RENDERED: NOVEMBER 26, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001421-MR

WILLIAM F. ALLARD, D.M.D;
AND FRANCES I. ALLARD — APPELLANTS

v.

APPEAL FROM HANCOCK CIRCUIT COURT
HONORABLE MICHAEL L. MCKOWN, JUDGE
ACTION NO. 09-CI-00097

WINCHELL FARMS, INC.;
CHARLES F. WINCHELL; AND
DAVID C. WINCHELL — APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; JONES AND VANMETER, JUDGES.

ACREE, CHIEF JUDGE: Appellants, William F. Allard, DMD, and Frances I. Allard, appeal from the Hancock Circuit Court's April 27, 2012 Findings of Fact, Conclusions of Law and Judgment wherein the circuit court established several

boundary lines between the parties' respective properties and found against the Allards as to their claims of trespass and adverse possession. For the foregoing reasons, we affirm in part, reverse in part, and remand for additional proceedings consistent with this opinion.

I. Facts and Procedure

The Allards and the Winchells own adjoining properties in Hancock County, Kentucky. The Allards' property lies to the north of the Winchells' property. The border between the Allards and the Winchells consists of five segments, designated as boundary lines 1 – 5.

The Allard property is comprised of two tracts: a 93-acre tract located on the east side of Muddy Gut Ditch owned by Appellant William F. Allard (Allard Tract 1); and a 72-acre tract located on the west side of Muddy Gut Ditch owned in fee simple by William, subject to a life estate of his mother, Appellant Frances I. Allard (Allard Tract 2). William's father, John F. Allard, originally purchased both tracts from R.C. Beauchamp in 1951.

The Winchell property also consists of two tracts: a 173.47-acre tract currently owned by Appellees Charles F. Winchell and David C. Winchell (Winchell Tract 1); and a 116.39-acre tract owned by Charles F. Winchell (Winchell Tract 2). Charles originally purchased Winchell Tract 1 in 1992. Charles conveyed the property to Appellee Winchell Farms, Inc., who owned it from December 2003 until February 2009, at which time it conveyed the property

to Charles and David. Similarly, Charles purchased Winchell Tract 2 in 2008 from Jamie, Noel, and Brenda Brantley.

Winchell Tract 1 shares its northern and western boundaries (Line 1, Line 2, and Line 3) with Allard Tract 1. Winchell Tract 2 shares its northern boundary (Line 4 and Line 5) with Allard Tract 2.

The dispute between the parties started in October 2008 when Winchell Farms allegedly cleared trees and vegetation along the southwest part of Line 1 and along part of Line 3. When William Allard and David Winchell met to discuss the alleged trespass, they quickly realized they disagreed as to the location of the various boundary lines. In the Spring of 2009, the Winchells allegedly trespassed a second time when they removed fence posts, part of a barbed wire fence, trees, and vegetation along Line 4. The third and final trespass occurred on or about November 2009 when the Winchells cleared trees and vegetation adjacent to Line 3.

On September 24, 2009, the Allards filed suit against the Winchells. In their complaint, as amended on May 7, 2010, the Allards requested a declaratory judgment be entered specifying the boundary lines between the Allard and Winchell properties. The Allards also asserted a claim for adverse possession of a triangular tract of land located near the junction of Lines 3 and 4; a claim for adverse possession of a strip of land along Line 4; three trespass claims, for which they requested compensatory and punitive damages; and they sought an injunction preventing further trespass by the Winchells. The Winchells denied the allegations

and counterclaimed that they adversely possessed a strip of land west (on the Allards' side) of Line 2.

A bench trial took place on January 5-6, 2012. Joseph Simmons, a land surveyor, testified on the Allards' behalf, while Tim Smith, also a land surveyor, testified in favor of the Winchells. Simmons and Smith each provided a survey plat. They disagreed, to some extent, as to the placement of each line; their testimony will be more fully recounted in the course of our analysis. In addition to the expert testimony provided by Simmons and Smith, each party testified on his own behalf, and the Winchells submitted testimony from a host of lay witnesses.

