



**IN THE MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

CHARLES ROBERT WATSON and	)	
CAROLYN WATSON,	)	
	)	
Respondents,	)	
	)	
vs.	)	WD 69255
	)	
ROBERT K. MENSE and CAROLYN K.	)	Opinion Filed: December 16, 2008
MENSE,	)	
	)	
Appellants.	)	

**APPEAL FROM THE CIRCUIT COURT OF MACON COUNTY**  
The Honorable Gary G. Wallace, Judge

Before Victor C. Howard, P.J., Thomas Newton, Judge and Alok Ahuja, Judge

Robert and Carolyn Mense appeal the judgment of the trial court in favor of Charles and Carolyn Watson in their action to quiet title. The Menses present nine points on appeal. Their arguments include claims that the trial court erred in (1) finding that the Watsons had adversely possessed the disputed area; (2) awarding damages for trespass and ejection to the Watsons; (3) declaring the width of the Watsons' easement to be 24 feet; (4) ordering the Menses to cease and desist from interfering with the Watsons' easement; and (5) ruling in favor of the Watsons on the Menses' counterclaims. The judgment is reversed and remanded in part and affirmed in part.

## **Factual and Procedural Background**

This appeal involves a dispute over the location of the boundary line dividing two tracts of land and the width of an easement that runs across the Menses' land. The Watsons own two 40 acre lots, which meet diagonally at one corner of each lot. One of these lots is directly north of an 80 acre lot owned by the Menses. The Watsons acquired the lot north of the Menses' lot from Jane Bolton, the mother of Charles Watson, in 1989. Bolton and her husband acquired the land in 1958, and Bolton owned it after her husband's death until she conveyed it to the Watsons. The Menses acquired their land in January 2006 from Jim Nelson. Prior to Jim Nelson, the land was owned by Frank Bush. Nelson and Bush had a combined period of ownership of more than thirty years before the Menses acquired the land.

Since at least 1958, a fence line in a hedgerow had divided the properties. Neither Nelson nor Bush ever had a dispute with Bolton or the Watsons regarding the boundary line between the two tracts. The Watsons never attempted to farm south of the fence line, and Nelson and Bush never tried to farm north of the line. While Bush owned the southern tract in the 1980s, he removed the fence and cleared out the hedgerow on the east end of the disputed line. Although the fence on the east end was never replaced, there was a "hump" that marked where the fence and hedgerow had been. The Watsons removed the fence and hedgerow on the west end in 1998 or 1999 but replaced the fence in 2000. As to the location where the Watsons' two tracts met at the corners, the Watsons and their predecessors used that area to move cattle and equipment from one tract to the other. The Watsons claimed an easement in this area.

When the Menses acquired the land to the south of the Watsons' land in 2006, there was no fence on the east end of the lot. Relying on the property line between the Watsons' land and the land of a neighbor to the east of the Menses, Robert Mense assumed that the boundary line

between his land and the Watsons' land was approximately eight feet to the north of the line where the fence and hedgerow had been. Because Mense believed the boundary was eight feet further north, he planted corn north of the old fence line in the spring of 2006.

After Charles Watson saw the corn Mense had planted, Watson placed a post at the eastern corner of the location where he believed the boundary to be. Mense used his tractor to remove the post and then placed his tractor to the side of a gate that crossed the location of the easement claimed by the Watsons. Mense posted a sign to his tractor that stated "To whom it may concern: This is my land. Anyone [who] attempts to move or vand[al]izes this tractor will be arrested. If any questions, I will pay half of cost to survey." The tractor remained in this location for at least one month. When Watson placed a second post in an attempt to mark the boundary, Mense removed that post as well.

In the summer of 2006, Mense asked Macon County surveyor Edward Cleaver to do a survey of the land described in the Watsons' and Menses' deeds. Cleaver's survey showed that the boundary line between the lots was approximately seven to eight feet north of the old fence line. Based on the survey, Mense planted soybeans up to the surveyed boundary line in the spring of 2007. The Watsons thereafter filed a petition to quiet title to the disputed area.

