-7; App. A3-7).

The court then went over what all of the parties' evidence had been, witness by witness (D61 pp. 7-28; App. A7-28). During this, it made some credibility determinations. It stated it found Mr. Barchak's and Ms. Mitchell's testimony credible (D61 pp. 13, 25; App. A13, A25). It stated it did not find Mr. Scorse's testimony about repairing the fence on the northern boundary of the Disputed Property credible, "given the condition of the fence in 2009" (D61 p. 20; App. A20). But it stated that the fencing was such within two or three years after 1975 that the Scorses' cattle could access the Disputed Property (D61 pp. 20-21; App. A20-21). Still, it found Mr. Scorse's "testimony that the [D]isputed [P]roperty was used for his cattle operations not to be credible" (D61 p. 21; App. A21). It found Mr. Scorse's "testimony not credible" about the purple paint and "no trespassing" signs he erected because he "did not provide examples of the signs, did not show where these signs were located or if they were located on or near the [D]isputed [P]roperty, nor whether those signs identified the Scorses as the owners of the [D]isputed [P]roperty" (D61 p. 22; App. A22).

The court then made conclusions. It found the Disputed Property "is a tract of wild and undeveloped land," the Utilities were its record owners, and therefore they were entitled to the presumption that they are its actual owners (D61 p. 29; App. A29). It found that the testimony of the subjective belief, opinions, or conclusions of Mr. Scorse or his witnesses about the ownership of the Disputed Property was insufficient, as it merely would be a mental enclosure of land (D61 pp. 29, 32; App. A29, A32).

The court stated it would divide Mr. Scorse's claim of adverse possession into three time periods: 1954-1975, 1975-2009, and 2009 to November 2015, and examine the elements of adverse possession for each one (D61 p. 33; App. A33). For 1954-1975, it found:

- the evidence did not establish continued acts of occupying, clearing, cultivating, pasturing, building fences, or other improvements on the Disputed Property;
- the evidence failed to establish physical possession of the entire area claimed;
- there was no proof that Mr. Scorse's predecessors possessed the Disputed Property in a manner that was antagonistic to the claims of others – specifically the record title owner;
- there was no evidence of sufficient acts of occupying, clearing, cultivating, pasturing, building fences, or building other improvements sufficient to give the owner cause to know of the adverse claim of ownership; and

- the owner was not excluded from using the Disputed Property, and any *de minimis* contacts established mere trespass, not possession.

(D61 pp. 34-35; App. A34-35).

For 1975-2009, the court found:

- no cattle ever were confined to the Disputed Property;
- the Disputed Property was unsuitable for grazing or keeping cattle, and only was suitable for providing occasional shelter or shade for cattle;
- the west side of the Disputed Property was inadequate to hold cattle;
- the old fence on the north side of the Disputed Property was not adequately maintained to establish a claim of ownership, as maintenance of an already existing fence is insufficient to establish adverse possession; this fence was nothing more than a dilapidated, old, unrepaired fence through a heavily timbered area, with no features to distinguish or characterize it as any form of boundary and therefore the fence could not serve as a boundary line to the claimed property;
- Mr. Scorse's and his family's recreational uses for exploring, hunting (which others stated they did with permission from Wildwood Ranch), family photographs and similar activities were insufficient to establish actual possession, because they "were activities which occurred for brief periods of one to four hours" and so were "only occasional trespasses which are insufficient to establish adverse possession."

(D61 pp. 35-37; App. A35-37).

Finally, for 2009-2015, the court found:

- after Mr. Scorse had discovered that he did not own the record title to the Disputed Property, he then asserted the claim of adverse possession;
- Mr. Scorse's actions included constructing a small area of fence on the east side of the Disputed Property and in the west creek and installing and removing fences on the north side of the Disputed Property;
- these were the first and only sufficient open, notorious, and hostile acts to meet Mr. Scorse's requirement for a claim of adverse possession;
- these acts fell short of the ten years for adverse possession; and
- deeds Mr. Scorse filed referencing the Disputed Property were of no force or effect.

(D61 pp. 37-38; App. A37-38).

The court entered judgment for the Utilities and against Mr. Scorse on all counts, quieted title to the Disputed Property in the Utilities' favor, and denied Mr. Scorse's adverse possession claim (D61 p. 39; App. A39).

Mr. Scorse timely moved the court to amend its judgment (D63). Among other things, he argued the court erred in failing to include in its judgment the facts that were deemed uncontroverted under Rule 74.04(d), and – partly because it ignored the uncontroverted facts – misapplying the law in failing to grant his claim of adverse possession (D64 pp. 37-43, 86-95).

When the court denied Mr. Scorse's motion (D78), he timely appealed to the Missouri Court of Appeals (D79), which issued an opinion affirming the trial court's judgment. This Court then sustained Mr. Scorse's application for transfer and transferred his appeal.

Point Relied On

The trial court erred in denying Mr. Scorse's claim of adverse possession *because* this misapplied the law that actual use and possession of uncultivatable wild land is established by suitable occasional uses, that an "enclosure" means undescribed disputed land adjoins described deeded land and runs up to a fence or wall, giving the undescribed disputed land a visual demarcation, that as soon as land is adversely possessed the original owner loses the ability to transfer it, and that facts deemed established under Rule 74.04(d) are uncontested *in that* the trial court found the Disputed Property was wild and uncultivatable, and it was uncontested under Rule 74.04(d) that the seller represented to Mr. Scorse's father the Disputed Property was part of his purchase and that beginning in 1975 Mr. Scorse and his family intended to possess the Disputed Property, to do so regardless of record ownership, to exclude all others from possessing and owning it, they had unfettered access to it, no one gave them permission to possess and occupy it, they engaged in multiple suitable uses of it, they put "no trespassing" signs on it without the Elkans' objection, and a northern fence served as the boundary line between Mr. Scorse's property and property the Elkans owned to the north and east of the Disputed Property, all legally divesting the Elkans of ownership before 1999.

