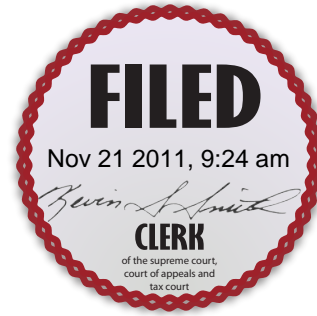


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

LELAND K. ROBERTS,)
)
Appellant-Plaintiff (and Counterclaim)
Defendant),)
)
vs.)
)
HART & SONS REALTY, LLC,)
)
Appellee-Defendant (and Counterclaim)
Plaintiff).)

No. 33A01-1103-PL-116

APPEAL FROM THE HENRY SUPERIOR COURT
The Honorable David Northam, Special Judge
Cause No. 33D01-0510-PL-40

November 21, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Leland Roberts appeals the trial court’s judgment quieting title to a tract of land in favor of Hart & Sons Realty, LLC (“Hart & Sons”). We affirm.

Issue

The sole restated issue we address is whether the trial court’s judgment is supported by a survey commissioned by Hart & Sons.

Facts

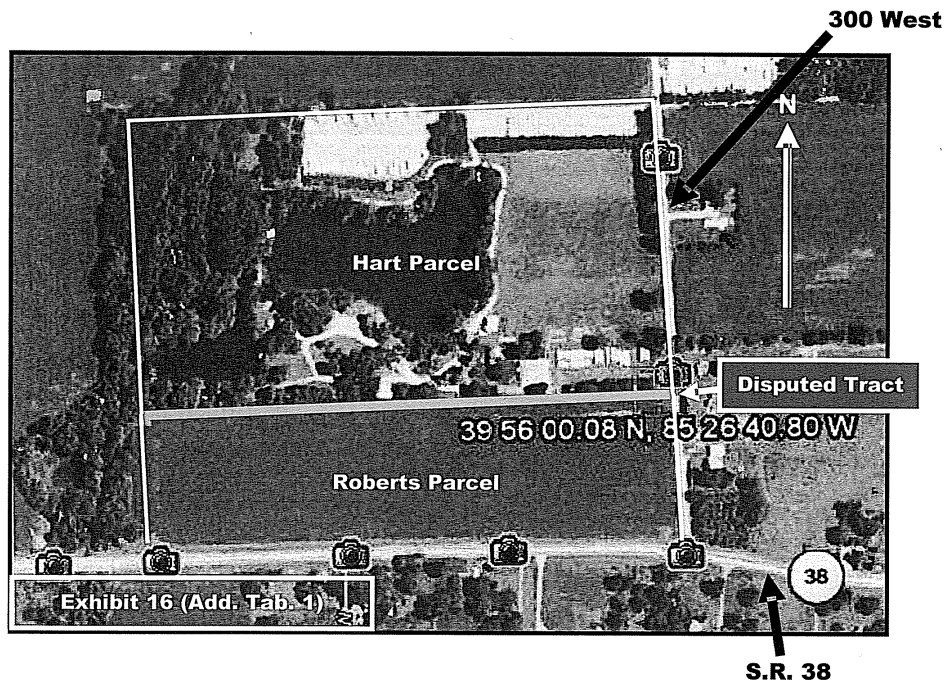
In 1950, the Henry County Conservation Club (“the Conservation Club”) purchased a 31.56 acre tract of land located to the west of Sulphur Springs Road, a/k/a County Road 300 West, and several hundred feet north of State Road 38 in Henry County (“the Hart parcel”). The legal description for the tract found in the deed states that it is located as follows:

Beginning at a point along the west side of the Sulphur Springs road and approximately 450 feet north of the center line of State Highway 38; thence west 1600 feet, more or less, to a point in the stream; thence north 863 feet, more or less, to a concrete corner post; thence S 89°-40’ E 1607 feet, more or less, to a wooden corner post; thence S 00°-30’ W along the west side of the Sulphur Springs road 852 feet, more or less, to the point of the beginning

Ex. 10.

In 1979, Roberts purchased approximately seventy acres of land in Henry County (“the Roberts parcel”) from the same grantor who sold the Hart parcel to the Conservation Club. The deed described the tract as consisting of 103 acres, but

specifically excepted the 31.56 acres previously deeded to the Conservation Club from its scope. The description for that 31.56 acre tract was precisely the same as in the 1950 deed to the Conservation Club. This resulted in the Conservation Club possessing a tract of land immediately to the north of a tract possessed by Roberts, unseparated by any obstacles. At issue in this case is a strip of land approximately twenty feet wide by 1600 feet long in between the parcels, which the parties refer to as the Disputed Tract. The respective tracts, as well as the Disputed Tract, are depicted in the following photograph:¹



¹ Additional markings to this photograph were provided by Roberts.

