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 REPLY BRIEF

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Table of Contents

Table of Authorities 2

Reply Argument 5

A. Summary of Mr. Scorse's argument 5

B. Mr. Scorse properly challenges the trial court's application of the law to the facts it found both in its Rule 74.04(d) findings and its judgment. 5

C. Because the trial court made findings, if those findings taken as true do not support the legal conclusion the trial court reached, then the trial court misapplied the law and whether the evidence could have supported other findings the court did *not* make is irrelevant. 8

D. The facts that the trial court held before trial were established for all purposes under Rule 74.04(d) must be taken as true. 11

E. Correctly applying the law to the Rule 74.04(d) facts and the trial court's remaining findings that do not conflict with them, as a matter of law Mr. Scorse is the lawful adverse possessory owner of the Disputed Property. 19

1. As a matter of law, Mr. Scorse's regular recreational use of the wild, uncultivatable Disputed Property was sufficient to establish "actual" possession. 20

2. As a matter of law, the visually apparent enclosure of the Disputed Property with Mr. Scorse's adjoining property was sufficient to establish both the "actual" and "open and notorious" elements of adverse possession. 24

Conclusion 29

Certificate of Compliance 29

Certificate of Service 30

Table of Authorities

Cases

Allee v. Ruby Scott Sigears Estate, 182 S.W.3d 772 (Mo. App. 2006) 10

Bldg. Owners & Managers Ass'n of Metro. St. Louis v. City of St. Louis, 341 S.W.3d 143 (Mo. App. 2011) 11

Calpetco 1981 v. Marshall Exploration, Inc., 989 F.2d 1408 (5th Cir. 1993) 14

Crane v. Loy, 436 S.W.2d 739 (Mo. 1968) 26-27

Estate of Elder v. Estate of Pageler, 564 S.W.3d 742 (Mo. App. 2018) 7, 9

Four Star Enters. Equip., Inc. v. Empl'rs Mut. Cas. Co., 451 S.W.3d 776 (Mo. App. 2014) 18

Graves v. Stewart, 642 S.W.2d 649 (Mo. banc 1982) 9, 21, 23

Harris v. Lynch, 940 S.W.2d 42 (Mo. App. 1997) 26

Heigert v. Londell Manor, Inc., 834 S.W.2d 858 (Mo. App. 1992) 27

Hobbs v. Dir. of Revenue, 109 S.W.3d 220 (Mo. App. 2003) 17

Jenni v. Gamel, 602 S.W.2d 696 (Mo. App. 1980) 17

Killian Constr. Co. v. Tri-City Constr. Co., 693 S.W.2d 819 (Mo. App. 1985) 16

Land Clearance for Redev. Auth. of the City of St. Louis v. Osher, No. ED1207081, 2020 WL 1921081 (Mo. App. slip op. Apr. 21, 2020) 17

Murphy v. Carron, 536 S.W.2d 30 (Mo. banc 1976) 7, 27

Murphy v. Holman, 289 S.W.3d 234 (Mo. App. 2009) 26

Ray Klein, Inc. v. Kerr, 272 S.W.3d 896 (Mo. App. 2008) 16-17

Rocking H. Trucking, LLC v. H.B.I.C., LLC, 427 S.W.3d 891 (Mo. App. 2014) 10

Sands, Taylor & Wood Co. v. Quaker Oats Co., 978 F.2d 947 (7th Cir. 1992). 15-16

Segraves v. Consol. Elec. Co-op., 891 S.W.2d 168 (Mo. App. 1995) 10

Shanks v. Honse, 364 S.W.3d 809 (Mo. App. 2012) 8, 22, 27

Singh v. George Wash. Univ. Sch. of Med. & Health Sci., 508 F.3d 1097 (D.C. Cir. 2007). 15-16, 26

State ex rel. Turner v. Sloan, 595 S.W.2d 778 (Mo. App. 1980) 13

Stiens v. Mo. Dept. of Agriculture, 587 S.W.3d 666 (Mo. App. 2019) 26

Thomas v. Depaoli, 778 S.W.2d 745 (Mo. App. 1989) 10

Tiemann v. Nunn, 495 S.W.3d 804 (Mo. App. 2016) 22-23

Whiteside v. Rottger, 913 S.W.2d 114 (Mo. App. 1995) 22-23

Young v. Young, 14 S.W.3d 261 (Mo. App. 2000) 9-10

Missouri Supreme Court Rules

Rule 55.03 30

Rule 59.01 16-17

Rule 73.01 10

Rule 74.04 ..... *passim*

Rule 84.06 29

Other authorities

Fed. R. Civ. P. 56 (1943-2007) 14-15

Reply Argument

A. Summary of Mr. Scorse's argument

In his opening brief, Appellant John Scorse explained that the trial court misapplied the law in denying his claim of adverse possession to the Disputed Property (Substitute Brief of the Appellant ["Aplt.Br."] 38-68).