Tiemann v. Nunn, 495 S.W.3d 804 (Mo. App. 2016)

Whiteside v. Rottger, 913 S.W.2d 114 (Mo. App. 1995)

Crane v. Loy, 436 S.W.2d 739 (Mo. 1968)

Heigert v. Londell Manor, Inc., 834 S.W2d 858 (Mo. App. 1992)

Argument

The trial court erred in denying Mr. Scorse's claim of adverse possession *because* this misapplied the law that actual use and possession of uncultivatable wild land is established by suitable occasional uses, that an "enclosure" means undescribed disputed land adjoins described deeded land and runs up to a fence or wall, giving the undescribed disputed land a visual demarcation, that as soon as land is adversely possessed the original owner loses the ability to transfer it, and that facts deemed established under Rule 74.04(d) are uncontested *in that* the trial court found the Disputed Property was wild and uncultivatable, and it was uncontested under Rule 74.04(d) that the seller represented to Mr. Scorse's father the Disputed Property was part of his purchase and that beginning in 1975 Mr. Scorse and his family intended to possess the Disputed Property, to do so regardless of record ownership, to exclude all others from possessing and owning it, they had unfettered access to it, no one gave them permission to possess and occupy it, they engaged in multiple suitable uses of it, they put "no trespassing" signs on it without the Elkans' objection, and a northern fence served as the boundary line between Mr. Scorse's property and property the Elkans owned to the north and east of the Disputed Property, all legally divesting the Elkans of ownership before 1999.

Preservation Statement

This point is preserved for appellate review. Mr. Scorse made the argument in it in his post-judgment motion (D64 pp. 86-95). Rule 78.07(c).

Standard of Review

In this judge-tried case, the judgment will be affirmed "unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law." *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). "This Court reviews *de novo* both the trial court's legal conclusions and its application of law to the facts." *Zweig v. Metro. St. Louis Sewer Dist.*, 412 S.W.3d 223, 231 (Mo. banc 2013).

* * *

The law of Missouri is that a party adversely possesses wild, uncultivatable land adjoining his own when he regularly uses it in a suitable manner, a boundary makes it seem part of his land, he intends to possess it, he excludes others from using it, and he does all this for ten years. Once this occurs, the actual owner is divested of ownership and has no title to transfer. And when the trial court deems uncontroverted facts established under Rule 74.04(d), they are uncontested for trial and must be taken as true on appeal.

Here, taking as true the facts the trial court deemed established under Rule 74.04(d), plus its other findings that do not conflict with them, and correctly applying the law to those facts, all of the factors for adverse possession of the Disputed Property were conclusively established in Mr. Scorse's favor before the Elkans purported to sell it to the Utilities in 1999.

Nonetheless, the trial court ignored the Rule 74.04(d) facts, made contrary findings, and held otherwise. This misapplied the law, requiring reversal and remand for judgment in Mr. Scorse's favor.

A. An adverse possession claimant must prove that his possession was actual, hostile, open and notorious, exclusive, and continuous for a period of ten years.

In Missouri, "adverse possession" of property "means a possession in opposition to the true title and real owner." *Badger Lumber Co. v. St. Louis-S.F. Ry. Co.*, 89 S.W.2d 954, 959 (Mo. 1935). It "is a doctrine which transfers legal title in real estate from the true record owner to a party who … maintains 'hostile' possession of such property for a requisite statutory period and who otherwise meets the requirements of" the doctrine. Timothy J. Tryniecki, 18A MO. PRAC. § 66:1.

"Missouri's doctrine of adverse possession is derived from section 516.010," R.S.Mo., which is the ten-year statute of limitations on actions for possession of land. *Dumproff v. Driskill*, 376 S.W.3d 680, 688 (Mo. App. 2012).

"To establish title to a tract of land by adverse possession, a claimant must prove that his possession of the land was (1) actual; (2) hostile and under claim of right; (3) open and notorious; (4) exclusive; and (5) continuous for a period of ten years." *Creech v. Noyes*, 87 S.W.3d 880, 885 (Mo. App. 2002). "The burden is on the party claiming adverse possession to prove each element by a preponderance of the evidence." *Id.* at 885-86.

Each of these elements has a specific meaning, discussed more thoroughly below at pp. 58-68. But in short:

- Actual possession means "the present ability to control the land and the intent to exclude others from such control." *Martens v. White*, 195 S.W.3d 548, 554 (Mo. App. 2006).

- "'Hostile and under claim of right' means that the possession must be opposed and antagonistic to the claims of all others, and the claimant must occupy the land with an intent to possess it as his or her own." *Flowers v. Roberts*, 979 S.W.2d 465, 469 (Mo. App. 1998) (Teitelman, J.) (citation omitted).
- Open and notorious possession "is demonstrated by showing that the occupancy on the disputed property was conspicuous, widely recognized, and commonly known." *DeVore v. Vaughn*, 504 S.W.3d 176, 185 (Mo. App. 2016).
- "'Exclusive' possession means that the claimant must hold the land for himself or herself only, and not for another." *Creech*, 87 S.W.3d at 885 (quoting *Flowers*, 979 S.W.2d at 470).
- "[C]ontinuous" means a "ten-year period of continuous possession … during which all of the required elements … have consistently been met." *Flowers*, 979 S.W.2d at 470.

"[W]hen real estate is held adversely the statutes of limitation operate upon the title, and when the bar is complete the title of the original owner is transferred to the adverse possessor." *McRee v. Gardner*, 33 S.W. 166, 167 (Mo. 1895). As soon as that occurs, the original owner owns no title to transfer, and any purported transfer of title by him is void. *Pankins v. Jackson*, 891 S.W.2d 845, 847-48 (Mo. App. 1995) (quitclaim deed by record owner was void when the claimant's bar of adverse possession already was complete before the deed was issued).

B. For adverse possession purposes, a party "actually" possesses wild, uncultivatable land when he uses it regularly in a manner appropriate to it, and also when it adjoins land he owns and is demarcated visually as being part of that land.

1. The trial court misapplied the law that appropriate occasional recreational use of wild, uncultivatable land is sufficient to establish "actual" possession.

The trial court held that Mr. Scorse's and his family's recreational uses of the Disputed Property for exploring, hunting, photographs, and other activities were insufficient to establish "actual" possession (D61 pp. 35-37; App. A35-37). It held this was because these "activities … occurred for brief periods of one to four hours" and so were "only occasional trespasses which are insufficient to establish adverse possession" (D61 pp. 35-37; App. A35-37).

But as the trial court repeatedly found, the Disputed Property was "wild and undeveloped land" (D61 pp. 10, 29; App. A10, A29). It noted that, as with any property, to prove actual possession the claimant "must show 'physical possession of the entire area claimed'" (D61 p. 30; App. A30) (quoting *Murphy v. Holman*, 289 S.W.3d 234, 238 (Mo. App. 2009)). But it held that "occasional uses" are "insufficient to establish" actual possession (D61 pp. 30-31; App. A30-31).