The parties spent considerable time at trial discussing the existence and placement of a landmark known as Goose Pond Ditch, which runs along Line 2. The parties presented deeds tracing the ownership of the Allard and Winchell properties to 1882 and 1885, respectively. All of the Allard deeds from 1882 to the present refer to the middle of Goose Pond Ditch as the boundary line (Line 2) between the Allard and Winchell properties. Conversely, none of the Winchell deeds, except for the 1885 deed, reference Goose Pond Ditch as the boundary for Line 2. Furthermore, William Allard testified Goose Pond Ditch has existed, in its current location, since his family purchased the Allard property in 1951, while Charles and David Winchell both testified that, when Charles purchased Winchell Tract 1 in 1992, no ditch existed. Charles and David claimed that they created Goose Pond Ditch in 1994. Likewise, George Dean testified that, when he owned

Winchell Tract 1 from 1975 until 1987, there was no ditch between the Allard and Winchell properties.

The parties also submitted evidence of prior surveys conducted along the disputed boundary lines. In 1974, surveyor Charles Ranney completed a survey of Winchell Tract 1, which included Lines 1 – 3. During the course of his survey, Ranney placed several survey pins. Smith also conducted at least three prior surveys of the Winchell property, the first in 1992, the second in 2008, and the third in 2010. Like Ranney, Smith also placed pins at various points.

The circuit court entered its findings of fact, conclusions of law and judgment on April 27, 2012. The circuit court determined that the various boundaries would be defined and established by using Smith's survey lines for Lines 1 and 2, and Simmons's survey lines for Lines 3, 4, and 5. The circuit court also concluded that the Winchells trespassed upon the Allards' property along Line 3 in 2008 and 2009, thereby destroying five trees, but found the Allards failed to sustain their burden of proof regarding the remaining two trespass claims. Finally, the Court concluded that neither party had satisfied their burden of proof as to their respective adverse-possession claims, and denied the Allards' request for injunctive relief prohibiting future trespasses.

The circuit court largely denied the Allards' post-judgment motion.[1] The Allards promptly appealed.

[1] The circuit court granted the Allards' post-judgment motion only to amend a clerical error in the property and line description prepared by the circuit court.

II. Standard of Review

Our review of a circuit court's findings of fact following a bench trial is to determine whether those findings are clearly erroneous. Kentucky Rules of Civil Procedure (CR) 52.01. This rule applies with equal force to matters involving boundary disputes. *Croley v. Alsip*, 602 S.W.2d 418, 419 (Ky. 1980). Factual findings are clearly erroneous if unsupported by substantial evidence. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). Substantial evidence is "some evidence of substance and relevant consequence, having fitness to induce conviction in the minds of reasonable people." *Abel Verdon Const. v. Riveria*, 348 S.W.3d 749, 753 (Ky. 2011). Reviewing courts are prohibited from disturbing the circuit court's factual findings that are supported by substantial evidence, despite whether a contrary conclusion might have been reached. *Moore,* 110 S.W.3d at 354. We defer to a significant degree to the circuit court, for it had the opportunity to observe, scrutinize and assess the credibility of witnesses. CR 52.01; *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998).

Notwithstanding the deference due the circuit court's factual findings, its conclusions of law, reached after making its findings, are reviewed *de novo*. *Hoskins v. Beatty*, 343 S.W.3d 639, 641 (Ky. App. 2011).

III. Analysis

The Allards present four arguments for our consideration. They claim the circuit court: (a) incorrectly located Lines 1 and 2; (b) incorrectly located Line 4 and, in turn, erroneously denied their adverse-possession claim along Line 4; (c)

should have found that the Allards adversely possessed the cropland in the triangular tract of land located near the junction of Lines 3 and 4; and (d) should have found that the Winchells trespassed across Line 1 in October 2008. The Allards do not take issue with the circuit court's placement of Lines 3 and 5. We will discuss Lines 3 and 5 only to the extent needed to explain the circuit court's placement of Lines 1, 2, and 4.

A. Boundary Lines 1 and 2

The Allards contend the circuit court erroneously relied on the testimony presented by Smith, rather than the testimony presented by Simmons, as to the placement of Lines 1 and 2. Specifically, the Allards argue that the circuit court's decision to accept Smith's starting point for Line 2 is not supported by substantial evidence. Inherent in the Allards' argument is their belief that Line 2 must first be accurately located before Line 1 can be accurately placed.