Mr. Scorse explained this is because first, the facts the trial court had found were uncontroverted and established for all purposes under Rule 74.04(d) had to be taken as true at trial and have to be taken as true now on appeal, and the trial court misapplied the law in ignoring them in its judgment (Aplt.Br. 49-57). He then explained that, taking as true both those facts and the trial court's additional express findings that do not conflict with them, the law of Missouri is that they conclusively established his claim for adverse possession of the Disputed Property, and the trial court misapplied the law in holding otherwise (Aplt.Br. 58-68).

B. Mr. Scorse properly challenges the trial court's application of the law to the facts it found both in its Rule 74.04(d) findings and its judgment.

In response, the Respondent Utilities argue that Mr. Scorse is not challenging the trial court's application of the law to the facts it found, but instead really "is asking this Court to reevaluate the evidence, to reassess the credibility of the parties and witnesses, and reach a different decision from the one made by the [t]rial [c]ourt" (Substitute Brief of the Respondents ["Resp.Br."] 40).

They say this is because Mr. Scorse argues "that principal reliance should be placed on the Rule 74.04(d) findings and this Court should reach an

entirely different outcome and rule in favor of Mr. Scorse on his adverse possession claim," which they argue "is clearly a challenge to the sufficiency of the evidence," an argument which is not in Mr. Scorse's point relied on (Resp.Br. 40). They argue that "[f]or this reason, his arguments should be disregarded and this appeal should be dismissed" (Resp.Br. 40).

This is without merit. The Utilities misunderstand both the standard of review and Mr. Scorse's argument. Mr. Scorse never argued that the trial court erred in finding *evidence* sufficient. Instead, his opening brief explains, just as its point relied on states, that taking as true the trial court's own findings in the judgment, plus those it previously made under Rule 74.04(d), which the law of Missouri required it to do unless it gave the parties notice otherwise beforehand, its legal conclusions about what the uses it found meant – i.e., that the uses were insufficient for adverse possession – were wrong as matter of law. As he put it:

> [T]aking 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.

(Aplt.Br. 40).

Mr. Scorse is not asking the Court to reevaluate the evidence or assess witness credibility. He is highly cognizant that the trial court was the arbiter of credibility and had the ability to believe or disbelieve any, all, some, or none of any witness's testimony, and it is not this Court's place to second-

guess that. The trial court readily took up that role and made detailed findings of fact.

Instead, Mr. Scorse merely asks the Court to review the trial court's application of the law to those findings, which *is* this Court's *de novo* role. Necessarily, a challenge under *Murphy v. Carron*'s misapplication-of-the-law prong involves taking the trial court's findings as true. *Estate of Elder v. Estate of Pageler*, 564 S.W.3d 742, 748 (Mo. App. 2018).

The question is whether the trial court properly applied the law to the facts it found. *Id.* The question here, though, is *which facts*, and what the effect of the trial court's prior findings under Rule 74.04(d) must be. That is a question of law, not evidence. So, Mr. Scorse's point is that taking as true *both* the facts deemed established under Rule 74.04(d), which the law required the trial court to accept and which as a matter of law remain true on appeal, as well as the trial court's remaining findings that do not conflict with those conclusively established facts, the law of Missouri is that every element of adverse possession was established.

Indeed, in his discussion in his opening brief of how the trial court misapplied the law to each of the elements of adverse possession, Mr. Scorse cites *only* the Rule 74.04(d) facts in D8 and the trial court's findings in D61 (Aplt.Br. 58-68). Not once does he argue that any evidence did not support any of those findings, or that a finding was against the weight of the evidence (Aplt.Br. 58-68). He only explains that the trial court misapplied the law to the Rule 74.04(d) facts and its remaining findings.

C. Because the trial court made findings, if those findings taken as true do not support the legal conclusion the trial court reached, then the trial court misapplied the law and whether the evidence could have supported other findings the court did *not* make is irrelevant.

Though Mr. Scorse challenges the trial court's application of the law to the facts it found and those it had to accept under Rule 74.04(d), in defending that application the Utilities barely address the trial court's findings at all (Resp.Br. 40-51). Instead, they pretend that this is a case in which the trial court made no findings, and so the findings will be deemed to conform to the evidence, and discuss the evidence as they believe should be viewed favorably to *them* (Resp.Br. 40-51). Only seven times in that eleven pages of argument do the Utilities even *cite* the trial court's findings in D61, and then only when selective of those findings fit their view of the evidence (Resp.Br. 41-42, 47, 51).

Beyond that, the Utilities essentially ignore what the trial court wrote. That is fatal to their argument.

This is because on appeal, the evidence is not viewed in a light most favorable *to the prevailing party*, but instead *to the judgment*. The Utilities even note this, stating that this Court "defers to the trial court's credibility determinations and views the evidence and permissible inferences in the light most favorable *to the judgment*" (Resp.Br. 39) (citing *Shanks v. Honse*, 364 S.W.3d 809, 811 (Mo. App. 2012)) (emphasis added).

