ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
LARRY D. VAUGHT, JUDGE

DIVISION I

CA06-1326

June 27, 2007

TONY STEWART APPELLANT	APPEAL FROM THE SHARP COUNTY CIRCUIT COURT
V.	[CV-2005-66]
TRACY MORGAN, BONNIE MORGAN, TERRY McCLINTOCK and MITZI CASTELLI APPELLEES	HON. PHILIP GREGORY SMITH, CIRCUIT JUDGE AFFIRMED AS MODIFIED

This is an adverse-possession case. Appellant Tony Stewart has record title to a parcel of wooded pasture land in Sharp County that is contiguous, on three sides, to land owned by appellees Tracy Morgan, Bonnie Morgan, Terry McClintock, and Mitzi Castelli, who are the heirs of Clarence J. Morgan. The issue on appeal is whether the trial court's finding of fact that appellees established title to the property by adverse possession is clearly erroneous. We affirm.

Mr. Morgan's father purchased the contiguous property in 1943. Appellant and his wife acquired title to the disputed property in 2004; when they divorced, she conveyed her interest to appellant. In 2005, Mr. Morgan brought this action to quiet title to the land, alleging that he had possessed it for over fifty years. Appellant counterclaimed for ejectment. Mr. Morgan died after bringing suit, and his son Tracy was appointed special administrator

of his estate to conclude the litigation. Appellant filed a third-party petition to quiet title against appellees in 2006. Appellees counterclaimed for confirmation of their title acquired by adverse possession.

At trial, appellant testified and called Christina Donohoe, a title company employee, as a witness. Appellees presented Tracy Morgan's and Terry McClintock's testimony, along with that of several long-time neighbors and friends.

Ms. Donohoe testified that she issued a title commitment to appellant in November 2004; that he holds record title to the property; and that the taxes on the land had always been paid by the record title owner. She also said that, around 2005, Mr. Morgan came to her office and asked her if she thought he had record title; when she informed him that he did not, he said he would leave the issue of the property's ownership "up to Tracy." Ms. Donohoe said that he never mentioned a possible adverse-possession claim.

Appellant, who invested in the land for its timber, testified that he first became interested in the property eleven or twelve years ago, when it was owned by Dayle Rust. At first, he said, Mr. Rust indicated that he did not want to sell; however, in 2004, Mr. Rust called him about selling it. He stated that, to get to the parcel, one travels on the South Morgan Trail, which crosses his and appellees' property. There is a gate across the trail at the boundary of a game reserve owned by Arkansas Game and Fish Commission to the north; appellees have placed a cattle guard where the trail crosses their land. He stated that he called on Mr. Morgan soon after he bought the land to find out where the boundary line is and that Mr. Morgan, who was sick, did not feel well enough to show it to him. Appellant said that

Mr. Morgan stated that he had tried to buy the land in the past but could not "get a hold of anyone." They briefly talked about a possible sale to Mr. Morgan after appellant cut the timber, he said, but no mention was made of adverse possession. The next day, appellant testified, Tracy confronted him and his logger at the property; Tracy said that he was trespassing and that Tracy would file an adverse-possession action. Appellant testified that, although there is an old "deficient" fence, the property is not enclosed. On cross-examination, appellant admitted that, before he closed on the property, Mr. Rust told him that there had been problems with Mr. Morgan over the years and that he might claim it by adverse possession. He said that was why he obtained a title policy commitment on the property and that he probably did mention an adverse-possession problem to Ms. Donohoe. She disputed this.

Appellees presented the testimony of Tommy Taylor, who was fifty-seven at the time of trial. Mr. Taylor said that he had known Mr. Morgan for thirty-five to forty years and had ridden horses, hunted, and cut wood on the property for as long as he could remember. He stated that Mr. Morgan had run cattle and cut wood there and that he treated that piece of land no differently than he did the rest of his property.

Bob Harrison testified that he and several men from his church rented the land in question from Mr. Morgan for hunting in 1981, which they continued until four years before trial. He stated that, when they first started hunting there, Mr. Morgan drove them around the property and told them not to go on anyone else's land. He said that the land in dispute was within the area Mr. Morgan said he owned. He stated that Mr. Morgan told them that

"everything on this side of the road" was his and that they hunted everything south of the road. Mr. Harrison testified that, over twenty years before, he posted the trees with paint.

Tee Wright, aged seventy, testified that he had known the Morgans since he was ten and had spent a lot of time at their place. He described hunting and cutting wood on the land in question, which was within the Morgan fence, for forty or fifty years and said that Mr. Morgan's father had run cattle there. In those days, he said, the road was open and people used it to go between Highway 58 and the River Road.