The trial court's conclusion that Mr. Scorse's uses of the Disputed Property were insufficient for "actual" possession misapplied the law. As the Court of Appeals noted in *Murphy*, "[t]he actual possession requirement 'is less strict for wild and undeveloped land than it is for developed property, because the nature, location, and potential uses for the property may restrict the type of affirmative acts of ownership.'" *Id.* at 237 (quoting *Martens*, 195

S.W.3d at 554). "[C]ontinued acts of occupying" the property are sufficient. *Id.* (citation omitted).

So, in *Murphy*, where the claimant to adverse possession of wild pastureland that *was* cultivatable showed no "activities additional to maintaining a non-boundary fence, pasturing livestock, and permitting others to hunt," this was insufficient. 289 S.W.3d at 239. This is because that land was suitable for further use, such as farming or development. *Id.*

But when property is *not* cultivatable and only is subject to limited uses, the claimant's regular engagement in those suitable uses is sufficient to prove "actual possession." In *Whiteside v. Rottger*, for example, the evidence was sufficient to show "actual possession" where the claimants built a fence and a well on the property, hunted and allowed others to hunt on it, cleared timber, and "exercised some control over who had access to the parcel." 913 S.W.2d 114, 120 (Mo. App. 1995). The Court of Appeals reasoned that this was because "[t]hose were the only activities that could be done on the property. The land was not fit for cultivation or building and was subject to flooding. Indeed, no one would have allowed the property to be used or disturbed in any other fashion." *Id.*

Similarly, in *Tiemann v. Nunn*, where the disputed "wooded portion" of the property "offered limited uses beyond hunting," the claimant's occasional use of it for hunting, plus his seeking to keep others off it, was sufficient. 495 S.W.3d 804, 810 (Mo. App. 2016). And this does not have to be every day: "landowners might go for lengthy time periods without having any reason to

be on the 'wild' property.'" *Id.* There is no additional requirement that the claimant "clear or log the timber or develop the land for other purposes." *Id.*

As the trial court repeatedly found here, resolving a disputed issue of fact, the Disputed Property was *not* cultivatable. It "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" (D61 p. 14; App. A14). It "was not suitable to keep or graze cattle because it was steep, heavily timbered, with no grass or open pasture areas" (D61 p. 15; App. A15). "[T]he property was steeply sloped, covered in large trees, and had only acorns and leaves on the ground. There was no grass for the cattle to feed on and the property would not be useful to graze or keep cattle" (D61 p. 16; App. A16). It "wasn't suitable for crops or anything agricultural use [*sic*]" (D61 p. 18; App. A18). It "was steep, hilly, and 'agriculturally it was worthless'" (D61 p. 18; App. A18). It "was heavily timbered, hilly and was not at all suitable for cattle because it had no grass and was very rocky" (D61 p. 24; App. A24).

Therefore, the trial court erred in applying the legal standard for actual possession for *cultivatable* wild land from *Murphy* to the Disputed Property here, which it found itself was "agriculturally worthless." Instead, the lower standard for *uncultivatable* wild land from *Whiteside* and *Tiemann* applied. As a matter of law, there was no requirement to clear, cultivate, pasture, or build on it. Instead, as long as Mr. Scorse and his predecessors used the land regularly in the manner in which it was suitable for use, as in *Whiteside* and *Tiemann* they established "actual" possession. This is true even if the only use was occasional hunting. *Tiemann*, 495 S.W.3d at 810.

2. The trial court misapplied the law of Missouri that a visually apparent enclosure of disputed property with adjoining property is sufficient to establish both the "actual" and "open and notorious" elements of adverse possession for the adjoining property's owner.

The trial court also held that the old fence on the north side of the Disputed Property was not adequately maintained to establish a claim of actual possession, reasoning that maintenance of an already existing fence is insufficient to establish actual or open possession (D61 p. 36; App. A36) (citing *Murphy*, 289 S.W.3d at 240; *Harris v. Lynch*, 940 S.W.2d 42, 47 (Mo. App. 1997); *Shanks v. Honse*, 364 S.W.3d 809, 816 (Mo. App. 2012)).

But in *Murphy*, *Harris*, and *Shanks*, the fences at issue were in the middle of the respective disputed properties, and the claimants only attempted to show that their *repair* of the fences was a *use* sufficient to be actual possession. *See Murphy*, 289 S.W.3d at 239 ("non-boundary fence"); *Harris*, 940 S.W.2d at 44 (fence did not track boundary line of disputed property); *Shanks*, 364 S.W.3d at 813 ("the fence did *not* mark the boundary line" (emphasis in the original)).

This equally misapplied the law. Even if existence of an old *boundary* fence, which was not at issue in *Murphy*, *Harris*, or *Shanks*, does not prove actual possession by its *repair* qualifying as a sufficient use, the fence nonetheless still can be sufficient for both the "actual" and "open and notorious" elements of possession.

Where land adversely held is included in the same enclosure with land owned and conveyed by the grantor, the taking of possession by the grantee of the entire enclosed area creates a privity with the grantor as to the portion

not conveyed and qualifies as an actual, open, and notorious possession. *See Crane v. Loy*, 436 S.W.2d 739, 740-41 (Mo. 1968). For these purposes, "enclosed" means that either

> (1) the described deeded land and adjoining undescribed disputed land are entirely enclosed by a fence, wall or other enclosure; or (2) the undescribed disputed land *adjoins the described deeded land* ***and runs up to a fence or wall, thus, giving the undescribed disputed land a clearly seen demarcation and, in effect, "enclosing" it and the described deeded land.***

Heigert v. Londell Manor, Inc., 834 S.W.2d 858, 865 (Mo. App. 1992) (emphasis added).