In addition to asking the court to quiet title, the Watsons requested damages for trespass, an order of ejectment against the Menses, and an order establishing a prescriptive easement and enjoining the Menses from further interference with the claimed easement. In their answer, the Menses included two counterclaims, asking the court to declare that the Watsons had no interest in the disputed area and to award trespass damages to the Menses.

Before trial, the Menses consented to judgment on the Watsons' quiet title count because the Menses agreed that while the Watsons owned the land described in their deed, the land

described in the deed did not include the disputed area. Therefore, the boundary line between the two lots was still at issue. The Menses also consented to judgment on the Watsons' prescriptive easement claim but stipulated that they wished for the trial court to determine the width and scope of the easement.

During trial, the court heard testimony describing the width of the easement as being anywhere from 15 to 24 feet. Based on pictures of the roadway and testimony that described the easement as being the width of a 16 foot gate plus one-half of the width of a 16 foot cattle panel, the trial court found that the easement was 24 feet wide. The trial court further found that the Watsons had adversely possessed the area between the surveyed boundary line and the fence line, and thus declared the boundary line between the Watsons' and Menses' lots to be the area where the fence line had been. Because the court found that the disputed area belonged to the Watsons, the court also awarded trespass and ejectment damages to the Watsons. This appeal by the Menses followed.

### **Standard of Review**

In reviewing the judgment of the trial court, the appellate court will affirm the judgment unless there is no substantial evidence to support it, it is against the weight of the evidence, it erroneously declares the law, or it erroneously applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). "All evidence favorable to the judgment and all inferences to be drawn from the evidence are accepted as true, and all contradictory evidence is disregarded." *Underwood v. Hash*, 67 S.W.3d 770, 774 (Mo. App. S.D. 2002). The appellate court defers to the trial court's determination of the credibility of witnesses and the weight to be given to their testimony. *Id.* The trial court "is free to believe none, part, or all of the testimony of any witness." *Id.*

## **Adverse Possession**

In their first point on appeal, the Menses contend that the trial court erred in finding that the Watsons had adversely possessed the strip of land north of the fence. They claim that there was no substantial evidence to support the trial court's finding in that the Watsons did not prove that their use of the land was hostile, actual, open and notorious, exclusive, and lasted for a continuous period of at least ten years.

A party claiming ownership by adverse possession has the burden of proving by the preponderance of the evidence each element necessary to establish adverse possession for the entire statutory period. *Shuffit v. Wade*, 13 S.W.3d 329, 335 (Mo. App. S.D. 2000). Such a claimant ““must show actual, hostile, i.e., under a claim of right, open and notorious, exclusive and continuous possession of the property for ten years.”” *Id.* (quoting *Teson v. Vasquez*, 561 S.W.2d 119, 125 (Mo. App. 1977)); *see also* § 516.010, RSMo 2002. The ten years of possession must be consecutive, but they need not be the ten years immediately preceding the filing of the petition. *Kitterman v. Simrall*, 924 S.W.2d 872, 876 (Mo. App. W.D. 1996). A claimant may tack his period of adverse possession with that of his predecessors in order to meet the ten year requirement. *Id.*

The element of actual possession is defined as “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. S.D. 2006). Whether an act constitutes actual possession ““depend[s] on the nature and location of the property, the uses to which it can be applied and all the facts and circumstances of a particular case.”” *Id.* at 555 (quoting *City of S. Greenfield v. Cagle*, 591 S.W.2d 156, 160 (Mo. App. S.D. 1979)). The actual possession requirement “is less strict for wild, 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.* However, “A mere mental enclosure of land does not constitute the requisite actual possession.” *Harris v. Lynch*, 940 S.W.2d 42, 45 (Mo. App. E.D. 1997). Instead, “[t]here must be continued acts of occupying, clearing, cultivating, pasturing, building fences or other improvements, and paying taxes.” *Eime v. Bradford*, 185 S.W.3d 233, 236 (Mo. App. E.D. 2006) (holding that farming bean field adjacent to tract and enjoying tract's aesthetic properties did not amount to actual possession).