At some point, apparently in the 1980s, the Conservation Club built a clubhouse, a parking lot, and several outbuildings on the eastern portion of its lot. One of the outbuildings, as well as a concrete pad on which a dumpster was stored, were partially located on the Disputed Tract. The entire outbuilding was assessed as part of the Conservation Club's property for property tax purposes. The western portion of the lot was, and remains, wooded and also had two lakes, one of which the Conservation Club operated as a pay lake with trails leading to that lake.

In 1985 or 1986, the Conservation Club cleared dozens of trees and undergrowth in the eastern portion of the Disputed Tract adjoining the parking lot and planted grass there. The Conservation Club and Hart & Sons have mowed the grass in that area, in a manner similar to a residential lawn, ever since. Roberts did not object to the removal of the trees and planting of grass.

Roberts, meanwhile, used his tract for farming. For the most part, the crop line of Roberts's field did not cross into the Disputed Tract, although the line was not always in precisely the same place every year and there was occasional slight overlap into the Disputed Tract, or Roberts's tractors may sometimes have crossed into the Disputed Tract. The Conservation Club and Hart & Sons always believed that their property extended to Roberts's crop line.

In November 2002, the Conservation Club sold its property to Gary, Nathan, and Justin Hart. The Harts in turn conveyed the property to Hart & Sons in March 2004. The

eastern portion of the tract has been used as an RV dealership since 2002, while the western portion has remained wooded.

In late 2003, the Harts removed five Chinese elm trees that were located on the Disputed Tract. Gary Roberts, Roberts's son and attorney-in-fact, noticed the removal of the trees. This prompted Gary to retain Leland Miller to conduct a survey to determine where the boundary line between the Roberts parcel and the Hart parcel lay and whether the Chinese elms that had been removed were on Roberts's property.

Miller believed it was difficult to conduct an accurate survey of what constituted the Hart parcel because of the use of "more or less" and "approximate" terms in the 1950 deed's legal description. He also believed it would be difficult to assess where the center line of State Road 38 was located in 1950, and so he did not attempt to begin his survey at a point 450 feet north of State Road 38, which is the starting point for the Hart parcel in the legal description, located at the southeast corner of the parcel. Instead, he located a concrete post at what he concluded was the northwest corner of the parcel, which conclusion was based on a survey conducted of an adjoining parcel, and began his survey there. Ultimately, he concluded that the southern border of the Hart parcel was located 484.95 feet north of the current centerline of State Road 38. This resulted in a conclusion that the Disputed Tract belonged to Roberts and that the outbuilding, constructed by the Conservation Club and for which it had paid property taxes, encroached onto Roberts's property by nine feet.

In September 2004, Roberts or someone acting on his behalf placed survey stakes at the Disputed Tract that marked the property boundary as reflected by the Miller survey. This prompted Hart & Sons to hire their own surveyor, Steven Cooper of Coor Consulting. Cooper was able to locate where the centerline of State Road 38 lay in 1959, and found no evidence that it lay elsewhere in 1950. Thus, he began his survey of the property at a point 450 feet north of the 1959 centerline of State Road 38 at the southeast corner of the Hart parcel, as indicated by the legal description. Starting from this point, Cooper concluded that the boundary line between the Roberts parcel and the Hart parcel was nineteen feet south of where Miller believed it to be at the eastern edge of the property, and forty-three feet south at the western edge. This placed the boundary line just north of where Roberts's crop line existed and meant that Hart & Sons possessed the Disputed Tract. It also meant that none of the buildings encroached on Roberts's property and that none of the removed Chinese elms had been located on Roberts's property.

On October 31, 2005, Roberts filed a complaint against Hart & Sons, alleging it had trespassed onto his property. Hart & Sons filed an answer as well as a counterclaim, which sought to quiet title to the Disputed Tract based on the Coor survey, and alternatively sought possession of the Disputed Tract by adverse possession or based upon Roberts's acquiescence. The trial court conducted a bench trial on October 7-8, 2010. On February 23, 2011, the trial court entered judgment against Roberts on his trespass claim and in favor of Hart & Sons on its action to quiet title to the Disputed

Tract. At Roberts's request, the trial court entered findings of fact and conclusions thereon.