In *Crane*, the defendant had purchased a tract of land adjoining the plaintiffs' property from John in 1961, the deed for which did not include a certain strip of land. 436 S.W.2d at 740. The plaintiffs sued to quiet title to that strip of land in 1963. *Id.* In response, the defendant claimed title to the strip by adverse possession. *Id.*

This Court held that the defendant adversely possessed the strip because it had been enclosed for a sufficient period and in a sufficient manner with the property the defendant had purchased. *Id.* at 740-41. Between 1915 and 1929, the strip had been enclosed by a fence along with the tract the defendant actually purchased, which was "a period of fourteen years" and "was adverse in character. Possession to an agreed line varying from the true line has been held in a considerable number of decisions to be adverse and, when maintained for the statutory limitation period, to pass title." *Id.* 741. The defendant's grantor and the grantor's predecessor, who had sold the

defendant's grantor the property in 1958, also all had sold the piece of property thinking that they did in fact own the disputed strip. *Id.*

The Court held that

> [i]f a fence is constructed as a boundary line fence between two properties and if the parties concerned claim ownership of the land to the fence during the statutory period without interruption in their possession or control during that time, they will acquire title by adverse possession to any land that was improperly inclosed [*sic*] with or added to the land they owned at the time the fence was constructed.

Id. at 741-42.

So, "from 1929 to 1958, 29 years, the … strip of land was occupied and held adversely by the [defendant's] predecessors in title and meets all the requirements of establishing title by adverse possession even before John acquired title and occupied the fenced area." *Id.* at 742. "The effect of all this is that John's and [the defendant]'s predecessors acquired legal title to the fenced strip even though it was not mentioned in the conveyances." *Id.* at 743.

The trial court here erred in applying the law for *non*-boundary fences in concluding that an old *boundary* fence on disputed land that adjoins the claimant's land and makes the two appear continuously enclosed is insufficient to prove open and notorious possession. The law of Missouri is that a boundary fence in that circumstance is sufficient to prove actual, open, and notorious possession of the continuous adjoining land.

C. When in deciding a motion for summary judgment a trial court holds certain facts uncontroverted and established under Rule 74.04(d), it is a partial summary judgment as to those facts that makes then established and conclusive at trial, and a reviewing appellate court must take them as true, too.

1. A Rule 74.04(d) order is a partial summary judgment as to the facts deemed established in it, which a trial court cannot undo without notice to the parties, and any facts deemed established in it must be taken as true at trial and on appeal.

In a court-tried case, generally "this Court views the evidence in the light most favorable to the circuit court's judgment[,] … defer[s] to the circuit court's credibility determinations, … accept[s] as true the evidence and inferences ... favorable to the trial court's decree[,] and disregard[s] all contrary evidence." *Pasternak v. Pasternak*, 467 S.W.3d 264, 268 (Mo. banc 2015) (internal quotation marks and citation omitted).

But this is not so when "evidence is uncontested …." *White v. Dir. of Revenue*, 321 S.W.3d 298, 308 (Mo. banc 2010). "Uncontested" evidence includes "stipulated facts" that do "not involve resolution by the trial court of contested testimony …." *Id.* As to "uncontested" evidence, this Court does not defer to the trial court's factual findings, and instead the question before it, reviewed *de novo*, "is whether the trial court drew the proper legal conclusions from" that uncontested evidence. *Id.*

Besides a stipulation, another manner in which evidence is uncontested is under Rule 74.04(d). Rule 74.04(d) provides a procedure for a trial court when denying a motion for summary judgment to declare certain facts conclusively established for the purposes of trial:

> If on motion under this Rule 74.04 judgment is not entered upon the whole case or for all the relief asked and a trial is necessary,

> the court … shall ascertain, if practicable, what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. The court shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. **Upon the trial of the action *the facts so specified shall be deemed established*, and the trial shall be conducted accordingly.**

Id. (App. A69) (emphasis added).

This is a form of "partial summary judgment." *Dygert v. Crouch*, 36 S.W.3d 1, 4 (Mo. App. 2001) (joined by Stith, J.).

> Rule 74.04 makes a distinction between a full summary adjudication and a partial summary adjudication, and provides for the rendition of both. Paragraphs (a) and (b) of the rule provide for summary judgment for a party, plaintiff or defendant, upon all or any part of the claim asserted or defended. Paragraphs (c) and (d) define more particularly that **the partial summary adjudication** may operate to conclude the liability although the damage remains an issue, or **may result in an order for trial that certain of the facts are without controversy**, and so determined.

State ex rel. Turner v. Sloan, 595 S.W.2d 778, 782 (Mo. App. 1980) (emphasis added).

So, when the court finds that facts specified are deemed established under Rule 74.04(d), they are "findings of undisputed facts" that are "deemed established" "at trial …." *Brenneke v. Dept. of Mo., Veterans of Foreign Wars of Am.*, 984 S.W.2d 134, 146 (Mo. App. 1998) (Stith, J.). Moreover, the reviewing appellate court takes them as true. *Id.*

Brenneke appears to be the only reported Missouri decision dealing with the effect on an appellate court's review of an order deeming facts established under Rule 74.04(d). There, a jury found a defendant employer liable on an employee's claim that she was wrongfully terminated for blowing the whistle on an officer, Mr. Bryant, who had stolen from the company. 984 S.W.2d at 136.

On appeal, the employer argued that a new trial was required because during his opening statement, the employee's counsel was allowed to read the jury an affidavit whose contents were inadmissible, in which the affiant, Mr. Mueller, another officer of the employer, stated he knew about the employee's claim that Mr. Bryant was stealing. *Id.* at 144. The employee used that affidavit to establish the employer's knowledge of her whistleblowing. *Id.*

The Court of Appeals held that even if it was error to allow the employee's counsel to read the affidavit to the jury was error, it was harmless because the trial court already had deemed it established in a Rule 74.04(d) order that the employee had reported Mr. Bryant's theft to her employers, which therefore made this established for trial and appeal anyway. *Id.* at 146. Before trial, the court had denied the employer summary judgment on the employee's wrongful discharge claim, but entered a Rule 74.04(d) order

> mak[ing] findings of uncontroverted fact regarding the whistleblowing claim based on the record presented to it on summary judgment. Among other matters, it found:
>
> no substantial controversy exists that: ...
>
> ***4. Prior to their respective terminations, Plaintiffs reported alleged improper financial transactions by [Mr.]***

Bryant involving funds of Defendant VFW to individuals other than [Mr.] Bryant.

Id. (emphasis in the original).

The Court of Appeals held that "Rule 74.04(d) specifically provides that a court may make such findings of undisputed facts where, as here, a case is not fully adjudicated on a motion for summary judgment." *Id.* "Thus, at trial it was, or should have been, deemed established that plaintiff had reported to others allegations of improper financial transactions by Mr. Bryant involving VFW funds." *Id.*

While no Missouri decision besides *Brenneke* appears to concern the effect of a Rule 74.04(d) order on a subsequent trial and appeal, a number of federal appellate decisions applying the identical Fed. R. Civ. P. 56(d) (as it was before 2007) do. They uniformly hold that facts deemed established in this manner must be taken as true at trial and on appeal, and a trial court cannot reconsider them or hold contrary to them without prior notice to the parties.