Edward Cleaver’s survey of the parties’ deeds shows that the disputed area north of the fence line is part of the land owned by the Menses, as described in their deed. Because the disputed area does not lie within the survey description of the Watsons’ land, they do not have color of title. *See, e.g., Shuffit*, 13 S.W.3d at 335. “Where the claimant occupies land without color of title, in order to prevail, he must show physical possession of the entire area claimed.” *Id.* (quoting *Teson*, 561 S.W.2d at 126).

In its judgment, the trial court found that the Watsons and their predecessors had “farmed up to the line from the north and never crossed south of it.” In finding that the Watsons had established each element of adverse possession, the trial court again stated that the Watsons and their predecessors had “possessed, used and farmed the land north of the fence line,” and had “maintained and improved the property.” However, the testimony of the Watsons’ predecessor, Charles Watson’s mother, did not show that his mother had used, farmed, maintained, or improved the disputed area. In her testimony, she only stated that there had never been any arguments regarding the boundary line between the two tracts, and she testified that the primary use of the entire lot was for cattle, crops, and pasture. Watson’s mother did not disclose a particular use for the disputed area, nor did she give a time frame over which any use occurred.

Charles Watson also testified that prior to the spring of 2006, there had never been a dispute involving the boundary line. He stated that the Menses' predecessors had never tried to farm north of the old fence line. The common theme throughout the testimony of the Watsons, their predecessors, and the Menses' predecessors was that none of the owners, until the Menses, had ever tried to go beyond the fence line. Although this testimony tends to show that the Watsons and their predecessors had exclusive control over the disputed area until 2006, because the Watsons failed to plead the theory of boundary by acquiescence, this testimony does little else to establish their claim of adverse possession.

The only testimony in the record that reveals a specific use of the disputed area is Charles Watson's testimony regarding the fence and posts. He testified that in 1998 or 1999, he removed the brush and the fence from the west end of the fence line. In 2000, he replaced the fence in the same location. The next activity he testified to was setting posts and running a smooth wire over the fence in 2006 after he saw the corn the Menses had planted. Additionally, exhibits entered into evidence at trial, specifically a photo of the western fence line marked Defendant's Exhibit B, show that the four to five foot area immediately next to the fence is covered with tall weeds. While Exhibit B also shows that the Watsons used a field near the fence for alfalfa, there is an area between the alfalfa and the weeds that is not being visibly used. When the Menses' attorney asked Charles Watson if the photo showed that he was not using all of his land north of the fence line, Watson replied, "That's what it shows, yes."

As to the element of actual possession, Charles Watson's testimony reveals that the earliest date of actual use was 1998 or 1999, when he removed the brush and fence on the west end of the fence line. The mere fact that a fence existed prior to Watson's ownership of the land and remained there until 1998 or 1999 does not establish actual use. *See Edmonds v. Thurman,*

808 S.W.2d 408, 411 (Mo. App. S.D. 1991) (finding that, even when taking into account the fact that disputed land was wild and undeveloped, maintenance of an old fence not built by the claimant was not enough to establish actual possession). The testimony of Watson's mother cannot establish an earlier period of adverse possession because her testimony only showed that there had been no disputes regarding the boundary. Because the Watsons filed their petition in June of 2006, and the earliest example of actual use that Charles Watson testified to occurred in 1998 or 1999, there was no substantial evidence to support the trial court's finding that the Watsons had actually used the disputed area for a continuous ten year period. The Menses first point is granted, and this portion of the trial court's judgment is reversed.

### **Trespass and Ejectment Damages**

In their second and third points, the Menses argue that the trial court erred in awarding to the Watsons \$75.00 in damages for trespass and \$90.00 in damages for ejectment. The trial court found that Robert Mense had trespassed on the Watsons' land when he removed the posts placed by Charles Watson, and that the Watsons were entitled to \$75.00 as result. The court further found that the Watsons were entitled to \$90.00 in ejectment damages because the Menses' planting of corn and soybeans amounted to a deprivation of the Watsons' right to use and enjoy their land.

