



**In the
Missouri Court of Appeals
Western District**

GARY COLEMAN,	)	
	)	
Appellant,	)	WD83925
	)	
v.	)	OPINION FILED: May 25, 2021
	)	
HEATH HARTMAN, ET AL.,	)	
	)	
Respondents.	)	

Appeal from the Circuit Court of Buchanan County, Missouri
The Honorable Daniel F. Kellogg, Judge

Before Division Four: Cynthia L. Martin, Chief Judge, Presiding, Lisa White Hardwick,
Judge and W. Douglas Thomson, Judge

Gary Coleman ("Coleman") appeals from the trial court's judgment awarding title to 0.35 acres of Coleman's property to Heath Hartman ("Mr. Hartman") and Kellie Hartman ("Mrs. Hartman") (collectively "the Hartmans"). Coleman asserts that the trial court committed error because the evidence did not support the Hartmans' claim of boundary by acquiescence or the Hartmans' claim of adverse possession. Finding no error, we affirm.

Factual and Procedural History¹

Coleman bought approximately 122 acres of farmland in Buchanan County, Missouri from Gerald Lindsey ("Lindsey") and his wife in the summer of 2015. Lindsey had acquired this land in May 1994, and while he owned the land, Lindsey farmed tobacco and other row crops. Prior to purchasing the land from Lindsey, Coleman inspected the property, drove along the perimeter of the property, and checked the fences and pond. Coleman noted fencing that would need to be repaired or replaced in order to run cattle on the land. Based on his inspection, Coleman believed that the land he was purchasing was contained within the existing perimeter fencing. Nonetheless, Coleman required Lindsey to obtain a stake survey prior to closing.

Coleman received the stake survey at closing but did not reinspect the property to observe the boundary stakes. Coleman proceeded with closing, and the sale was finalized.

A few months later, Coleman walked the property and realized that the survey stakes were not on the existing north-south fence line he had believed to be the eastern boundary line of his property. Instead, the stakes were located approximately fifteen feet to the east of the existing north-south fence line.

The adjacent property to the east of Coleman's property was owned by the Hartmans. The Hartmans purchased their property, totaling approximately fifty-five acres, in February 2005 from John Coil ("Coil"). Before purchasing the Coil property,

¹"In the appeal of a bench-tried case, [we] view[] the facts in the light most favorable to the trial court's judgment." *Tenampa, Inc. v. Bernard*, 616 S.W.3d 327, 330 n.4 (Mo. App. W.D. 2020) (quoting *Maly Com. Realty, Inc. v. Maher*, 582 S.W.3d 905, 907 n.1 (Mo. App. W.D. 2019)).

Mr. Hartman walked the property and was told by his real estate agent that the western boundary of the property was the north-south fence line between Coil's property and what was then Lindsey's property.

The Hartmans moved into their home in April 2005, and rented a portion of their land to Gene McMillen ("McMillen"),² who ran cattle on the land. McMillen ran a "hot wire" along the perimeter of the property to contain the cattle, including along the north-south fence line on the property's presumptive western boundary. In 2006, Mr. Hartman decided to sharecrop the property with Jeffrey Dexter ("Dexter"), and McMillen removed his cattle. To make the land suitable for row crops, Mr. Hartman created a buffer strip by mowing and clearing brush, including along the north-south fence line that separated his property from the Lindsey's property to the west. Hartman continued this maintenance of the area along the fence line for more than ten years.

At some point between the summer of 2015 and 2018, Coleman informed Mr. Hartman of his plans to run cattle on his property, including the land east of the north-south fence line up to the surveyed property line. Mr. Hartman told Coleman not to erect a fence on the surveyed property line, which had been denoted by flags, and not to cut down any trees along the existing north-south fence line. Coleman and Hartman had several other conversations about the contested boundary line, and each time Hartman told Coleman that the survey was not controlling because the existing north-south fence line had served as the boundary between the properties for more than ten years. Hartman

²Mr. Hartman testified that McMillen's name was "Mr. Gene McMillen--or I think his name was Julius, actually, McMillen." Because the parties use "Gene" as McMillen's first name, we have elected to do so as well.

told Coleman that if a new fence was erected on the surveyed line, the fence "wouldn't stay," a comment Coleman understood to mean that Hartman would tear down new fencing.