The trial court made the following pertinent findings with respect to the competing Miller and Coor surveys:

26. The following findings raise issues of reliability of the method used by Miller to prepare his survey:

a) Because the Hart parcel was an exception to Roberts' 70 acre tract, Miller testified that he did not consider the 70 acre tract at all in his survey, which the Court believes would have been helpful, if not determinative of the boundary; and at the very least would have raised questions as to the accuracy of the surveys of adjoining tracts.

b) Miller testified that one of his major concerns with the legal description of the Hart parcel was that it did not use the section line system as its basis. A review of the 70 acre Tract shows that said tract did in fact specifically relate to the section line system. The south boundary was the section line; the west boundary was "parallel with the East line of said section 12"; the north boundary was "parallel with the South line of said section"; and the east boundary of the Hart parcel deviates substantially from the 70 acre Tract because of additional acreage to the north and east in said 70 acre Tract, said additional acreage being unrelated to the Disputed Tract.

c) The Ashton Survey used by Miller to locate adjoining tracts, notes there is an uncertainty of approximately 16 feet as to the location of the corner post. From a review of the Ashton survey, for some unknown reason the surveys of the adjoining tracts, and possibly the exception in question, appear to be using boundary angles and measurements inconsistent with the section lines and thereby inconsistent with the original 70 acre Tract. These inconsistencies appear to have resulted in a discrepancy as to the boundary of the northwest corner of approximately 16

feet, including the possibility that Miller's starting point, the northwest corner of the Hart parcel, is outside the 70 acre Tract from which the exception came. No evidence was presented that the exception, or any portion thereof was excepted from any of the adjoining tracts.

d) Miller's survey places the southeast corner of Hart's parcel (starting point of the legal description) at a point 484.95 feet north of the current centerline of State Road 38; 469.00 feet north of the center line of State Road 38, as noted in the State Highway drawings of 1959; and 455.63 feet north of the ¼ section line of Section 12, Twp17N, Rge 9E. Miller's original issue with the legal description was that because State Road 38 curved south of the Section line at its intersection with Sulfur [sic] Springs Road that point could not be precisely determined. Miller's result places that same location north of said section line, which would be inconsistent with any interpretation of the Hart parcel legal description.

* * * * *

30. Cooper believes Miller's depiction of the southern boundary to be inaccurate as a result of the methodology utilized by Miller. In particular, Miller did not begin at the starting point called for in the deed. Cooper testified that it was common practice for surveyors to begin a measurement from the starting point called for in a legal description. Further as previously noted the "starting point" utilized by Miller had a potential inaccuracy of approximately 16 feet.

31. The following findings raise issues of reliability of the method used by Cooper to prepare his survey:

a) Because the Hart parcel was an exception to Roberts' 70 acre tract, Cooper also did not consider the 70 acre tract in his survey.

b) Cooper used the standard surveying procedure of using the starting point of the survey. This does note the starting point is 450' north of the centerline of State Road 38

at the west boundary of Sulphur Springs Road. At this point, State Road 38 has started its curve south and is south of the section line. Although Cooper's theory of where the centerline of State Road 38 was located is reasonable and has a basis in fact from the evidence, there is the possibility said placement is incorrect.

c) Although Cooper's placement of the Hart parcel starting point appears to be more accurate than Miller's, there is still the issue of what angle to use on the boundary line. Although Cooper's decision regarding the angle of the boundary line is reasonable and has a basis in fact from the evidence, there is the possibility said angle is incorrect.

32. Both surveyors acknowledged that different surveyors could reasonably differ with their opinion of the boundaries of the Hart parcel.

App. pp. 15-18.

The trial court then reached the following conclusions:

1. The central issue in this case is the location of the boundary between the Roberts parcel and the Hart parcel. The answer to that question resolves both the issue of trespass in Roberts' Complaint and the counterclaim of Hart for the purposes of quieting title and determining a definitive property line between the two parcels.

2. In order to succeed on his claim of trespass, Roberts must establish that he was in possession of the land and that Hart entered his land without right. . . . The Court concludes that Roberts did not establish by a preponderance of the evidence that they were the owners or possessed the Disputed Tract where they alleged that Hart had entered without right. Both surveyors acknowledged that different surveyors could come to different conclusions as to where the boundary line should be placed. As noted in the Court's findings, both surveys had their flaws; however, the court concludes that Miller's methodology was fatally flawed both in its application and its final result. The Coor's survey also had its

own short comings, and Cooper acknowledged there could be a variety of interpretations with differing results. However, the basis of the Coor's survey was reasonable, avoided the fatal flaws of the Miller survey, and the Court concludes the Coor's survey was more reliable than Miller's. The final conclusion of Coor's Survey was that none of the alleged encroachments were on the Roberts parcel. Based upon the evidence of the surveys, Roberts did not sustain its burden of proof of possession/ownership for its claim of trespass against Hart; and as such also failed to establish by a preponderance of the evidence that Hart entered Roberts land without right.