This Court adopted Rule 74.04(d) from the identical Fed. R. Civ. P. 56(d) as it was before 2007. *ITT Comm. Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 378 (Mo. banc 1993). So, "federal decisions construing Rule 56 [of the Federal Rules of Civil Procedure] are particularly persuasive in applying the Missouri rule [74.04]." *Id.*

Before 2007, federal Rule 56(d) provided virtually identically to Missouri's Rule 74.04(d):

> If on motion under this rule judgment is not entered upon the whole case or for all the relief asked and a trial is necessary, the court … shall if practicable ascertain what material facts exist

> without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

As with Rule 74.04(d), federal appellate courts uniformly have held that a Rule 56(d) order deeming facts established is "an entry of partial summary judgment" as those facts. *Alberty-Velez v. Corp. De P.R. Para La Difusion Publica*, 242 F.3d 418, 422 (1st Cir. 2001). It is "a partial summary judgment order removing certain claims from a case …." *Leddy v. Standard Drywall, Inc.*, 875 F.2d 383, 386 (2d Cir. 1989). It "authorizes a summary adjudication that will often fall short of a final determination, even of a single claim." *Lies v. Farrell Lines, Inc.*, 641 F.2d 765, 769 n.3 (9th Cir. 1981).

Moreover, "[a] partial summary judgment adjudication pursuant to Rule 56(d)" is like "a pretrial order under Fed.R.Civ.P. 16 '[i]nasmuch as it narrows the scope of trial.'" *Alberty-Velez*, 242 F.3d at 422 (quoting 10B FED. PRAC. & PROC. § 2737; citing *Cohen v. Bd. of Trustees*, 867 F.2d 1455, 1463 (3d Cir. 1989); *Travelers Indem. Co. v. Erickson's, Inc.*, 396 F.2d 134, 136 (5th Cir. 1968)). It "serves the purpose of speeding up litigation by eliminating before trial matters wherein there is no genuine issue of fact." *Id.* (citation omitted). It "establishes a procedural mechanism whereby a district court can ensure a more enduring effect for its summary judgment ruling, and … narrow the factual issues for trial." *Rivera-Flores v. Puerto Rico Tel. Co.*, 64 F.3d 742, 747-48 (1st Cir. 1995).

So, "[f]acts found on partial summary judgment" in a Rule 56(d) order "are taken as established at trial." *Singh v. George Wash. Univ. Sch. of Med. & Health Sci.*, 508 F.3d 1097, 1106 (D.C. Cir. 2007). "The parties [a]re therefore entitled to rely on that determination when preparing their trial strategies." *Hayduk v. City of Johnstown*, 386 F. App'x 55, 61-62 (3d Cir. 2010).

Federal appellate courts are equally uniform in holding that once a trial court deems certain facts established under Rule 74.04(d), they cannot be disregarded or put back into dispute without prior notice to the parties, so that the parties can adjust their presentation of evidence at trial accordingly:

> Once a district judge issues a partial summary judgment order removing certain claims from a case, the parties have a right to rely on the ruling by forbearing from introducing any evidence or cross-examining witnesses in regard to those claims. If … the judge subsequently changes the initial ruling and broadens the scope of the trial, the judge must inform the parties and give them an opportunity to present evidence relating to the newly revived issue.

Leddy, 875 F.2d at 386; *accord*, *Alberty-Velez*, 242 F.3d at 422; *Hayduk*, 386 F. App'x at 61-62.[2] After deeming facts established in a Rule 56(d) order, a court may "not thereafter try [those] issue[s] without notice to the parties." *Sands, Taylor & Wood Co. v. Quaker Oats Co.*, 978 F.2d 947, 952 n.5 (7th Cir. 1992). "A trial court's reopening of such an issue without notice to the parties is error …." *Singh*, 508 F.3d at 1106.

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[2] Other states' courts applying their identical state rules also have held this, too. *See, e.g.*, *Blagbrough v. Town of Wilton*, 755 A.2d 1141, 1146 (N.H. 2000).

This is true even when the summary judgment non-movant comes "forward with evidence not submitted prior to the ruling" under Rule 56(d). *Calpetco 1981 v. Marshall Exploration, Inc.*, 989 F.2d 1408, 1415 (5th Cir. 1993). Indeed, it is true even if the party benefiting from the Rule 56(d) order questions a trial witness on the issues that had been deemed established. *Singh*, 508 F.3d at 1106. "It is plainly impermissible for a party to lie low and then, the record having closed, label the testimony a 'reopening.'" *Id.* Instead, unless the trial court gives notice that it is going to revisit facts found in the Rule 56(d) order, the non-movant must "mov[e] in the district court to vacate the partial summary judgment" or "otherwise g[i]ve effective notice that it [seeks] to disestablish the prior finding." *Id.*

Put simply, when facts are deemed established under Rule 56(d), unless the trial court gives the parties prior notice otherwise, it must "exclude any evidence to the contrary" from its ultimate findings. *Calpetco*, 989 F.2d at 1417. All of these principles necessarily apply equally to Rule 74.04(d). *ITT*, 854 S.W.2d at 378.

2. The trial court misapplied the law in failing to take the facts it found under Rule 74.04(d) as true, and this Court now must take them as true.

Here, in denying Mr. Scorse's motion for summary judgment as to adverse possession, the trial court followed Rule 74.04(d)'s procedure and stated that a number of factual statements in his statement of uncontroverted material facts "are not in substantial controversy and are established for all purposes of this litigation, including trial" (D22 p. 2; App. A57) (citing D8 ¶¶ 1-11, 13-18, 20, 22, 35, 37-40, 44-50, 52-56, 58-68, and 72).

Later, on the Utilities' motion to reconsider this, the court held that a few of those actually were controverted, and set aside its findings as to those few (D30 p. 3; App. A58) (citing D8 ¶¶ 5, 6, 7, 10, 16, 45, 46, 50, 54, 56, and 58). Later still, on the Utilities' further motion to reconsider, the court held that one other statement of fact was controverted, and set aside its finding as to that one, too (D52 p. 2; App. A60) (citing D8 ¶ 52).