The parties agree that the northeast corner of Line 1, which is the northern end of the entire boundary line between the parties' properties, is located at the "Fister pin," which is a survey pin placed by Ben D. Fister during the survey of an adjoining property not owned by any of the parties to this action. The parties also agree, for purposes of this appeal, upon the southern end point of Line 2. Thus, the dispute centers on the intersection between Lines 1 and 2, and the exact path and length of each line.

The Allards argue that the location of Line 1 depends upon the exact location of the other four boundary lines, most particularly Line 2. The Allards'

expert witness, Simmons, testified he set Line 2 before locating Line 1. In so doing, Simmons turned to an 1882 Allard-land deed and an 1885 Winchell-land deed, both of which included a call that stated that Line 2 was to run "down the middle of Goose Pond Ditch" for approximately 1544.81 feet. Simmons explained he started at the southern end of Line 2 and travelled north directly through the existing ditch for 1544.81 feet, at which point Line 2 stopped. Simmons then placed Line 1 by starting the northern terminus of Line 2 and traveling northeast in a straight line to the Fister pin. Simmons concluded Line 1 was 1,119 feet in length. The most recent deed conveying the property from Frances Allard to William Allard stated Line 1 was approximately 1,056 feet (64 poles) in length.

Conversely, Smith located Line 1 first. Smith testified he used both the existing tree line and fence remnants found in two different trees to guide the placement of Line 1. Smith viewed the tree line and fence remnants as guiding monuments – though not referenced in the Winchell deeds – and, because Line 1 had more monuments than Line 2, placed Line 1 first. Smith explained he started at the Fister pin and then travelled southwest, following the tree line and through the trees with fence remnants, until he reached the existing ditch line. Smith's survey resulted in Line 1 ending very close to a pin placed by Ranney in 1974. Smith determined Line 1 was approximately 1,100 feet in length.

Smith then placed Line 2. Smith testified he found no evidence indicating that the current ditch, which the parties continue to call "Goose Pond Ditch," is the original Goose Pond Ditch referenced in the 1882 and 1885 deeds.

Smith believed the Winchells' statements that they created Goose Pond Ditch in 1994. Because of this, Smith viewed the calls of the 1882 and 1885 deeds, which again called for Line 2 to run down the center of Goose Pond Ditch, to no longer be accurate. Consequently, Smith used pipe monuments placed by Ranney in 1974 along with courses, bearings, and distances to locate Line 2. Ultimately, Smith testified he started at the terminus of Line 1 and, using courses and distances, travelled south to the agreed upon end point of Line 2. Smith found Line 2 to be 1,573 feet in length. Due to the placement of Smith's Line 1, which is northwest of Simmons's Line 1, Smith's Line 2 is approximately 29 feet longer in length than Simmons's Line 2.

In determining the location of property boundary lines, natural and permanent monuments (such as roads, rivers, or trees) take precedence, for they "are the most satisfactory evidence and control all other means of description." *Metropolitan Life Ins. Co. v. Hoskins*, 273 Ky. 563, 117 S.W.2d 180, 182 (1937). Absent natural and permanent monuments, artificial marks or monuments (such as iron pins or fences), courses and directions (in degrees and seconds), "distances, and area follow in the order named, area being the weakest of all the means of description." *Id.*; *see also Wagers v. Wagers*, 238 S.W.2d 125, 126 (Ky. 1951). Furthermore, "[a] fact-finder may choose between the conflicting opinions of surveyors as long as the opinion relied upon is not based upon erroneous assumptions or fails to take into account established factors." *Webb v. Compton*,

98 S.W.3d 513, 517 (Ky. App. 2002)(quoting *Howard v. Kingmont Oil Co.*, 729 S.W.2d 183, 184-85 (Ky. App. 1987)).

We disagree with the Allards' assertion that the circuit court was obligated to set Line 2 before placing Line 1. The Allards argue that, because an ancient, natural monument, *i.e.*, Goose Pond Ditch, exists to direct the location of Line 2, Line 2 must be placed before locating Line 1. We are not persuaded.