Jimmy Cruise, aged fifty-eight, testified that he had known Mr. Morgan all his life and that he had hunted on the property with him. He said that Mr. Morgan had considered the land in dispute to be his.

Donald Honey stated that he had known Mr. Morgan since he was three years old (he was fifty-seven at trial) and had cut logs on the property with the Morgans around 1969. He said that Mr. Morgan ran cattle there and treated the property as his own. He also remembered the old trespassing signs. According to Mr. Honey, the road was not public.

Bartis Allen, who has lived in Sharp County for all of his seventy-three years, testified that he was friends with Mr. Morgan since they were children. He said that he lives "just over the hill" from the Morgans; when he and Mr. Morgan were fourteen or fifteen, they raced horses and chased cattle together on the land in dispute. He said that he had helped Mr. Morgan ride boundary fence on that property and that the Morgans' entire property was fenced. He said that the trail had, at one time, been a "through trail" but that he had heard

that it is now cabled at the far end. He believed that everything within the fence was Mr. Morgan's property.

Kenny Swetman, aged fifty-two, testified that his family had been friends with the Morgans since he was a little boy; that the property is all under one fence; and that the Morgan Trail has been closed by the Game and Fish Commission. He said that he had hunted and cut wood on the land in dispute; that he had helped the Morgans feed cattle there; and that, about forty years ago, his father bought crossties made from timber harvested there from Mr. Morgan and his brother Carl.

Tracy Morgan testified that he has lived on the old home place for all of his forty-six years. He said that the fence was there in 1943 when his grandfather bought the property, and that the fence had always been considered the property line. He testified that all of the Morgan place, including the land in dispute, is under fence; that the fence held cattle and horses; that the property has been leased to hunters since about 1980; and that the only way to get to the property in dispute is to come by his house and go across the cattle guard. Tracy said that they had run cattle there since he was fifteen. At one time, he said, there was a cross-fence to let one side of the pasture rejuvenate but that they abandoned it when they reduced the herd to a manageable size. Most of the forty acres in dispute is wooded, and was last logged in 1992, he said. Tracy admitted that neither he nor his grandfather had paid taxes on the land in dispute; however, his grandfather gave permission for a power line across that land for the benefit of a neighbor in the early 1970s. Although Morgan Trail is not gated at the Morgan end, he said that "[i]f you drive up there, . . . you're going to have one of us right

on your hind end to see what you're doing." He stated that his grandfather had hogs on the land at one time; now, he had fourteen horses and twenty-five cows on their farm, including the area in dispute, which is enclosed with the rest of the Morgans' property. Tracy stated that his father had always said that the family farm was 700 acres, more or less. This would include the parcel in question. According to Tracy, his father informed a realtor ten or twelve years ago that he claimed the property and that he did the same thing when appellant first contacted Mr. Rust twelve years ago. On another occasion when Bill Higginbotham had title to the property in dispute, he said, his father told Mr. Higginbotham's surveyors that they were surveying his property. Mr. Morgan's daughter, Terry McClintock, also testified about the cross-fence and said that her testimony about the use of the property would be the same as Tracy's.

Joe Stidman, the Sharp County Judge, testified that the road had probably been open to the public at one time for access to Rock Creek but it was not a county road and is now closed at one end.

Mr. Morgan's sworn statement was taken on January 26, 2005, before the lawsuit was filed, because he had incurable lung cancer and was under hospice care. This statement was admitted into evidence. He stated that the fence was there when his father bought their property in 1943 and that he was a grown man before he heard about a "discrepancy." Mr. Morgan said that, about twenty-five years ago, he saw an attorney, Lohnes Tiner, about the matter; Mr. Tiner advised him to let the other folks "make the move" and then make his adverse-possession claim. Several times, he said, he tried to pay the taxes on the land in

dispute but "they" refused to take the money. He stated that the property in question is all under fence with his other land and that one cannot get to it without going through his property. Mr. Morgan said that his father took possession of the land in dispute in 1943 and that his ownership and use of it was never challenged; after his father died in 1980, he took full charge of it, using it openly, notoriously, and adversely to the owner ever since. In 1951, he said, he bought his first little herd of cattle to run there. He also said that they had openly cut timber and grazed cattle there and, about twenty years ago, he leased the property to hunters.