On February 1, 2019, Coleman filed a petition ("Petition") against Mr. Hartman in the Circuit Court of Buchanan County. The Petition sought: (1) a declaration that the boundary survey line determined in 2015 was the legal boundary between Coleman's property and the Hartman's property, and that Coleman is the legal owner of the .35 acres of land located between the north-south fence line and the eastern boundary of his property determined by the survey (the "disputed tract"); (2) a preliminary injunction restraining Mr. Hartman from entering onto the disputed tract and attempting to destroy, alter, or otherwise damage any fence installed by Coleman, and restraining Mr. Hartman from disturbing Coleman's livestock located on the disputed tract during the pendency of the action; and (3) an award of attorney's fees. Mr. Hartman filed an answer and counterclaim ("Answer and Counterclaim") which claimed that the existing north-south fence line constitutes the legal boundary between his property and Coleman's property as a result of adverse possession and as a result of boundary by acquiescence. On August 14, 2019, Mr. Hartman filed a motion to join Mrs. Hartman as a necessary party. The motion was granted.

During a bench trial on September 10, 2019, the trial court heard evidence before accompanying the parties to inspect the disputed tract. The trial court then issued a judgment on October 25, 2019. The judgment concluded that the Hartmans presented sufficient evidence "to support that [they] obtained title to the land east of the fence line

by adverse possession" so that the existing north-south fence line should serve as the boundary between Coleman's property and the Hartmans' property. The judgment further concluded that "[e]ven if [the] Hartman[s] did not acquire title to the disputed tract by adverse possession, there is evidence Lindsey and Hartman made an oral agreement that the fence line was the boundary line" so that the boundary agreed upon should be considered the true one. The judgment concluded that no award of attorney's fees was appropriate.

The Hartmans filed a motion to amend the judgment on November 13, 2019, that pointed out that the judgment erroneously indicated that the north-south fence line at issue was located on the **east** side of the Hartmans' property instead of the **west** side of the Hartmans' property. Then, on November 21, 2019, the Hartmans filed a motion to vacate the judgment that because the judgment was not sufficiently definite to quiet title as it failed to describe the disputed tract by metes and bounds. The motion to vacate essentially asked the trial court to reopen the case to take additional evidence in the form of a legal description for the disputed tract.

On November 22, 2019, the trial court set aside the October 25, 2019 judgment.³ On December 4, 2019, the trial court conducted a hearing, and in a bench note, expressed the intent to enter a judgment "sustaining [the Hartmans'] claim for adverse possession," and ordered the Hartmans "to conduct a survey at their own expense" to determine the legal description of the disputed tract. On December 19, 2019, the trial court entered a

³Before this order was entered, and despite the Hartmans' pending motion to amend, Coleman filed a notice of appeal from the October 25, 2019 judgment. That appeal was later dismissed by Coleman on April 20, 2020.

corresponding interlocutory judgment ("Interlocutory Judgment") that included findings of fact and conclusions of law that were identical in every material respect to those in the October 25, 2019 judgment, with the exception that the Interlocutory Judgment noted that a hearing would be later conducted to permit the Hartmans to provide the court with evidence of a legal description for the disputed tract.

At a hearing on June 24, 2020, the trial court received in evidence a survey providing a legal description for the disputed tract. The trial court then issued a judgment ("Final Judgment") on June 29, 2020, setting forth the legal description of the disputed tract⁴ "previously found by the Court to belong to [the Hartmans]."

Coleman appeals.⁵

Standard of Review

Appeals from a bench-tried case are reviewed pursuant to the standard set forth in *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). *Daniels-Kerr v. Crosby*, 484 S.W.3d 798, 801 (Mo. App. W.D 2016). "We will affirm the [trial] court's judgment unless it is unsupported by substantial evidence, it is against the weight of the evidence, or it erroneously declares or applies the law." *Id.* We view the evidence and the reasonable inferences drawn therefrom in the light most favorable to the judgment. *Id.*

⁴We have not set forth the lengthy metes and bounds legal description for the disputed tract in this Opinion, and instead incorporate by reference the legal description for the disputed tract set forth in the Final Judgment entered on June 29, 2020.