Therefore, at the time of trial, paragraphs 1, 2, 3, 4, 8, 9, 11, 13, 14, 15, 17, 18, 20, 22, 35, 37, 38, 39, 40, 44, 47, 48, 49, 53, 55, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, and 72 of Mr. Scorse's statement of uncontroverted material facts still were "deemed established" "for all purposes of this litigation, including trial" (D22 p. 2; D30 p. 3; D52 pp. 1-2; App. A57-60). So, for purposes of this Court's review, these are "undisputed facts" that the trial court had to take as true, and which this Court now must take as true on appeal, too. *Brenneke*, 984 S.W.2d at 146. All of these facts are recited verbatim above at pp. 29-33.

But despite Mr. Scorse's counsel invoking these established facts in his request for findings of fact and conclusions of law (D54 pp. 2-7) and again in his opening statement at trial (Tr. 44), in deciding the case the trial court ignored them entirely – and in some cases faulted Mr. Scorse for not *re*-proving them at trial. Not once, though, did it ever give the parties notice that it was revisiting or undoing its Rule 74.04(d) order.

For example, one of the facts deemed established under Rule 74.04(d), paragraph 37, was that "[b]eginning in 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" (D8 p. 6; App. A51). In its judgment, the court faulted Mr. Scorse for not proving this further, finding his "testimony not credible" about the purple paint and signs because at trial he "did not provide examples of the signs, did not show where these signs were located or if they were located on or near the [D]isputed [P]roperty, nor whether those signs identified the Scorses as the owners of the [D]isputed [P]roperty" (D61 p. 22; App. A22).

But under Rule 74.04(d), Mr. Scorse was under no obligation to prove this further, because it already had been deemed "established for all purposes of this litigation, including trial" (D22 p. 2; App. A57). Had Mr. Scorse known that the trial court was not going to follow its Rule 74.04(d) order, he would have altered his trial preparation and introduced that evidence.

As the federal decisions cited above explain, a trial court cannot excuse a party from proving a fact at trial and then, Kafkaesque, find against the party for failing to prove that fact at trial. In his post-judgment motion, Mr. Scorse cited other examples of the trial court doing this (D64 pp. 88-91), which he incorporates here, all of which he would have cured with additional evidence at trial had he known the court was abandoning its Rule 74.04(d) order. Indeed, the trial court's judgment ignores *all* the uncontested facts in its Rule 74.04(d) order.

The trial court misapplied the law in ignoring in its judgment the facts it had deemed uncontroverted and established for trial under Rule 74.04(d). As a matter of law, those facts are undisputed, and on appeal they now must be treated as uncontested.

D. Correctly applying the law to the uncontested facts and the trial court's remaining findings that do not conflict with them, as a matter of law Mr. Scorse conclusively established adverse possession of the Disputed Property before the Elkans ever purported to transfer it to the Utilities, making that purported transfer void and making Mr. Scorse its lawful owner.

Applying the correct legal standards for adverse possession of wild, uncultivatable land and "enclosures" to both the facts deemed established under Rule 74.04(d) and the further facts the trial court found in its judgment that do not conflict with the Rule 74.04(d) facts, as a matter of law Mr. Scorse conclusively established that he and his predecessors adversely possessed – and so had title to – the Disputed Property long before the Elkans ever purported to sell it to the Utilities in 1999. As a matter of law, when the Elkans purported to sell the Disputed Property to the Utilities, they lacked any title to transfer, and their purported transfer is void.

This Court should reverse the trial court's judgment and remand this case with instructions to deny the Utilities' claim to quiet title and instead enter judgment granting Mr. Scorse's adverse possession claim.

1. Actual possession was conclusively established.

First, it was conclusively established that since 1975, Mr. Scorse and his predecessors continuously "actually" possessed the Disputed Property.

Actual possession means "the present ability to control the land and the intent to exclude others from such control." *Martens*, 195 S.W.3d at 554. It requires regular use of the land. *Id.* For wild, uncultivatable land, the only requirement is that it be used for "the only activities that could be done on" it. *Whiteside*, 913 S.W.2d at 120. There are no further requirements that the land be developed or used every day, only that it be used as often as a

reasonable owner of wild, uncultivatable property would use it. *Tiemann*, 495 S.W.3d at 810. Occasional hunting and seeking to keep others off the property is sufficient. *Id.*

Here, the trial court itself repeatedly found that the Disputed Property was uncultivatable – "agriculturally worthless" – and its only possible uses were recreational activities and hunting. *See* above at pp. 43-45. It was uncontested that consistently since 1975, Mr. Scorse and his predecessors engaged in these activities and all the uses to which the Disputed Property could be put, which were not limited to the few "occasional trespasses" the trial court recounted in its judgment (D61 pp. 35, 37; App. A35, A37).

From 1975 to the present, Mr. Scorse and his family intended to possess the Disputed Property and to do so regardless of record ownership (D8 p. 3; App. A48). During that same time, they also intended to exclude all others from possession and ownership of the Disputed Property (D8 p. 7; App. A52). From 1975 to the present, they had unfettered access to the Disputed Property (D8 p. 4; App. A49).

Over the years from 1975 to the present, Mr. Scorse and his family have built or maintained multiple deer stands on the Disputed Property (D8 p. 4; App. A49). They hunted on the property (D61 pp. 35-37; App. A35-37). Over that same time, they also drew and removed water from the Disputed Property for irrigation purposes (D8 p. 5; App. A50), removed rocks and stones from the Disputed Property for decorative purposes, fished in Shoal Creek from the Disputed Property, and explored various caves on the Disputed Property (D8 p. 6; App. A51). They painted various fence posts and

trees on the Disputed Property with purple paint warning others not to trespass on the Disputed Property (D8 p. 6; Tr. 273, 291; App. A51).

The law of Missouri is that for this wild, uncultivatable property, this was more than sufficient to be undisputed, unbroken "actual" possession beginning in 1975. *Whiteside*, 913 S.W.2d at 120 (drawing water from property, hunting, and seeking to exclude others sufficient); *Tiemann*, 495 S.W.3d at 810 (occasional hunting and seeking to exclude others sufficient).

The trial court was equally wrong that the Disputed Property's northern boundary fence did not constitute an "enclosure" and that Mr. Scorse and his predecessors only had a "mental enclosure" of the Disputed Property (D61 p. 32; App. A32). Instead, as in *Crane*, 436 S.W.2d at 740-41, the land was "enclosed" as a matter of law because of the undisputed fences.