So, when the trial court makes findings, the evidence must be viewed favorably to those findings. And when the trial court's application of law to those findings is challenged on appeal, rather than challenging the findings

themselves, the findings themselves are simply taken as true. *Estate of Elder*, 564 S.W.3d at 748. That is exactly what Mr. Scorse does (Aplt.Br. 58-68).

Therefore, unlike the Utilities, this Court cannot ignore the findings the trial court actually made, the application of the law to which is what Mr. Scorse challenges. The Utilities' contrary notion seems to be "based on a rule which has been abandoned. The former rule was that … findings of fact and conclusions of law present no question for review other than as a general finding and may not be assigned as error on appeal," whereas for nearly 40 years the law of Missouri has been that even

> when no request is made of the court in a court-tried case to make specific findings of fact or conclusions of law and they are voluntarily given, such findings and conclusions do form a proper basis for assigning error and should be reviewed. **Any holding to the contrary is hereby overruled.**

Graves v. Stewart, 642 S.W.2d 649, 651 (Mo. banc 1982)) (emphasis added).

So, while this Court generally "assume[s], in the absence of a specific finding, that all fact issues were resolved in accordance with the circuit court's judgment,"

> [n]onetheless, when a circuit court volunteers findings of fact, the findings are reviewable on appeal. The voluntary statement by the circuit court of the grounds for its decision certainly may be considered in determining what evidence, if any, it rejected. **It may also be considered in determining whether the circuit court misapplied the law.**

Young v. Young, 14 S.W.3d 261, 263 (Mo. App. 2000) (emphasis added).

This Court and the Court of Appeals have recounted this rule countless times, holding that when the trial court makes findings, the law is applied to

those findings, not evidence outside those findings, and if the trial court misapplied the law to those findings, it is reversible error. *See, e.g.*:

- *Rocking H. Trucking, LLC v. H.B.I.C., LLC*, 427 S.W.3d 891, 895-96 (Mo. App. 2014) (restating rule; trial court's findings showed it only had disposed of one potential remedy and failed to consider the others, making its judgment not final; appeal dismissed);
- *Allee v. Ruby Scott Sigears Estate*, 182 S.W.3d 772, 779 n.1 (Mo. App. 2006) (restating rule; using trial court's findings to determine whether it misapplied the law as to a presumption of undue influence);
- *Young*, 14 S.W.3d at 263 (restating rule; trial court's findings failed to apply proper legal standard to third-party custody determination; reversing judgment);
- *Segraves v. Consol. Elec. Co-op.*, 891 S.W.2d 168, 170 (Mo. App. 1995) (restating rule; using trial court's findings to determine whether it misapplied the law as to scope of easement and treble damages); and
- *Thomas v. Depaoli*, 778 S.W.2d 745, 747 (Mo. App. 1989) (restating rule; using trial court's findings to determine whether it misapplied the law in holding a restrictive covenant was violated).

Here, both parties requested findings of fact and conclusions of law under Rule 73.01 (D54; D55). The trial court then gave them in detail, explaining the facts it found and did not find to support its decision (D61). As in all these other cases, Mr. Scorse's argument properly is that taking those findings (and the facts deemed uncontroverted under Rule 74.04(d)) as true, the trial court's resulting conclusions misapplied the law.

The facts are not whatever the Utilities wish them to be. They are what the trial court found and what Rule 74.04(d) bound it to find. At the same time, the Utilities cannot challenge any of the trial court's findings, because they do not cross-appeal. *Bldg. Owners & Managers Ass'n of Metro. St. Louis v. City of St. Louis*, 341 S.W.3d 143, 147 n.4 (Mo. App. 2011).

Mr. Scorse's appeal is a standard misapplication-of-law challenge where the trial court made express factual findings. The question before this Court is whether, taking those findings (and the facts by which the trial court was bound under Rule 74.04(d)) as true, the trial court's conclusion that Mr. Scorse did not meet the elements of adverse possession correctly applied the law. As Mr. Scorse explained in his opening brief, it did not and must be reversed (Aplt.Br. 49-68).

D. The facts that the trial court held before trial were established for all purposes under Rule 74.04(d) must be taken as true.

In his opening brief, Mr. Scorse explained that while the trial court deemed 36 factual statements "established for all purposes of this litigation, including trial" under Rule 74.04(d) (D22 p. 2), in entering the findings of fact in its judgment it ignored these entirely – and in some cases faulted Mr. Scorse for not *re*-proving them at trial (Aplt.Br. 49-57).

Citing both Missouri decisions on Rule 74.04(d) and numerous federal appellate decisions concerning the identical Fed. R. Civ. P. 56(d) as it existed until 2007, Mr. Scorse explained that this misapplied the law (Aplt.Br. 49-55). This is because unless the trial court first gave the parties notice that it was abandoning these findings, Rule 74.04(d) bound it to take them as true at trial, and this Court also must do so on appeal (Aplt.Br. 49-55).

In response, the Utilities say "[t]hese arguments are meritless" (Resp.Br. 53). They say this is principally because "Mr. Scorse has failed to properly describe the limited scope and relevance of the Rule 74.04(d) facts to the Trial Court's ultimate Judgment in this case" (Resp.Br. 53) and suggest that "[o]nly one of the Rule 74.04(d) facts is argued or even mentioned in Mr. Scorse's brief" (Resp.Br. 55).