⁵Coleman's notice of appeal identifies the June 29, 2020 Final Judgment as the trial court judgment from which he appeals. As a matter of law, the Final Judgment incorporates the December 19, 2019 Interlocutory Judgment, for purposes of preserving the right to seek appellate review. *State ex rel. Koster v. ConocoPhillips Co.*, 493 S.W.3d 397, 401 (Mo. banc 2016) (holding that a final judgment necessarily incorporates all prior orders or interlocutory judgments whether or not addressed in the final judgment). The jurisdictional statement in Coleman's brief inexplicably refers to the vacated October 25, 2019 judgment as the judgment from which he appeals. We have, *ex gratia*, afforded Coleman the benefit of the doubt and have treated his appeal as taking issue with the findings and conclusions in the Interlocutory Judgment, as they are virtually identical to those set forth in the October 25, 2019 judgment.

Further, we defer to the trial court's determination as to the weight to be given to the evidence and to the trial court's determination of credibility, as the trial court "is free to believe some, all, or none of the testimony of any witness." *A2 Creative Grp., LLC v. Anderson*, 596 S.W.3d 214, 218 (Mo. App. W.D. 2020) (quoting *Brasher v. Craig*, 483 S.W.3d 446, 450 (Mo. App. W.D. 2016)).

Analysis

Coleman presents two points on appeal. In the first, Coleman argues that the trial court committed error in accepting testimony presented at trial by the Hartmans as "immediately determinative" of ownership of the disputed tract under the legal theory of boundary by acquiescence, and as "conclusive evidence" of the Hartmans' adverse possession claim. Coleman's second point on appeal claims that the trial court erred in finding for the Hartmans on their claim of adverse possession because the Hartmans "failed to establish by a preponderance of the evidence all of the required five elements of adverse possession."⁶ We address the points collectively.

The Interlocutory Judgment made factual findings based on the evidence presented by the parties, and concluded as a matter of law that the Hartmans presented sufficient evidence to establish that they had obtained title to the disputed tract via adverse possession. Alternatively, the Interlocutory Judgment found that Lindsey and Hartman

⁶As noted in our discussion of the standard of review applicable to Coleman's appeal, *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976), controls our review so that we may only reverse if the Final Judgment is unsupported by substantial evidence, is against the weight of the evidence, or erroneously declares or applies the law. See *Daniels-Kerr*, 484 S.W.3d at 801. In contravention of Rule 84.04(d)(1)(B), neither of Coleman's points relied on specify on which ground he relies for reversal, thereby preserving nothing for our review. See *Warren v. Dunlap*, 532 S.W.3d 725, 728 n.3 (Mo. App. S.D. 2017). However, it is apparent from the argument portion of Coleman's brief that his first point relied on asserts that the trial court erroneously applied the law concerning boundary by acquiescence and that his second point relied on asserts that there was not substantial evidence to support the Hartmans' claim of adverse possession.

had treated the north-south fence line as the boundary line for more than ten years, triggering the doctrine of boundary by acquiescence.

"The theories of boundary by acquiescence and adverse possession are separate and distinct legal doctrines." *Brasher*, 483 S.W.3d at 450-51. Adverse possession claims, if successful, divest the record owner of title, and award ownership of and title in, disputed property to the adverse possessor. *Fischer v. First Am. Title Ins. Co.*, 388 S.W.3d 181, 189 (Mo. App. W.D. 2012). Boundary by acquiescence, on the other hand, "exists if there is an uncertain boundary and the landowners fix the boundary by 'an agreement that is presumed as a result of long acquiescence.'" *Id.* (quoting *Weiss v. Alford*, 267 S.W.3d 822, 827 (Mo. App. E.D. 2008)). That acquiescence may be proved by "an express agreement or by acquiescence in a fence as a boundary for a period of time sufficient to evidence a mutual acceptance of the dividing line as the common boundary by the adjoining owners." *Id.* (quoting *Shoemaker v. Houchen*, 994 S.W.2d 40, 45 (Mo. App. W.D. 1999)). Though boundary by acquiescence can establish the boundary between two parcels, it does not operate to alter the possessor of legal title of the land on either side of the boundary line. *Id.* However, "[o]nce there is an express agreement or acquiescence on the part of the landowners [about a boundary line], possession [thereafter] becomes adverse for the purpose of running the statute of limitations period for adverse possession." *Id.*

Here, "the *boundary* to which there was claimed to have been an acquiescence or agreement merely defined the outer edge of the land [the Hartmans] claimed to have *adversely possessed*." *Brasher*, 483 S.W.3d at 451 (quoting *Fischer*, 388 S.W.3d at 190).