The parties agree that none of the ancient deeds included natural monuments to guide the placement of Line 1. Similarly, the only natural monument to guide the placement of Line 2 is Goose Pond Ditch. At trial, the parties hotly contested whether the Goose Pond Ditch referenced in the 1882 and 1885 deeds is the same Goose Pond Ditch that currently exists. William testified that he remembered Goose Pond Ditch always being there; the Winchells both testified that they constructed Goose Pond Ditch, as it currently exists, in 1994. In its order, the circuit court made a specific and well-supported factual finding that "the ditch used by Simmons in conducting his survey is not 'Goose Pond Ditch' as described in the Allards' deed." (R. at 307). The circuit court explained:

> William F. Allard testified that from 1979 – 1988 he lived in Union County, Kentucky. He further testified that from 1988 until 1998 he lived in Saudi Arabia, and that from 1998 until 2005 he lived in Goodlettsville, TN. The Court finds that it is doubtful that William F. Allard was present to verify whether "Goose Pond Ditch" existed during those time frames, and specifically whether "Goose Pond Ditch" existed in 1992 when the Winchells purchased the property.

The Court believes the Winchells' testimony that no "Goose Pond Ditch" existed when they purchased the property in 1992. Specifically, the Court finds that the Winchells constructed a ditch that runs close to the previous location of Goose Pond Ditch and the boundary line at line two (2) in 1994. The Court finds this testimony to be of particular importance. If the ditch known as "Goose Pond Ditch" had existed in 1994, why would the Winchells have constructed a new ditch? Simply, the answer is that "Goose Pond Ditch" did not exist in 1994.

Further, the Court believes the testimony of Mr. George Dean, who owned the Winchells' property from 1975 until 1987. Mr. Dean testified that he did not recall a ditch existing along line two (2) when he owned the property. . . . Additionally, the deed conveying his land to Mr. Dean in 1975 does not mention "Goose Pond Ditch". Accordingly, the Court believes that "Goose Pond Ditch" did not exist in 1975.

The deed conveying the Winchells' property to Mr. Dean used a survey completed by a surveyor named Charles Ranney. The survey was completed in 1974. Part of the Ranney survey was completed along line two (2). At no time does the Ranney survey mention a ditch or "Goose Pond Ditch" in the location around line two (2). Instead, Ranney placed pipe monuments at each end of what he surveyed to be line two (2). The Court believes that Ranney did not mention "Goose Pond Ditch" and placed the monuments along line two (2) in 1974 because the "Goose Pond Ditch" did not exist in 1974.

. . . .

The Court cannot say for certain when the "Goose Pond Ditch" referred to in the 1882, 1885, and subsequent Allard deeds ceased to exist, but the Court does note that the land in dispute is located very close to the Ohio River. The Ohio River levels frequently raise and flood into this land, which is reflected by the testimony of the parties that this land area has been, at least at times, a part of a wetlands conservation project. The Court

> believes that the "Goose Pond Ditch" may have been washed away by flood waters, or that the topography of the land has changed by other natural causes. The Court finds, however, that no adequate evidence has been presented to support a finding that the 1994 ditch constructed by the Winchells is the same ditch, or located in the exact same location, as the "Goose Pond Ditch".

(R. at 308 – 311) (footnotes omitted). The circuit court's factual finding is certainly supported by substantial evidence. We decline to disturb it. Moreover, the circuit court's decision to disregard the reference to Goose Pond Ditch in the calls of the ancient deeds certainly comports with Kentucky law, because "natural objects cannot prevail when they are doubtful, and in that case recourse is had to artificial marks or monuments or other calls of an inferior degree of accuracy." *Duff v. Fordson Coal Co.*, 298 Ky. 411, 416, 182 S.W.2d 955, 957 (1944).

The Allards further argue that Smith's testimony regarding the placement of Line 2 cannot possibly constitute substantial evidence to justify the circuit court's decision because Smith, without justification, ignored and disregarded the distance for Line 2 specified in the 1882 and 1885 deeds. Again, we are not persuaded.

As previously stated, none of the deeds contained in the record include natural and permanent monuments to direct the placement of Line 1. Smith explained he used artificial marks (*i.e.*, the existing tree line and fence remnants), *albeit* not described in the deeds, coupled with courses and distances to place Line 1. On the other hand, Simmons testified he established Line 1 by simply travelling in a straight line from the terminus of Line 2 to the Fister pin. Admittedly, neither

approach comports perfectly with established surveying principles. However, as between the competing expert approaches, the circuit court found Smith's approach more compelling.