This is untrue. In explaining how the trial court misapplied the law to each element of adverse possession, Mr. Scorse relies on numerous of the 36 Rule 74.04(d) findings, not just paragraph 37 (Aplt.Br. 56-58). Taking these as true along with the trial court's other findings that do not conflict with them, each element of adverse possession was established (Aplt.Br. 58-68).

The Utilities also say that "Mr. Scorse's argument, reduced to its essence, is that the [t]rial [c]ourt was required to include each of the Rule 74.04(d) facts in its Judgment regardless of whether they were relevant" (Resp.Br. 54). That is equally without merit. Mr. Scorse's point concerns only the specific relevant facts he identifies in his opening brief, which he analyzes in detail for each element of adverse possession (Aplt.Br. 58-68).

At the same time, the Utilities do not cite any authority holding that a trial court is *not* bound to Rule 74.04(d) findings it made (Resp.Br. 52-71). Nor do they address – or even cite – a single one of the Missouri or federal authorities on which Mr. Scorse relied in his opening brief holding that these findings *do* bind the trial court at trial (Resp.Br. 52-71).

Instead, citing no authority, at the very end of their brief the Utilities argue that the federal Rule 56(d) decisions on-point Mr. Scorse discussed

"have no application" to this case (Resp.Br. 70-71). They say this is because "[u]nder Rule 74.04, summary judgment may only be entered upon a 'claim, counterclaim or cross-claim'" and "[t]he rule does not authorize or permit summary judgment to be entered on facts" (Resp.Br. 71).

This is untrue. Rule 74.04(a) specifically allows "a party seeking to recover upon a … counterclaim" to "move … for a summary judgment upon … **any part of the pending issues**." (Emphasis added). And Rule 74.04(d) provides that if the case is not fully adjudicated on a such a motion, "the court … shall ascertain, if practicable, what material facts exist without substantial controversy," "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 "[u]pon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly."

As Mr. Scorse explained in his opening brief, citing authorities to which the Utilities give no response, Rule 74.04(d) allows that partial adjudication to be to those specific facts (Aplt.Br. 50). *See State ex rel. Turner v. Sloan*, 595 S.W.2d 778, 782 (Mo. App. 1980) ("the partial summary adjudication" of Rule 74.04(d) "may result in an order for trial that certain of the facts are without controversy, and so determined")). And because this is a partial summary judgment, it cannot be changed or abandoned without notice to the parties (Aplt.Br. 52-55). The Utilities offer no contrary authority because none exists.

The Utilities also argue that the trial court could deem the Rule 74.04(d) facts "not established" without notice because either Mr. Scorse or they presented evidence on some of those issues at trial (Resp.Br. 59-63).

This is without merit. Rule 74.04(d), as Fed. R. Civ. P. 56(d), does not allow parties to negate facts deemed established under it automatically, without asking for the Rule 74.04(d) findings to be set aside, merely by presenting evidence on them at trial. To the contrary, the rule expressly provides that "[u]pon the trial of the action *the facts so specified* ***shall*** *be deemed established, and the trial* ***shall*** *be conducted accordingly*." (Emphasis added).

Several of the federal decisions Mr. Scorse cited specifically held that because of this language, Rule 56(d) facts cannot be *dis*established by the mere presentation of evidence.

In *Calpetco 1981 v. Marshall Exploration, Inc.*, after a Rule 56(d) order deeming certain facts established, at trial the plaintiff sought to produce documents to negate some of those facts and show a genuine dispute as to them. 989 F.2d 1408, 1415 (5th Cir. 1993). The Fifth Circuit held that the mere fact the plaintiff "belatedly came forward with evidence not submitted prior to the ruling" under Rule 56(d) did not undo the Rule 56(d) facts or make them any less binding. *Id.* "Otherwise, the cycle of reconsideration would be never-ending. … Where, as here, partial summary judgment is granted, the length and complexity of trial on the remaining issues are lessened, all to the advantage of the litigants, the courts, those waiting in line for trial, and the American public in general." *Id.*

The D.C. Circuit's decision in *Singh v. George Wash. Univ. Sch. of Med. & Health Sci.*, 508 F.3d 1097 (D.C. Cir. 2007), directly refutes the Utilities' argument. There, after a rule 56(d) order deeming certain facts established, at trial the plaintiff's expert witness testified on some of those same issues, wavered, and was less certain as to them than he had been in his pretrial deposition. *Id.* Just as the Utilities do here, the defendant argued that the plaintiff's presentation of testimony on issues in the Rule 56(d) facts constituted a "reopening" of those issues. *Id.* The D.C. Circuit disagreed:

> [The defendant] offers no authority holding that a party may unwittingly forfeit the benefit of partial summary judgment through inartful questioning of a trial witness. Facts found on partial summary judgment are taken as established at trial. [The defendant] neither moved in the district court to vacate the partial summary judgment, nor otherwise gave effective notice that it sought to disestablish the prior finding. A trial court's reopening of such an issue without notice to the parties is error, and reversible error if it causes substantial prejudice. **It is plainly impermissible for a party to lie low and then, the record having closed, label the testimony a "reopening."**

Id. (internal citations omitted; emphasis added).