Id. at 19-20. After entering these conclusions, the trial court then proceeded to discuss at length that Hart & Sons had satisfied the elements of both adverse possession of and title by acquiescence to the Disputed Tract as against Roberts.

The trial court then concluded as follows:

11. Roberts argues that surveys should have the highest priority in such disputes as exist in this cause. In this case two qualified surveyors cannot agree on a legal description's boundaries because of its imprecise nature. The fact that the Coor's Survey approximates the boundary line which had been used by the adjoining landowners for over fifteen years adds mutual credibility to the theories. However, in light of the imprecise survey, it is the property owners' use of the Disputed Tract for such a long period of time that carries the most weight with the Court.

12. Hart owns all land up to the crop line by virtue of adverse possession and acquiescence. . . . Therefore, Roberts cannot satisfy his burden of showing that they owned the land where the trees cut in 2003 were located as a result of the operation of law as it relates to adverse possession and acquiescence. The Court concluded previously, the Miller survey was not adequate to establish by a preponderance of the evidence to establish ownership/possession for the purpose of establishing their claim to trespass.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED judgment is entered in favor of the Defendant, Hart & Sons Realty, LLC and against the Plaintiff, Leland Roberts on Roberts' Complaint seeking damages for trespass.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED judgment is entered in favor of the Defendant and Counter-claimant, Hart & Sons Realty, LLC, and against the Plaintiff and Counter-defendant, Leland Roberts on Hart's counterclaim and title is vested in Hart & Sons Realty, LLC to all land in the Disputed Tract north of a line along the full width of the Disputed tract to the edge of the crop line by virtue of acquiescence and adverse possession, more specifically described and consistent with the boundary line determined by the Coor's Survey

Id. at 25-26. Roberts now appeals.

Analysis

When, as here, a party has requested special findings of fact and conclusions thereon pursuant to Indiana Trial Rule 52(A), we apply a two-tiered standard of review. First, we must determine whether the evidence supports the findings and second, whether the findings support the judgment. S & B Const., LLC v. Old Fort, LLC, 826 N.E.2d 32, 36 (Ind. Ct. App. 2005), trans. denied. To be adequate, requested special findings must disclose a valid legal basis for the result reached by the trial court. Id. However, we may affirm the judgment on any legal theory supported by the findings. Siegel v. Williams, 818 N.E.2d 510, 515 (Ind. Ct. App. 2004). Before affirming on a legal theory supported by the findings but not espoused by the trial court, we should be confident that affirmance on such a basis is consistent with all of the trial court's findings of fact and inferences drawn from the findings. Id.

We will not disturb a trial court's findings or judgment unless they are clearly erroneous. S & B Const., 826 N.E.2d at 36. Findings of fact are clearly erroneous only if the record lacks any reasonable inference from the evidence to support them. Id. A judgment is clearly erroneous only if a review of the record leaves us with a firm conviction that a mistake has been made. Id. "We will neither reweigh evidence nor judge the credibility of witnesses, but will consider only the evidence favorable to the judgment and all reasonable inferences to be drawn therefrom." Id. Although we defer substantially to a trial court's factual findings, we do not defer to conclusions of law. Maxwell v. Maxwell, 850 N.E.2d 969, 972 (Ind. Ct. App. 2006), trans. denied. A judgment also may be clearly erroneous if the trial court has relied upon an incorrect legal standard. Id.

On appeal, Roberts does not challenge the trial court's findings and conclusions concerning the respective validity of the Miller and Coor surveys. Roberts also does not appeal the judgment against him on the trespass claim. Instead, Roberts argues that the trial court's findings and conclusions regarding adverse possession and title by acquiescence are clearly erroneous. Although Hart & Sons believes and argues that the trial court correctly ruled on the issues of adverse possession and title by acquiescence, they assert that we need not even reach those issues and may instead resolve this appeal solely upon the basis of the Coor survey. Roberts replies that it would be improper to resolve this appeal in that manner because the trial court noted some concerns that it had with the Coor survey, not just the Miller survey, and expressly ruled that Hart & Sons

was entitled to the Disputed Tract “by virtue of adverse possession and acquiescence”, and not because of the Coor survey. App. p. 25. There is, we concede, some possibility for confusion in the trial court’s findings and conclusions as to the theory or theories upon which it quieted title to the Disputed Tract in favor of Hart & Sons.