The 180 acres Mr. Scorse's parents purchased in 1975 directly adjoins the Disputed Property to the west (D8 p. 2; App. A47). Before making the purchase, Mr. Scorse and his father walked the entire property they believed they were purchasing, including the Disputed Property, and Mr. Scorse believed the Disputed Property was part of the property being purchased (D8 p. 3; App. A48). He did not see any evidence that anyone else had possession of the disputed property besides the seller, who represented that the Disputed Property was part of the purchase (D8 p. 3; App. A48).

At the same time, from before 1975 and to the present, a fence ran along the boundary line between Mr. Scorse's property and property the Elkans owned to the north and east of the Disputed Property (D8 p. 6; App. A51). Fencing also enclosed the Disputed Property along with the property

that Mr. Scorse's family purchased in 1975 (D8 p. 7; App. A52). And as the trial court found, this fence – old and dilapidated for a period – also ran across the northern boundary of the Disputed Property, from Mr. Scorse's property to the Elkans' other property (D61 p. 36; App. A36).

At the same time, there was no fence or other boundary of any kind between Mr. Scorse's property and the Disputed Property, and instead Mr. Scorse and his family had unfettered access to the Disputed Property (D8 p. 4; App. A49). To the eye, then, (1) the fence between the Scorses' property and the Elkans' property to the north and east of the Disputed Property, (2) the fence along the Disputed Property's northern boundary, and (3) the *lack* of any boundary between the Disputed Property and the Scorses' adjoining property, collectively would demarcate the Disputed Property as part of the 1975 purchase, just as it was represented to the Scorses.

So, it was conclusively established that Mr. Scorse and his father were led to believe the Disputed Property was part of their purchase of the adjoining land in 1975, and from before 1975 onward the adjoining Disputed Land that was not described in that purchase "r[an] up to a fence" on its northern boundary and the eastern boundary of the Scorse Farms, "thus giving the undescribed disputed land a clearly seen demarcation and, in effect, 'enclosing' it and the described deeded land" the Scorses had purchased. *Heigert*, 834 S.W.2d at 865; *see also Crane*, 436 S.W.2d at 740-41.

As a matter of law, both the Scorses' established actual uses of the Disputed Property and the established fencing proved Mr. Scorse's continuous "actual" possession of the Disputed Property beginning in 1975.

2. Hostile and exclusive possession were conclusively established.

Second, the evidence conclusively established that since 1975, Mr. Scorse and his predecessors continuously "hostilely" and "exclusively" possessed the Disputed Property.

"'Hostile and under claim of right' means that the possession must be opposed and antagonistic to the claims of all others, and the claimant must occupy the land with an intent to possess it as his or her own." *Flowers*, 979 S.W.2d at 469 (citation omitted). Similarly, "'Exclusive' possession means that the claimant must hold the land for himself or herself only, and not for another." *Creech*, 87 S.W.3d at 885 (quoting *Flowers*, 979 S.W.2d at 470).

That beginning in 1975, Mr. Scorse and his predecessors occupied the Disputed Property with an intent to possess it as their own, for themselves only and not for others, and to exclude anyone else from possessing or using it, was "deemed established" in the trial court's Rule 74.04(d) order. Simply put, from 1975 to the present, Mr. Scorse and his family intended to possess the Disputed Property and to do so regardless of record ownership (D8 p. 3; App. A48). During that same time, they also intended to exclude all others from possession and ownership of the Disputed Property (D8 p. 7; App. A52). They even painted various fence posts and trees on the Disputed Property with purple paint warning others not to trespass on the Disputed Property (D8 p. 6; Tr. 273, 291; App. A51). No one gave Mr. Scorse or his family permission to possess and occupy the Disputed Property (D8 p. 8; App. A53).

While the trial court stated that others used the Disputed Property for hunting, too, some with the Scorses' permission and some without, the law of

Missouri is that this does not defeat the Scorses' "hostile" or "exclusive" possession. *See, e.g.*, *Martens*, 195 S.W.3d at 556 (allowing people to hunt on property did not defeat exclusive or hostile possession, where claimant intended to possess the land as his own and without subordination to the rights of others, and posted "no trespassing" signs indicating so).

As a matter of law, the Scorses' established intent to possess the Disputed Property as their own and to exclude anyone else from using it without their permission, especially manifested by their placing purple "no trespassing" signs on it, proved continuous "hostile" and "exclusive" possession of the Disputed Property beginning in 1975.

3. Open and notorious possession was conclusively established.

Third, the evidence conclusively established that since 1975, Mr. Scorse and his predecessors continuously possessed the Disputed Property "openly" and "notoriously."

Open and notorious possession "is demonstrated by showing that the occupancy on the disputed property was conspicuous, widely recognized, and commonly known." *DeVore*, 504 S.W.3d at 185. It "is satisfied by visible acts of ownership exercised over the premises, such as maintaining and improving the property." *Id.* It "does not require proof that the true owner have actual knowledge of the claim, only that the occupancy be conspicuous, widely recognized, and commonly known." *Id.* When land is undeveloped, using it "as one would expect for an undeveloped piece of land" is sufficient if the use "would have put the [true owner] on notice" and the true owner "could have … discovered" it "through reasonable inquiry." *Id.* at 186-87.

This was established here as a matter of law. First, as in *Crane*, 436 S.W.2d at 740-41, the combination of the established fencing between the Scorses' property and the Elkans' property, the established fencing along the northern boundary of the Disputed Property, and the established lack of fencing between the Disputed Property and the Scorses' adjoining property itself, *see* above at pp. 46-48, conclusively proved open and notorious possession. It "g[ave] the undescribed disputed land a clearly seen demarcation and, in effect, 'enclose[ed]' it and the described deeded land." *Heigert*, 834 S.W.2d at 865. This was a visible act of ownership, making it appear to anyone that the Scorse's property and the adjoining Disputed Property were one, and were separate from the Elkans' property from which they were separated.

Second, other Rule 74.04(d) findings established visible acts of ownership as one would expect for this wild, uncultivatable, agriculturally worthless property that would have put any true owner on notice, who could have discovered it through reasonable inquiry. From 1975 to the present, Mr. Scorse and his family built and maintained multiple deer stands on the Disputed Property (D8 p. 4; App. A49). They drew and removed water from the Disputed Property for irrigation purposes (D8 p. 5; App. A50). They removed rocks and stones from the Disputed Property for decorative purposes (D8 p. 6; App. A51). They painted various fence posts and trees on the Disputed Property with purple paint warning others not to trespass on the Disputed Property (D8 p. 6; Tr. 273, 291; App. A51).