The point is that unless the trial court gives notice that it is reopening facts deemed established under Rule 74.04(d) / 56(d) and gives the parties an opportunity to introduce new evidence on them, then regardless of what evidence is presented at trial, those issues simply are not before the court for its decision, and its prior findings must be taken as true. 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). Evidence may be presented on those issues, but they are not up for trial. *Singh*, 508 F.3d at 1106.

The same is true here. Regardless of what Mr. Scorse or any other witness did or did not testify, the facts found in the trial court's Rule 74.04(d) order are established as a matter of law and are not up for reopening without notice to the parties. Indeed, Mr. Scorse knew this, because his counsel invoked the established facts at trial (Tr. 44) and also reminded the trial court of them in his request for findings of fact and conclusions of law (D54 pp. 2-7). Like the defendant in *Singh*, the Utilities never once argued during trial that the trial court should revisit or reconsider the Rule 74.04(d) findings. Therefore, they remained established as a matter of law.

The Utilities also briefly try to analogize this to a situation in which a party makes an admission that is both against his own interest and contrary to his adversary's admission (Resp.Br. 61-62) (citing *Ray Klein, Inc. v. Kerr*, 272 S.W.3d 896, 900 (Mo. App. 2008); *Killian Constr. Co. v. Tri-City Constr. Co.*, 693 S.W.2d 819, 827 (Mo. App. 1985)). This is without merit.

First, neither *Ray Klein* nor *Killian* concerned Rule 74.04(d) facts, which the rule specifically deems "established" and requires the trial to be "conducted accordingly." Instead, they concern discovery admissions under Rule 59.01, which contains no such language.

Second, the rule the Utilities invoke does not apply to this situation anyway. Under Rule 59.01, "[a]n adversary who adduces evidence on an issue which tends to disprove his own case does not rely upon the admission

of the adversary. The evidence then becomes disputed, and the issue is for the trier of fact." *Ray Klein*, 272 S.W.3d at 901.

Mr. Scorse never introduced evidence that tended to disprove his own case or negate any of the Rule 74.04(d) facts. The Utilities are correct that he "presented evidence on … placement of purple paint on the Disputed Property (Tr. 272, 290-91; Fact 37), building and installing tree stands for deer hunting (Tr. 282-83, 334; Fact 22), and repairing, constructing, and removing fences (Tr. 268, 275, 334; Facts 47-49)" (Resp.Br. 53) (Utilities' appendix citations omitted). But none of those "tend[ed] to disprove his own case …." *Ray Klein*, 272 S.W.3d at 901. Rather, all supported the Rule 74.04(d) facts. So, even if the Rule 59.01 caveat to which the Utilities point somehow applied to Rule 74.04(d) facts, it would not apply to them here.

The Utilities also try to analogize this to a party abandoning an admission in its pleading or a pretrial stipulation by testifying contrary to it (Resp.Br. 60-61) (citing *Land Clearance for Redev. Auth. of the City of St. Louis v. Osher*, No. ED1207081, 2020 WL 1921081 (Mo. App. slip op. Apr. 21, 2020), *application for transfer filed*, No. SC98567 (June 12, 2020) (party testified contrary to pretrial stipulation); *Hobbs v. Dir. of Revenue*, 109 S.W.3d 220, 222 (Mo. App. 2003) (party testified contrary to admission); *Jenni v. Gamel*, 602 S.W.2d 696, 699 (Mo. App. 1980) (same)).

Again, those principles are inapposite. Neither one rests on a rule of civil procedure that expressly deems the pretrial fact "established" and requires the trial to be "conducted accordingly," as Rule 74.04(d) does. And again, Mr. Scorse did not testify contrary to any of the Rule 74.04(d) facts.

Instead, a more analogous rule is that a trial court cannot change an evidentiary ruling for the first time in its judgment, which seems to be what the Utilities are suggesting the trial court did with the Rule 74.04(d) facts here. *See, e.g.*, *Four Star Enters. Equip., Inc. v. Empl'rs Mut. Cas. Co.*, 451 S.W.3d 776 (Mo. App. 2014).