But the Hartmans' adverse possession claim does not depend for its proof on the presence of a boundary by acquiescence. If the trial court otherwise permissibly concluded that the Hartmans established adverse possession of the disputed tract, then the Hartmans' boundary by acquiescence claim is rendered moot. We therefore turn our attention to Coleman's second point on appeal, which contests the sufficiency of the evidence to establish all of the elements of a claim of adverse possession.

To prevail on their adverse possession claim, it was the Hartmans' burden to prove by a preponderance of the evidence that their possession of the disputed tract was: "(1) hostile, that is under a claim of right, (2) actual, (3) open and notorious, (4) exclusive, and (5) continuous for [ten] years prior to the commencement of action." *A2 Creative Grp., LLC*, 596 S.W.3d at 219, 221 (quoting *Watson v. Mense*, 298 S.W.3d 521, 526 (Mo. banc 2009)). Each claim of adverse possession presents unique circumstances requiring the resolution of mixed questions of law and fact. *Id.* at 219. "Much depends on the location, the character and the use to which the land in question may reasonably be put." *Id.* (quoting *Kitterman v. Simrall*, 924 S.W.2d 872, 876 (Mo. App. W.D. 1996)). The Hartmans' "failure to prove even one of the elements of adverse possession will defeat [their] claim." *Empire Dist. Elec. Co. v. Coverdell*, 588 S.W.3d 225, 234 (Mo. App. S.D. 2019) (quoting *Conduff v. Stone*, 968 S.W.2d 200, 203 (Mo. App. S.D. 1998)).

In the argument portion of his brief, Coleman alleges that the Hartmans failed to prove three of the five elements of adverse possession by a preponderance of the evidence; specifically, that their possession of the disputed tract was actual, open and notorious, and exclusive. Coleman does not contest that substantial evidence established

that the Hartmans' possession of the disputed tract was hostile and continuous for the statutory period of ten years prior to commencement of the action.

Coleman's second point relied on does not specify whether the contested elements of the Hartmans' adverse possession claim were not supported by substantial evidence, or were against the weight of evidence. However, in the argument portion of the brief, it is apparent that Coleman effectively contends that no substantial evidence supported finding that actual, open and notorious, or exclusive possession of the disputed tract was established.⁷ "Substantial evidence is evidence that, if believed, has some probative force on each fact that is necessary to sustain the [trial] court's judgment." *ADB Cos. v. Socket Telecom, LLC*, 618 S.W.3d 237, 244 (Mo. App. W.D. 2021) (quoting *Ivie v. Smith*, 439 S.W.3d 189, 199 (Mo. banc 2014)).

Actual Possession

Coleman asserts that the Hartmans failed to establish actual possession of the disputed tract because they failed "to demonstrate [their] intent to exclude others from control of the disputed tract." [Appellant's Brief, p. 26] "Actual possession is the present ability to control the land and the intent to exclude others from such control." *Kinder v. Calcote*, 537 S.W.3d 379, 385 (Mo. App. W.D. 2018) (quoting *Stratford v. Long*, 430 S.W.3d 921, 925 (Mo. App. S.D. 2014)). Actual possession refers to something more than a "mere mental enclosure," so that "there must be continual acts of occupying, clearing, cultivating, pasturing, erecting fences or other improvements, and paying taxes on the land." *Id.* (quoting *Stratford*, 430 S.W.3d at 925). All or any combination of these

⁷See *supra* note 6.

acts will serve as evidence, but will not be conclusive, of actual possession of the disputed tract because, as noted *supra*, each parcel of land is unique and each case must be decided in light of its particular facts and circumstances. *Id.* Actual possession "is less strict for wild, undeveloped land." *Watson v. Mense*, 298 S.W.3d 521, 527 (Mo. banc 2009).