The photos entered into evidence and the testimony of the parties shows that Charles Watson placed the posts along the fence line, or where the fence line had been on the eastern end before it was torn down. As the Watsons did not prove ownership of the disputed area by adverse possession, and the survey showed the true boundary to be approximately seven to eight feet further north of the fence, there is no substantial evidence to support the trial court's finding that Robert Mense trespassed on the Watsons' land. Similarly, there was no evidence to show

that Mense planted corn or soybeans north of the survey line. Therefore, there is no substantial evidence to support an award of damages for trespass or ejectment, and these findings of the trial court are reversed.

In their ninth point, the Menses argue that the trial court erred in refusing to award them damages for trespass by the Watsons in that the Watsons placed two posts south of the surveyed boundary line. Based on our conclusion that the Watsons do not own the disputed area through adverse possession, the case is remanded to the trial court for a determination of the amount of damages, if any, to which the Menses are entitled as a result of the Watsons' placement of posts south of the surveyed boundary line. Because we find that the Watsons did not prove each element of adverse possession and that the true boundary line is, therefore, the line defined by Cleaver's survey, we need not address the Menses' remaining points regarding the ownership of the disputed area or the boundary line between the two tracts.

### **Easement by Prescription**

The Menses' two remaining points concern the Watsons' count claiming an easement by prescription, to which the Menses consented. In their fourth point, the Menses argue that the trial court erred in declaring the width of the easement to be 24 feet, in not declaring the use of the easement, and in not stating that only half of the width of the easement burdened the Menses' land. The Menses claim that the evidence was sufficient only to declare that the easement was 16 feet in width, was for agricultural use, and that only half of the width of the easement was on the Menses' land.

The testimony at trial varied regarding the width of the easement. Carolyn Watson and her brother Lester Snow testified that the width of the easement was equal to a 16 foot gate that crossed the path, plus the width of an adjacent cattle panel. Charles Watson's testimony was

more specific in that he stated that the easement path included a gate that measured 16 feet and a cattle panel that measured 16 feet. Because the gate and panel overlapped by eight feet, he estimated the total width of the easement to be 24 feet. Robert Mense testified that the total width of the path was only 16 feet.

“Where the evidence is contradictory and conflicting, we defer to the trial court’s opportunity to view the witnesses and assess their credibility. Conflicts in evidence are for the trial court to resolve and the facts must be taken in accordance with the result reached.” *Thomas v. King*, 160 S.W.3d 445, 452 (Mo. App. S.D. 2005) (citations omitted) (quoting *Moss v. Ward*, 881 S.W.2d 238, 243 (Mo. App. S.D. 1994)). In *Thomas*, the appellant argued that the trial court erred in finding an easement to be 15 feet wide because conflicting testimony showed the easement to be of varying widths. *Id.* at 451. Because at least some of the testimony estimated the easement to be 15 feet, and the trial court was entitled to resolve conflicts in evidence, the appellate court held that there was sufficient evidence for the trial court to declare the width of the easement to be 15 feet. *Id.* at 452.

In this case, there was testimony indicating that the width of the easement was equal to the measurements of a gate and cattle panel. Charles Watson specifically stated that the width of the easement was equal to the 24 foot measurement of the gate plus the cattle panel. Additionally, the trial court relied on photos of the path that the trial court believed showed the width to be 24 feet. Because we must accept the facts in accordance with the trial court’s resolution of conflicting testimony, we find that there is substantial evidence to support the trial court’s declaration that the width of the easement is 24 feet.