In *Four Star*, the trial court admitted ten pieces of evidence at trial to which the defendant had objected. *Id.* at 780. In its judgment, it made a surprise about-face, changed that ruling, and held the evidence inadmissible. *Id.* at 781. "It was only after the trial concluded, when [the plaintiff] could no longer present any other evidence, that the trial court … excluded the previously admitted evidence" and ruled for the defendant based on this. *Id.*

The Court of Appeals held that the trial court lacked discretion to do this and reversed. *Id.* at 781-82. "Once the trial court decided to exclude the previously admitted evidence, the failure to give [the plaintiff] a chance to offer other evidence in lieu of the previously admitted and then excluded evidence shocks this Court's sense of fairness and justice. This failure substantially hindered [the plaintiff]'s fair ability to present its case and therefore prejudiced" the plaintiff. *Id.*

As in the on-point federal decisions Mr. Scorse cited, the trial court similarly lacked discretion to do this here, either. The trial court could not set aside its earlier Rule 74.04(d) order about what facts were deemed established all (a) without saying so, (b) without giving Mr. Scorse an opportunity to argue otherwise, and (c) without giving Mr. Scorse an opportunity to admit evidence in lieu of those established facts. As in those

federal decisions and in *Four Star*, the trial court lacked discretion to do that. The Utilities' argument otherwise is without merit.

This Court should do what it expressly required in Rule 74.04(d). It should take the facts deemed established in the trial court's Rule 74.04(d) order as established conclusively for trial and binding now, on appeal.

E. Correctly applying the law to the Rule 74.04(d) facts and the trial court's remaining findings that do not conflict with them, as a matter of law Mr. Scorse is the lawful adverse possessory owner of the Disputed Property.

In his opening brief, Mr. Scorse went through every element of adverse possession and showed how taking as true the facts deemed established under Rule 74.04(d) as well as the trial court's remaining express findings that do not conflict with those facts, the law of Missouri is that every element of adverse possession was established (Aplt.Br. 58-68).

For the most part, the Utilities do not respond to this at all. Rather, they pretend the trial court did not make specific findings and rely on what they say are the "facts, evidence and credibility determinations that supported the [t]rial [c]ourt's decision," which they "will not … re-argu[e]" (Aplt.Br. 72). So, for the most part Mr. Scorse will rely on his opening brief. (This includes for the Rule 74.04(d) facts the Utilities call "ambiguous" or "not relevant or material" (Resp.Br. 55-58, 65-70). Mr. Scorse already addressed how the specific Rule 74.04(d) facts he identifies and relies on are relevant and material to each element of adverse possession (Aplt.Br. 58-68).)

But the Utilities do respond to a few parts of Mr. Scorse's argument on the merits. Their response just goes to show how they misunderstand the standard of review.

1. As a matter of law, Mr. Scorse's regular recreational use of the wild, uncultivatable Disputed Property was sufficient to establish "actual" possession.

First, the Utilities take issue with Mr. Scorse's argument that because the Disputed Property was wild and uncultivatable, the few uses to which it was put were legally sufficient to be adverse uses (Aplt.Br. 43-45, 58-60). They review what Mr. Scorse's evidence of the uses of the property was (Resp.Br. 41-42), as well as his arguments that the property *was* cultivatable and was usable for ranching and development (Resp.Br. 46).

But the Utilities ignore that the trial court *expressly disagreed with Mr. Scorse* and instead expressly found that the Disputed Property was not cultivatable or developable at all.[1] Rather, the Disputed Property:

- was "wild and undeveloped land" (D61 pp. 10, 29);
- "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);
- "was not suitable to keep or graze cattle because it was steep, heavily timbered, with no grass or open pasture areas" (D61 p. 15);
- "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);
- "wasn't suitable for crops or anything agricultural use [*sic*]" (D61 p. 18);
- "was steep, hilly, and 'agriculturally it was worthless'" (D61 p. 18); and

[1] Twice, the Utilities argue "the evidence showed that buildings can be constructed on the Disputed Property" (Resp.Br. 47). The trial court did not find this in its judgment.

- "was heavily timbered, hilly and was not at all suitable for cattle because it had no grass and was very rocky" (D61 p. 24).

Similarly, the trial court also disbelieved that Mr. Scorse had pastured cattle on the Disputed Property (D61 pp. 35-37). It found instead that his and his family's only uses were for exploring, hunting, family photographs and similar activities (D61 pp. 35-37). Additionally, it was conclusively established under Rule 74.04(d) that Mr. Scorse and his family:

- have built or maintained multiple deer stands on the Disputed Property (D8 p. 4);
- drew and removed water from the Disputed Property for irrigation purposes (D8 p. 5);
- 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); and
- painted various fence posts and trees on the Disputed Property with purple paint warning others not to trespass (D8 p. 6).

So, regardless of what Mr. Scorse would have preferred the trial court find, this is what it did find. And now, he is entitled to have these findings, taken as true, reviewed for whether the court's legal conclusion that these uses of what it found to be wild and wholly uncultivatable land were insufficient to be actual possession misapplied the law. *Graves*, 642 S.W.2d at 651.

As Mr. Scorse explained in his opening brief, the trial court's conclusion misapplied the law (Aplt.Br. 43-45, 58-60). That in arguing otherwise the

Utilities are forced to rely on evidence and arguments the trial court rejected is telling. Taking as true the trial court's findings about the Disputed Property's agricultural and developmental worthlessness, as well as the uses it found and was bound to find, the law of Missouri is that these uses were sufficient to establish "actual" possession (Aplt.Br. 43-45, 58-60).