Coleman's argument focuses on the existing north-south fence line. Coleman points to evidence that Mr. Hartman did not maintain the fence as it had multiple gaps and needed repair. Coleman also argues that the Hartmans never posted signage on the fence forbidding trespassing. Though Coleman acknowledges Mr. Hartman's testimony that he mowed a portion of the disputed tract two or three times a year to create a border around his row crops, Coleman asserts that "[t]his mowing is not equal to maintaining a fence that would keep humans entirely out of his piece of ground, let alone any other entity or animal." [Appellant's Brief, p. 27]

Coleman's focus on the fence ignores that the existence or maintenance of a fence is not necessary to establish actual possession. *See Watson*, 298 S.W.3d at 527 (concluding that there was evidence of actual possession where the claimants farmed, pastured, and cultivated land enclosed by a fence and hedgerow, and where the parties treated fence and hedgerow as the boundary, even after the fence and hedgerow were removed). Substantial evidence unrelated to the fence established that the Hartmans and their predecessors in title were in actual possession of the disputed tract.

Mr. Hartman's testimony established that the Hartmans had both the ability to control the disputed tract and the intent to exclude others from such control. The

Hartmans purchased their approximate 55-acre tract from Coil in February 2005. When Mr. Hartman walked the property before the purchase, he was told that he was buying all of the property within the fence lines that surrounded the property, including the north-south fence line at issue in this case. Mr. Hartman has treated the north-south fence line as the western boundary of his property at all times since purchasing the land in February 2005.

Mr. Hartman testified that he and his wife initially rented a portion of their land to McMillen, who ran a "hot wire" along the north-south fence line in order to run cattle, a use that continued until 2006, when Mr. Hartman arranged to sharecrop the land with row crops. Mr. Hartman created a buffer strip along the perimeter of the property, and around the row crops by cleaning out the brush on his side of the north-south fence line where feasible,⁸ and by cutting down trees and using Tordon to kill the roots and prevent future growth. Mr. Hartman mowed the buffer strip along the north-south fence line with a brush hog two to three times a year, and cleaned out the fence line when necessary so brush and limbs would not damage the farm machinery working in the field. After Coleman commissioned the survey to determine the property line, Mr. Hartman initially mowed around the survey stakes in the ground, but then used the brush hog to mow over the stakes to maintain the land on what he believed was his side of the fence.

⁸Mr. Hartman testified that the land toward the northern portion of the property line he shares with Coleman is difficult to reach with equipment because it has bluffs and is rocky.

Substantial evidence established that the Hartmans had actual possession of the disputed tract as they had both the ability to control the disputed tract and the intent to exclude others from such control.

Open and Notorious Possession

Coleman argues that the Hartmans failed to present evidence of their "visible acts of ownership" of the disputed tract, and thus failed to establish that their possession of the disputed tract was open and notorious. Possession of property is open and notorious if the claimant engaged in "visible acts of ownership exercised over the premises, such as maintaining and improving the property." *Kinder*, 537 S.W.3d at 387 (quoting *DeVore v. Vaughn*, 504 S.W.3d 176, 185 (Mo. App. W.D. 2016)). The claimant need not prove that the true owner of the property had actual knowledge of the claimant's claim to the property. *Id.* Instead, the claimant's occupancy on the property must be "conspicuous, widely recognized, and commonly known." *Id.* (quoting *DeVore*, 504 S.W.3d at 186). In other words, the legal owner must have "had cause to know of the adverse claim of ownership by another." *Id.* (quoting *DeVore*, 504 S.W.3d at 185).