Ultimately, however, we conclude that it is appropriate to resolve this case solely upon the basis of the Coor survey and the trial court’s findings and conclusions with respect to that survey versus the Miller survey. We reiterate that we may affirm this judgment on any basis supported by the findings, regardless of whether the trial court arguably relied more heavily upon alternative theories. See Siegel, 818 N.E.2d at 515. Also, the question of the accuracy of a survey is a question of fact. Thompson v. Leeper Living Trust, 698 N.E.2d 395, 397-98 (Ind. Ct. App. 1998). This is consistent with the notion that what constitutes the legally-described boundaries of a particular tract of land is a question of law, but where those boundaries actually are located is a question of fact. Ayers v. Huddleston, 30 Ind. App. 242, 250, 66 N.E. 60, 63 (1903).

A party seeking recovery for a claim of trespass must prove two elements: first, that he or she possessed the land when the alleged trespass occurred; and second, that the defendant entered the land without a legal right to do so. KB Home Indiana Inc. v. Rockville TBD Corp., 928 N.E.2d 297, 308 (Ind. Ct. App. 2010). Here, the trial court first addressed Roberts’s trespass claim against Hart & Sons and ruled against Roberts. In doing so, it properly recognized that in order to resolve not only that claim, but also Hart & Sons’ quiet title counter-claim, it would be essential to definitively establish a

boundary line between the two properties. The trial court then proceeded to reiterate that both the Miller and the Coor surveys had some weaknesses before stating that the Miller survey was “fatally flawed” App. p. 19. The trial court relied upon the Coor survey as the sole basis for rejecting Roberts’s trespass claim, because the Coor survey had established that none of Hart & Sons’ alleged encroachments onto Roberts’s property actually encroached upon Roberts’s property at all. Ultimately, the trial court concluded that Roberts had failed to prove that he owned the Disputed Tract. Elsewhere in the trial court’s findings, it had noted what it clearly perceived as extensive and fundamental flaws in the Miller survey. With respect to the Coor survey, the trial court did find some potential flaws, and allowed for the possibility that it too was incorrect, but also stated that the Coor survey “is reasonable and has a basis in fact from the evidence” *Id.* at 18. The trial court did not use that phrase with respect to the Miller survey. Finally, the trial court expressly utilized the precise boundaries found in the Coor survey to settle the dimensions of the Hart parcel in its resolution of the quiet title claim.

Upon finding, based upon the Coor survey, that Roberts did not own the Disputed Tract, we believe it was unnecessary for the trial court to delve into the particulars of adverse possession and title by acquiescence, although we applaud the thoroughness of the trial court’s findings on those issues. There has never been any claim or evidence presented that the Disputed Tract could belong to anyone other than either Roberts or Hart & Sons. Thus, an express finding that Roberts did not own the Disputed Tract leads

inevitably to the conclusion that Hart & Sons did own it. There is no other realistic possibility.

The doctrine of adverse possession is one that “entitles a person without title to obtain ownership to a parcel of land” if the required elements of the doctrine are met. Fraley v. Minger, 829 N.E.2d 476, 486 (Ind. 2005) (emphasis added); see also Garriott v. Peters, 878 N.E.2d 431, 438 (Ind. Ct. App. 2007) (“Adverse possession is a manner in which a party may defeat a party holding record title to a parcel of land.”), trans. denied. “It is evident that two or more persons cannot hold one tract of land adversely to each other at the same time.” Marengo Cave Co. v. Ross, 212 Ind. 624, 633, 10 N.E.2d 917, 921 (1937). Taken together, these principles mean that if a party defending against a claim of adverse possession does not actually own the disputed property, then there would be nothing for the alleged adverse possessor to adversely possess; there is simply possession.

Because Hart & Sons owned the Disputed Tract by virtue of the legal description of their parcel and the Coor survey’s findings of where the boundaries of that parcel actually lay in the real world, Hart & Sons could not adversely possess the Disputed Tract. Hart & Sons simply possessed the Disputed Tract as the legal title holder of it. The other evidence of the Conservation Club’s and Hart & Sons’ longstanding use of at least part of the Disputed Tract might tend to confirm the accuracy of the Coor survey, but under the circumstances such evidence did not have to fulfill the elements of either adverse possession or title by acquiescence. In reviewing the entirety of the record, along

with the trial court's findings and conclusions and the reasonable inferences that arise from them, we are confident that it is appropriate to affirm the judgment quieting title to the Disputed Tract in favor of Hart & Sons, even if upon a slightly different theory than that espoused by the trial court.

Conclusion

In reliance upon the trial court's findings and conclusions regarding the Coor survey, we affirm the trial court's judgment quieting title to the Disputed Tract in favor of Hart & Sons.

Affirmed.

ROBB, C.J., and BRADFORD, J., concur.