The Utilities also briefly argue that two decisions on which Mr. Scorse relied in which similar uses of similarly wild and uncultivatable property were held sufficient to be actual possession, *Whiteside v. Rottger*, 913 S.W.2d 114 (Mo. App. 1995), and *Tiemann v. Nunn*, 495 S.W.3d 804 (Mo. App. 2016), are inapposite (Resp.Br. 46-48). They say this is because the trial court in those cases found adverse possession, making them "of little or no value" here (Resp.Br. 48) (quoting *Shanks*, 364 S.W.3d at 811 n.4).

But the principle the Utilities cite – that bench-tried decisions in favor of a proposition are of little value in cases where the trial court reached the opposite conclusion – only applies when the appellant is mounting a lack-of-substantial-evidence or against-the-weight-of-the-evidence challenge. *Shanks*, 364 S.W.3d at 811 n.4. Here, Mr. Scorse's challenge is to the legal effect of the trial court's findings, taken as true. Therefore, the decisions in *Whiteside* or *Tiemann*, discussing the legal effect of a similar finding, control because this Court's review does not depend on evidence.

As well, contrary to the Utilities' argument, the uses the claimants made of the uncultivatable portions of the properties at issue in those cases were the same as those the trial court's Rule 74.04(d) findings and judgment found Mr. Scorse engaged in. *See Whiteside*, 913 S.W.2d at 120 (drawing

water from property, "fish[ing], hunt[ing] and remov[ing] timber" were sufficient for actual use, as they "were the only activities that could be done on the property"); *Tiemann*, 495 S.W.3d at 807-08, 810 (where "the wooded portion" of a disputed property "offered limited uses beyond hunting," this was "similar to *Whiteside*" and "occasionally grant[ing] permission for third parties to hunt on" it was sufficient for actual use).

Finally, the Utilities argue Mr. Scorse cannot challenge the trial court's conclusion about actual possession at all, because he did not take the position below that the Disputed Property was wild and uncultivatable (Resp.Br. 46). It is true that Mr. Scorse's position below was the Disputed Property was usable for cattle ranching – and possibly building – and he had pastured cattle on it.

But again, the trial court disagreed and expressly found otherwise. Because of this, now Mr. Scorse is entitled to challenge that the findings it *did* make, taken as true, means its legal conclusion that his uses of the Disputed Property were insufficient to be actual possession did not correctly apply the law of Missouri. *Graves*, 642 S.W.2d at 651. *This* issue is preserved, because Mr. Scorse made this same argument to the trial court in his post-judgment motion (D64 pp. 8-14).

The law of Missouri is that for what the trial court found to be this wild, uncultivatable property, Mr. Scorse's uses of that property that the court found and was bound to find under Rule 74.04(d) were more than sufficient to be undisputed and unbroken "actual" possession beginning in 1975 (Aplt.Br. 43-45, 58-60).

2. As a matter of law, the visually apparent enclosure of the Disputed Property with Mr. Scorse's adjoining property was sufficient to establish both the "actual" and "open and notorious" elements of adverse possession.

The Utilities also take issue with Mr. Scorse's argument that the Disputed Property was visually enclosed with his by fencing, establishing both "actual" and "open and notorious" possession (Aplt.Br. 46-48, 60-61, 64).[2] They review some of the evidence of the fencing and testimony about boundaries (Resp.Br. 49-50). They then characterize Mr. Scorse as "asserting a theory of boundary by acquiescence" (Resp.Br. 50). They argue that there was only evidence of an "old wire fence" along the north side of the Disputed Property, which was insufficient to show a boundary (Resp.Br. 49-52).

As with everything else in their brief, in discussing this the Utilities ignore the Rule 74.04(d) facts on this issue entirely (Resp.Br. 49-52). That is:

- "From 1975 and continuing thereafter to the present, … fencing serv[ed] as the boundary line between Defendant Scorse's property and property the Elkans owned to the north and east of the disputed property" (D8 p. 6, ¶ 44);
- When the Utilities cut existing fencing and Mr. Scorse repaired it, this "re-enclosed the Disputed Property" with his own (D8 p. 7, ¶ 47); and
- When Mr. Scorse removed the fencing the Utilities attempted to build, "the disputed Property continued to be enclosed by fencing with the property Defendant Scorse's family purchased in 1975" (D8 p. 7, ¶ 49).

[2] As Mr. Scorse explained in his opening brief, the "enclosure" issue is not necessary to prove any of these elements, which also rest on other Rule 74.04(d) facts and trial court findings the Utilities do not address (Aplt.Br. 58-61, 64-65).

The trial court then found:

- "[T]here was an old hog wire fence that existed along the north side of the disputed property, from Point A to B on J.Ex. I. When the Scorse family arrived in 1975, it was an old hog wire fence that included two strands of galvanized barbed wire" (D61 p. 36).

So, under Rule 74.04(d), it was conclusively established for trial that 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, and that until the Utilities tried to destroy it, fencing also enclosed the Disputed Property along with the property Mr. Scorse's family purchased in 1975 (D8 pp. 6-7). And the trial court found that this fencing existed. (The rest of its finding in paragraph 15 on page 36 conflicts with Facts 47 and 49, and so must be disregarded.)