All of these were "visible acts of ownership exercised over the premises," which were "as one would expect for" this wild, uncultivatable "piece of land," "would have put the [Elkans] on notice" that the Scorses were possessing the Disputed Property, and which the Elkans "could have … discovered … through reasonable inquiry." *DeVore*, 504 S.W.3d at 186-87; *see also Kinder v. Calcote*, 537 S.W.3d 379, 387-88 (Mo. App. 2018) (applying *DeVore*).

At the same time, Mr. Scorse never saw any evidence that the Elkans were occupying, possessing, or using the Disputed Property, nor did the Elkans ever give any indication to Mr. Scorse or his family that they owned the Disputed Property (D8 p. 3; App. A48). To the contrary, from 1975 to the present, Mr. Scorse and his family had unfettered access to the Disputed Property (D8 p. 4; App. A49) and no one gave them permission to possess and occupy the Disputed Property (D8 p. 8; App. A53).

As a matter of law, the Scorses' established visible ownership of the Disputed Property, which the Elkans could have discovered through reasonable inquiry, conclusively established that Mr. Scorse and his predecessors continuously possessed the Disputed Property "openly" and "notoriously."

4. Continuous possession was conclusively established.

Finally, the evidence conclusively established that Mr. Scorse and his predecessors possessed the Disputed Property in these manners continuously and without pause since 1975. As a matter of law, they adversely possessed the Disputed Property by at least 1985, meaning legal title to the Disputed

Property transferred to them at that time. The law of Missouri therefore is that the Elkans had no title to convey to the Utilities in 1999.

The "continuous" element of adverse possession means that "the ten-year period of continuous possession is one during which all of the required elements … have consistently been met." *Flowers*, 979 S.W.2d at 470. It

> means without lapse, uninterrupted, for the entire statutory period. Ten years means ten years. The years must be consecutive and need not be the ten years immediately prior to the filing of the law suit [*sic*], but once the ten-year period has run, the possessor is vested with title and the record owner is divested. The claimant, in certain circumstances, may tack his or her adverse possession on to his or her grantor's time of adverse possession in order to establish the requisite ten years.

Id. (internal citations omitted).

The trial court's findings under Rule 74.04(d), as well as findings in its judgment, established that Mr. Scorse and his predecessors met all of the elements here continuously and without interruption beginning in 1975, ten years after which they were vested with title and the Elkans were divested of title:

- Mr. Scorse's and his predecessors' intent to possess the Disputed Property and to do so regardless of record ownership was from 1975 to the present (D8 p. 3; App. A48).
- Their intent to exclude all others from possession and ownership of the Disputed Property was from 1975 to the present (D8 p. 7; App. A52).
- Their unfettered access to the Disputed Property was from 1975 to the present (D8 p. 4; App. A49).

- Their building and maintaining multiple deer stands on the Disputed Property was from 1975 to the present (D8 p. 4; App. A49).
- Their hunting on the Disputed Property was from 1975 to the present (D61 pp. 35-37; App. A35-37).
- Their drawing and removing water from the Disputed Property for irrigation purposes was from 1975 to the present (D8 p. 5; App. A50).
- Their removal of rocks and stones from the Disputed Property, fishing in Shoal Creek from the Disputed Property, and exploring caves on the Disputed Property was from 1975 to the present (D8 p. 6; App. A51).
- Their painting various fence posts and trees on the Disputed Property with purple paint warning others not to trespass on the Disputed Property was from 1990 to the present (D8 p. 6; Tr. 273, 291; App. A51).
- The fencing between the Scorses' property and the Elkans' property, along the northern boundary of the Disputed Property, and the lack of it between the Disputed Property and the Scorses' adjoining property was from 1975 to the present (D8 pp. 2-4, 6-7; D61p. 36; App. A36, A47-49, A51-52).
- No one else gave Mr. Scorse or his family permission to possess and occupy the Disputed Property at any time from 1975 to the present (D8 p. 8; App. A53).
- At no time from 1975 to the present did Mr. Scorse see any evidence that the Elkans were occupying, possessing, or using the Disputed Property, nor did the Elkans ever give any indication to Mr. Scorse or his family that they owned the Disputed Property (D8 p. 3; App. A48).

Therefore, as a matter of law, continuously since 1975 Mr. Scorse and his predecessors have actually possessed the Disputed Property, done so exclusively and hostilely, and done so openly and notoriously. That means that as early as 1985, "the ten-year period [ran], [Mr. Scorse and his predecessors were] vested with title [to the Disputed Property] and the [Elkans were] divested." *Flowers*, 979 S.W.2d at 470 (citation omitted). At that time, "the bar [was] complete" and so "the title of the" Elkans to the Disputed Property was "transferred to" Mr. Scorse and his predecessors. *McRee*, 33 S.W. at 167.

Accordingly, in 1999 the Elkans owned no title to transfer to the Utilities, and their purported transfer was void. *Pankins*, 891 S.W.2d at 847-48. As a matter of law, the quitclaim deeds the Utilities hold are worthless and meaningless. They never acquired any title to the Disputed Property, and legal title to the Disputed Property belongs to Mr. Scorse.

The trial court misapplied the law to the uncontested facts in holding otherwise. This Court should reverse the trial court's judgment and remand this case with instructions to deny the Utilities' claim to quiet title and instead enter judgment granting Mr. Scorse's adverse possession claim.

Conclusion

The Court should reverse the trial court's judgment and remand this case with instructions to deny the Utilities' claim to quiet title and instead enter judgment granting Mr. Scorse's adverse possession claim.

Respectfully submitted,

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Certificate of Compliance

I certify that I prepared this brief using Microsoft Word for Office 365 in 13-point, Century Schoolbook font, which is not smaller than 13-point, Times New Roman font. I further certify that this brief complies with the word limitations of Rule 84.06(b), as this brief contains 18,029 words.

/s/Jonathan Sternberg
Attorney

Certificate of Service

I certify that I signed the original of this substitute brief of the appellant, which is being maintained by Jonathan Sternberg, Attorney, P.C. per Rule 55.03(a), and that on June 8, 2020, I filed a true and accurate Adobe PDF copy of this substitute brief of the appellant and its appendix via the Court's electronic filing system, which notified the following of that filing:

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