Mr. Morgan described his encounters with others on the property as follows:

> My daddy most definitely claimed the land before me. I have never had any contacts with people who may be claiming record title to this or anybody on their behalf. I've never, never personally contacted the man in no way by telephone, or, in no way. There has been somebody on their behalf that came out and checked the property and found out that I was claiming the property. King and Rhodes Realty. Ron Rhodes, they sent Ron Rhodes out to attempt to sell it when this man Rudd got it. And when they passed my house or anybody passes my house I holler to see what they, what they're doing because the road dead ends, and I want to know what goes on when anybody passes my house. And I followed them up there to this property, and Ron told me what they were there for. He was attempting to sell the land. And I told them in a nice way that I claimed that land. I didn't have the paper on it but the land I claimed and before anybody took over there would be court action. He accepted that. He said, you'll not find me back on this property again. And, and I haven't.
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> I'm familiar with a fellow who's now dead by the name of Bill Higginbotham. I've known Bill all my life. I had an occasion to have some discussions with him about the land. I was up there one time when he was surveying it, and I, I told him that he was surveying my land. I said, it's all right. I'm going to permit you to go ahead and survey my land. It's, I'd like to know just how it lays anyway. But it, its is most definitely my land that you are surveying right now. And they gathered up their equipment and left.

> That was probably fifteen years ago. That is a guess. I don't know who he purchased it from. But anyway, when he came out there it would have been probably some time during the time that he purported to have bought that land. I'm a bit throwed right there, but I think we're right. At least fifteen or maybe longer years ago, I told a person that I've known to be claiming the land that it was my land and I was claiming it. I never heard anymore about it after that. No one ever come out and tried to fence it. No one ever came out and objected to me running cattle on it. No one ever objected to me cutting wood on it. Nobody ever objected to me leasing it out to any of the deer hunters. I've used that land open and notoriously and adverse to the owner for, ever since, I've been in charge of the property.

The trial court found that appellant and his predecessors were the record title owners who had paid taxes on the property. Finding that appellees had enclosed the land under fence with their other property, along the north side of Morgan Trail, and used it as their own for over fifty years, the trial court stated that they had established title by adverse possession through "open, notorious, exclusive, continuing and hostile possession," as evidenced by the following acts of dominion:

a. Running live stock on the property in excess of 50 years.

b. Riding and allowing guests to ride horses or otherwise pursuing cattle farming and other recreational riding for at least 50 years.

c. Hunting on the property and allowing others to hunt on the property for at least 50 years, including collecting rent for hunting rights from several persons in excess of 20 years.

d. Granting permission for construction of a power line across the tract to provide service to a neighboring land owner.

e. Cutting and selling timber off the property.

f. Posting the property as their own with recognized purple paint for more than 20 years.

The trial court described the land appellees own by adverse possession as "all of that part of the Southeast Quarter of the Southeast Quarter of Section 9, Township 18 North, Range 4

West of the 5th P.M. of Sharp County, Arkansas lying South of the fence that runs East and West across the Northern Border of said property . . . ." Appellant filed a timely notice of appeal from that order.

Appellant challenges the sufficiency of the evidence, arguing that appellees failed to establish all of the elements of an adverse-possession claim. We will not reverse a trial court's finding regarding adverse possession unless it is clearly erroneous. *Dillard v. Pickler*, 68 Ark. App. 256, 6 S.W.3d 128 (1999). In reviewing a trial court's findings with regard to adverse possession, due deference is given to the court's superior position to determine the credibility of the witnesses and the weight to accorded their testimony. *Belcher v. Stone*, 67 Ark. App. 256, 998 S.W.2d 759 (1999).

Adverse possession is governed by both common and statutory law. To prove the common-law elements of adverse possession, a claimant must show that he has been in possession of the property continuously for more than seven years and that his possession has been visible, notorious, distinct, exclusive, hostile, and with the intent to hold against the true owner. *Trice v. Trice*, 91 Ark. App. 309, 210 S.W.3d 147 (2005). It is ordinarily sufficient proof of adverse possession that the claimant's acts of ownership are of such a nature as one would exercise over his own property and would not exercise over the land of another. *Id.* A claimant may "tack on" the adverse-possession time of an immediate predecessor in title. *Id.* For possession to be adverse, it is necessary that it be hostile only in the sense that it is under a claim of right, title, or ownership as distinguished from possession in conformity with, recognition of, or subservience to the superior right of the holder of title to the land.

Fulkerson v. Van Buren, 60 Ark. App. 257, 961 S.W.2d 780 (1998). Whether possession is adverse to the true owner is a question of fact. *Trice*, 91 Ark. App. at 316, 210 S.W.3d at 152.

In 1995, the General Assembly added, as a requirement for proof of adverse possession, that the claimant prove color of title and payment of taxes on the subject property or contiguous property for seven years. *See* Ark. Code Ann. § 18-11-106 (Supp. 2005). However, if the claimant's rights to the disputed property vested before 1995, he need not comply with the 1995 statutory change. *See Schrader v. Schrader*, 81 Ark. App. 343, 101 S.W.3d 873 (2003). The statute does not apply here because of the many decades of adverse use by appellees' grandfather and father before 1995.