The Utilities claim the trial court included Facts 47 and 49 in its judgment. They include in their brief a table purporting to show how each of the Rule 74.04(d) facts were in the judgment (Resp.Br. 64-65). The table says paragraph 73 of the judgment is the same as Fact 47, and that paragraphs 18-20 of the judgment are the same as Fact 49 (Resp.Br. 64). This is simply untrue. Nothing in paragraphs 18, 19, 20, or 73 of the judgment mentions the two properties being enclosed or contains the same information as Facts 47 or 49 (D61 pp. 6-7, 19-20).[3] Regardless, under Rule 74.04(d), the trial court was bound to take these facts as true.

[3] The same is true for the rest of the corresponding references in the Utilities' table (Resp.Br. 64-65). The table is at best confused, at worst disingenuous.

As for Fact 44, the Utilities argue that it was not "relevant or material." But a material fact is any that "might affect the outcome of the suit under the governing law." *Stiens v. Mo. Dept. of Agriculture*, 587 S.W.3d 666, 670 (Mo. App. 2019).

The defendants are incorrect. That "fencing serv[ed] as the boundary line between Defendant Scorse's property and property the Elkans owned to the north and east of the disputed property" (D8 p. 6, ¶ 44) affects the outcome, because it shows that to the eye, Mr. Scorse's property appeared enclosed with the Disputed Property but *not* with the Elkans' other property to the north and east (Aplt.Br. 46-48, 60-61, 64). Moreover, the Utilities did not argue to the trial court that Fact 44 – or any of the other Rule 74.04(d) facts – were irrelevant or immaterial. *Cf. Singh*, 508 F.3d at 1106 (defendant who "neither moved in the district court to vacate" Rule 56(d) facts "nor otherwise gave effective notice that it sought to disestablish the prior finding" could not avoid that fact on appeal).

This is because Mr. Scorse is not arguing "boundary by acquiescence," as the defendants suggest. Nor is he arguing that *maintenance* of a fence constituted an actual use, which is all the trial court remarked on (D61 p. 36) and all that the authorities on which the defendants and the trial court relied concerned (Resp.Br. 49, 51) (citing *Murphy v. Holman*, 289 S.W.3d 234, 240 (Mo. App. 2009); *Harris v. Lynch*, 940 S.W.2d 42, 47 (Mo. App. 1997); *Shanks*, 364 S.W.3d at 816).

Instead, as this Court held in *Crane v. Loy*, 436 S.W.2d 739, 740-41 (Mo. 1968), Mr. Scorse's point is that per the Rule 74.04(d) facts (44, 47, and

49) and the trial court's remaining findings (D61 p. 36), as a matter of law the visually apparent enclosure of the Disputed Property with Mr. Scorse's adjoining property was sufficient to establish both the "actual" and "open and notorious" elements of adverse possession (Aplt.Br. 46-48, 60-61, 64). That is, these facts conclusively established that from before 1975 onward the adjoining Disputed Property "r[an] up to a fence" on its northern boundary and the eastern boundary of the Scorse Farms, and a fence separated the Scorse Farms from the Elkans' other property, "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 v. Londell Manor, Inc.*, 834 S.W.2d 858, 865 (Mo. App. 1992).

The Utilities' only mention of these authorities is to argue again that because in those cases the trial court found adverse possession, Mr. Scorse's reliance on them is "misplaced" (Resp.Br. 51). Again citing *Shanks*, 364 S.W.3d at 811 n.4, they argue this means that the standard of review was different there (Resp.Br. 51-52).

Again, the Utilities misunderstand how *Murphy v. Carron* review of the trial court's application of the law works. Their argument about viewing the evidence in the light most favorable to the trial court's judgment only applies when the appellant is mounting a lack-of-substantial-evidence or against-the-weight-of-the-evidence challenge. *Shanks*, 364 S.W.3d at 811 n.4. Here, Mr. Scorse's challenge is to the legal effect of the trial court's findings, taken as true. Therefore, the decisions in *Heigert* and *Crane*, discussing the legal

effect of a similar finding, control because this Court's review does not depend on evidence.

The law of Missouri is that the visually apparent enclosure of the Disputed Property with Mr. Scorse's adjoining property was sufficient to establish both the "actual" and "open and notorious" elements of adverse possession (Aplt.Br. 46-48, 60-61, 64). And taking as true the rest of the facts deemed established under Rule 74.04(d) as well as the trial court's remaining express findings that do not conflict with those facts, the law of Missouri is that every other element of adverse possession was established, too (Aplt.Br. 60-68).

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 7,234 words.

/s/Jonathan Sternberg
Attorney

Certificate of Service

I certify that I signed the original of this substitute reply brief, which is being maintained by Jonathan Sternberg, Attorney, P.C. per Rule 55.03(a), and that on August 7, 2020, I filed a true and accurate Adobe PDF copy of this substitute reply brief via the Court's electronic filing system, which notified the following of that filing:

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