The Menses further argue that the trial court erred in failing to specify that only half of the width of the easement burdened the Menses’ land. Evidence which will enable an easement

to be located is necessary, “and the judgment must contain a definite description of the easement based upon the evidence.” *Dillon v. Norfleet*, 813 S.W.2d 31, 32 (Mo. App. W.D. 1991). In their testimony, Robert Mense and both Carolyn and Charles Watson stated that half of the width of the easement burdened the Menses’ land and the other half burdened the land of Donald Ross, the Menses’ neighbor to the north who is not a party to this action. While the trial court sufficiently described the two tracts of land owned by the Watsons that benefited from the easement, the trial court failed to indicate that, based on the testimony of both parties, only half of the total width of the easement, or 12 feet, is located on the Menses’ property. The case is remanded with instructions for the trial court to specify that only half of the width of the easement burdens the Menses’ property.<sup>1</sup>

Next, the Menses argue that the trial court erred in not declaring the manner in which the Watsons could use the easement. Although the Menses briefly mention that the easement was used only for agricultural purposes, the Menses failed to develop their argument on this point or cite any authority supporting it. Rule 84.04(e) requires an appellant’s brief to contain an argument that discusses the point relied on. *Lueker v. Mo. W. State Univ.*, 241 S.W.3d 865, 868 (Mo. App. W.D. 2008). An appellant has a further obligation to cite appropriate and available precedent or explain why such authority is not available. *Id.* While the rules should be liberally interpreted to allow the court to reach the merits of a case, at a minimum, “some reference to authority is generally necessary.” *Kimble v. Muth*, 221 S.W.3d 419, 423 (Mo. App. W.D. 2006). Where, as here, “the appellant neither cites relevant authority nor explains why such authority is not available, the appellate court is justified in considering the point[] abandoned.” *Id.* (quoting *In re Marriage of Spears*, 995 S.W.2d 500, 503 (Mo. App. S.D. 1999)). Therefore, we consider

---

<sup>1</sup> It was not an issue in this case and we do not address the authority of the trial court to enter a judgment affecting the rights of Donald Ross, who is not a party to this action.

the Menses to have abandoned this issue and do not reach the merits of their argument regarding the Watsons' use of the easement.

In their fifth point, the Menses claim that the trial court erred in ordering the Menses to cease and desist from interfering with the Watsons' right to use and enjoy their prescriptive easement. They claim that there was no evidence that the Menses had interfered with the Watsons' access to and use of the easement because Charles Watson testified that the Menses' tractor was not blocking the easement.

“[A] property owner may not be enjoined from enjoying the lawful incidents of ownership absent a showing that the acts complained of constitute a damaging incursion of a fixed and determined property right in another.” *Cheatham v. Melton*, 593 S.W.2d 900, 904 (Mo. App. E.D. 1980). Therefore, the owner of a servient estate may use an area of his or her land that serves as an easement as long as that use does not unreasonably interfere with the rights of the easement holder. *See Swaggerty v. McKinzey*, 876 S.W.2d 795, 797-98 (Mo. App. S.D. 1994). In *Cheatham*, the court found that the trial court erred because its order could be interpreted to disallow any personal use of the easement area by the owner of the servient land when nothing in the record indicated that personal use would unreasonably interfere with the easement holder's rights. 593 S.W.2d at 904.

In this case, the trial court did not prohibit all personal use of the easement by the Menses but, rather, ordered them not to interfere with the Watsons' right to use the easement. Additionally, although photos and testimony show that the Menses' tractor did not completely block the easement area, the placement of a tractor with a threatening note in the vicinity of the easement could signify to the Watsons that the Menses were attempting to unreasonably interfere with the Watsons' easement rights. Because the owner of a servient lot may not unreasonably

interfere with an easement holder's rights, the trial court did not erroneously apply the law when it ordered the Menses to cease and desist from interfering with the Watsons' right to use and enjoy the prescriptive easement. The Menses' fifth point is denied.

### **Conclusion**

The portions of the trial court's judgment declaring the easement to be 24 feet wide and ordering the Menses to cease and desist from interfering with the Watsons' right to use and enjoy the easement are affirmed. The trial court's findings that the Watsons established adverse possession of the disputed area and that the Watsons were entitled to trespass and ejectment damages are reversed. The case is remanded to the trial court to determine the amount of trespass damages to which the Menses are entitled and to specify that only half of the width of the easement burdens the Menses' land.

All concur.

---

VICTOR C. HOWARD, PRESIDING JUDGE