Appellant argues that appellees did not establish that their possession of the land was with an intent to hold the property against the true owner. As support for this position, appellant relies on Mr. Morgan's visit to Ms. Donohoe in 2005, when he asked her opinion about who owned record title. Appellant also argues that Mr. Morgan's behavior, when appellant went to see him after buying the property, is evidence that Mr. Morgan did not intend to hold the land against the true owner; according to appellant, Mr. Morgan asked him what he wanted for the land but did not respond to appellant's quoted price and did not tell appellant that he owned the property. We disagree with appellant. Although this evidence is relevant and can be considered by the finder of fact, after an individual obtains title to land by adverse possession, his recognition that another may have a claim to the land does not divest title to the land from the adverse possessor nor does this recognition estop the adverse possessor from asserting title. *See McLaughlin v. Sicard*, 63 Ark. App. 212, 977 S.W.2d 1 (1998). In light of the evidence that Mr. Morgan's grandfather and father established adverse

possession of the property decades before these conversations, this testimony does not warrant reversal.

Appellant also contends that appellees failed to establish visible or open use of the land because the use of wild, unenclosed, and unimproved land is presumed to be permissive. The obvious flaw in this argument is that the trial court found that the land in question is enclosed within a fence, along with appellees' other property. The evidence to support that finding is overwhelming. The fact that the fence may have deteriorated, as appellant testified, does not necessarily mean that the property is not enclosed; the question is whether the enclosure is sufficient to put the record title owner on notice that his land is held under an adverse claim of ownership. *Boyd v. Roberts*, ___ Ark. App. ___, ___ S.W.3d ___ (April 25, 2007). As for the part of appellant's property that lies north of the fence, the trial court did not quiet title to it in appellees, and appellees do not challenge that finding in this appeal.

Appellant also points out that, at one time, the public could use the trail and that only a cattle guard, instead of a gate, is placed at one end of it. He notes the testimony that appellees' friends and neighbors used the property. Thus, he argues, appellees' use of the property was not exclusive. We disagree. Although the trail itself was probably used by the public in the past, the Morgan family's use of the pasture and timber land south of the fence was exclusive. The public's use of land that is adversely possessed does not render the adverse possessor's use non-exclusive, so long as the public's use and the adverse possessor's use of the land are not the same. *Anderson v. Holliday*, 65 Ark. App. 165, 986 S.W.2d 116 (1999). The general public did not run livestock on the property. Also, one easily infers from the

testimony of the Morgans' friends and neighbors that their use of the property for hunting, riding, and cutting wood was with the Morgans' permission.

Appellant further argues that Mr. Morgan did not believe that he owned the land in dispute, noting his remark that his deer-hunter lessees did not know that he did not own the land. This remark, however, is taken out of the following context of Mr. Morgan's statement:

> And I've leased it for, I believe, twenty or twenty-one years to some hunters that don't know this day right now. They don't know that I don't own the land. They think I own the land, and I never, I never told them of, well, what it is as far as I'm concerned my land. I am claiming that land and have claimed that land for all of these years.

This testimony is consistent with Mr. Harrison's testimony about how Mr. Morgan showed the hunters the boundaries of his land.

In conclusion, this is a textbook case of adverse possession. Through their running of livestock, hunting, and cutting of timber in the disputed area, which was enclosed with the rest of their property, the Morgans gave constructive notice that they considered the property theirs since 1943. At least as far back as Mr. Higginbotham's ownership of the property in the 1970s, Mr. Morgan gave actual notice to the record title owner that he claimed it. The trial court's finding that appellees established adverse possession of the property is not clearly erroneous.

The trial court described the land appellees own by adverse possession as "all of that part of the Southeast Quarter of the Southeast Quarter of Section 9, Township 18 North, Range 4 West of the 5th P.M. of Sharp County, Arkansas lying South of the fence that runs East and West across the Northern Border of said property . . . ." This description is not sufficiently specific because it does not describe the fence line so that it may be identified soley

by reference to the decree. In *Petrus v. Nature Conservancy*, 330 Ark. 722, 957 S.W.2d (1997), the supreme court dismissed an appeal for lack of a final order where the decree did not identify the boundary lines of the disputed property but ordered a future survey to establish them. In this case, however, no unresolved issue remains. As in *Jennings v. Burford*, 60 Ark. App. 27, 958 S.W.2d 12 (1997), this lack of specificity was a mere omission or oversight. Therefore, pursuant to Arkansas Rule of Civil Procedure 60(b), we grant leave to the circuit court to amend the decree by adding a more specific description of the boundary line between the parties' land.

Affirmed as modified.

BIRD and BAKER, JJ., agree.