Coleman points to Mr. Hartman's admissions that he had not placed any signs on the existing fence line to forbid trespassing, and that he had not completed the existing fence or installed a new fence to prevent access to the disputed tract. Coleman asserts that Mr. Hartman's minimal maintenance of the existing fence is not sufficient to establish open and notorious possession of the disputed tract. Coleman also argues that open and notorious possession is not established by the Hartmans' belief they had "somehow earned it through attrition." [Appellant's Brief, p. 29]

Coleman again places too much emphasis on the existing fence. For a claimant's possession to be open and notorious, "there need not be a fence, building or other improvements." *Trokey v. R.D.P. Dev. Grp., L.L.C.*, 401 S.W.3d 516, (Mo. App. S.D. 2013) (quoting *City of South Greenfield v. Cagle*, 591 S.W.2d 156, 160 (Mo. App. S.D. 1979)). It is true that the western boundary of the disputed tract was the north-south fence line. However, the disputed tract involved property other than the fence. The evidence established that Mr. Hartman regularly maintained and improved the disputed tract in that he: (1) cleared brush along the existing fence line; (2) cut down trees and sprayed stumps with Tordon to prevent future growth in the disputed tract; (3) created, and then regularly mowed with a brush hog, a buffer strip along the existing fence line where the terrain allowed; and (4) replaced fencing and water gap fencing in the northern end of the disputed tract, where the terrain is less suitable for row crops. Dexter, Hartman's sharecropper, confirmed that he was aware of the maintenance and improvements that Mr. Hartman had performed on the property. Dexter testified that, over the last thirteen years, he had witnessed Mr. Hartman maintain the disputed tract, including cutting down trees and mowing the grass. Finally, Coleman himself testified that he had witnessed Mr. Hartman mowing and cutting down trees in the disputed tract. Maintaining and improving the disputed tract constituted visible acts of ownership that would cause the Coleman's predecessor in interest to know of the Hartmans' adverse claim of ownership. *Kinder*, 537 S.W.3d at 387.

Substantial evidence established that the Hartmans' occupancy of the disputed tract was sufficiently "conspicuous, widely recognized, and commonly known" so as to constitute open and notorious possession. *See id.*

Exclusive Possession

Coleman finally argues that the Hartmans failed to present evidence that their possession of the disputed tract was exclusive for the ten-year statutory period. The exclusive element of adverse possession requires proof that "the claimant possesses the land for himself, and not for others." *Brasher*, 483 S.W.3d at 452. To demonstrate that their possession of the disputed tract was exclusive, the Hartmans had to present evidence that they "wholly excluded the true owner from possession of the property" so that they did not jointly possess the disputed tract with Coleman or his predecessor in interest. *A2 Creative Grp., LLC*, 596 S.W.3d at 219 (quoting *Brasher*, 483 S.W.3d at 452). "[S]poradic use, temporary presence, or permissive visits by others, including the record owner," will not defeat a claim of exclusive possession. *Id.* (quoting *Brasher*, 483 S.W.3d at 452).

Coleman argues that the only evidence the Hartmans presented suggesting exclusive possession of the disputed tract was that Mr. Hartman occasionally mowed and tilled a portion of the disputed tract. Coleman argues this is not substantial evidence of exclusive use.

Coleman's characterization of the evidence is inaccurate. The evidence established that for more than ten years before Coleman purchased his land from Lindsey, Mr. Hartman used and maintained the disputed tract, at first renting the pasture to

McMillen for running cattle, and later creating, maintaining, and routinely using the disputed tract to sharecrop with Dexter. Since purchasing his property in 2005, Mr. Hartman has treated the disputed tract as his property, reflected by giving people permission to use the land to the exclusion of others. In addition, Mr. Hartman performed periodic maintenance on the existing north-south fence, and when Coleman tried to erect a fence on the boundary line reflected by the stake survey, Mr. Hartman objected.

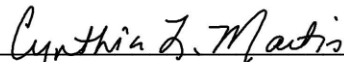
Substantial evidence established that the Hartmans exclusively possessed the disputed tract for themselves, and not for others, following their purchase of their property in February 2005, and thus for more than ten years before Coleman acquired his property in the summer of 2015.

The trial court's determination that the Hartmans acquired title to the disputed tract by adverse possession was supported by substantial evidence. Coleman's second point on appeal is denied.

Because the trial court did not err when it awarded title to the disputed tract to the Hartmans by adverse possession, we need not address whether the trial court correctly found in the alternative that the north-south fence line was the boundary between the Hartmans' and Coleman's properties by acquiescence. Coleman's first point on appeal is therefore denied as moot.

Conclusion

The Final Judgment is affirmed.



Cynthia L. Martin, Judge

All concur