Smith's placement of Line 1 affected his placement of Line 2. Smith, again, used the courses and bearings in the various deeds, along with several artificial monuments, *i.e.*, the pipe monuments placed by Ranney in 1974, to locate Line 2. To intersect with both Lines 1 and 3 at the appropriate places, Smith found Line 2 to be slightly longer than the distance called for in the ancient deeds. The record is clear that Smith did not casually disregard the distance of Line 2 specified in the 1882 and 1885 deeds. Instead, he used artificial monuments and courses and bearings – all of which have priority over distance – to guide his placement of Line 2. *Hoskins*, 117 S.W.2d at 182.

Furthermore, while Simmons complied with the deed distance for Line 2, he disregarded the deed distance for Line 1. The Allard deeds call for Line 1 to be 1,056 feet long. However, for Simmons to intersect Lines 1 and 2, he had to extend Line 1 an additional 63 feet, resulting in the total length of Line 1 being 1,119 feet. As noted by the circuit court in its order, "[t]he five lines located by the Court must, by necessity, intersect at certain points. The Court has found the location of all the lines, and found it necessary to lengthen/shorten the respective lines in order that they would intersect at the appropriate corners." (R. at 402).

In the case of a boundary line dispute there are sure to be conflicting opinions and evidence. It is the circuit court's task, as the fact-finder, to sort it out.

Ultimately, the circuit court here was faced with competing expert opinions and approaches, and it had to choose whom to believe. In its order, the circuit court explained it found Smith's approach more appropriate, and his placement of Lines 1 and 2 more accurate. The circuit court was free to believe Smith's testimony, as it did, and to accept his placement of Lines 1 and 2. The Allards have presented no grounds upon which to disturb the circuit court's findings. Accordingly, we find the circuit court did not err in determining Lines 1 and 2 in the manner that it did. On this issue, we affirm.

B. Boundary Line 4 and The Allards' Adverse-Possession Claim

The Allards next assert the circuit court incorrectly located Line 4, and erroneously concluded that they failed to carry their burden of proof with regards to their adverse-possession claim.

The circuit court accepted Simmons's survey and testimony as to the location of Line 4. Notably, Simmons testified as to the boundary line of record, using a natural monument to guide the placement of the line. The Allards argue they acquired additional land – between the boundary line of record and an old fence and possession land – by adverse possession. Consequently, the Allards assert the circuit court erred when it failed to locate Line 4 at the fence and possession line.

Before discussing Line 4, we must first briefly explain the location of Line 3. The circuit court adopted Simmons's placement of Line 3. Simmons testified Line 3 started at the terminus of Line 2 and ran southwest 1,470 feet to the

"1992 Smith pin," a pin placed by Smith during his survey of the Winchell property in 1992.

Simmons then testified as to the placement of Line 4. Simmons explained that the 1882 Allard deed and the 1885 Winchell deed both reference a white oak tree as a natural monument guiding the placement of Line 4. Simmons located the white oak approximately 1600 feet northwest of the intersection of Lines 4 and 5. Simmons then, using courses and distances, ran Line 4 southeast to the point where Lines 4 and 5 intersected, and then continued southeast to the 1992 Smith pin, thereby connecting Line 4 to Line 3. Smith agreed with Simmons's placement of Line 4.

William Allard, however, disagreed with his own expert witness as to the location of Line 4. William testified he thought Line 4 should track the existing fence line, which he claims his father erected in 1951. Williams further claims, no matter where the actual boundary is located, he owns the property up to the fence by adverse possession.

We must first establish the boundary line of record, *i.e.*, the deed line, before determining whether the Allards acquired *additional* property by adverse possession, which in turn may alter the location of Line 4.

The circuit court concluded that the actual boundary line, as described in the various Allard and Winchell deeds, does not follow the fence line, but tracks the deed line, as established by Simmons. We agree. The white oak tree, as described in the ancient 1882 and 1885 deeds, was in existence at the time all of

the surveys were conducted and the subsequent deeds executed. It is a natural monument that takes precedence over the fence line, an artificial monument that came into existence in 1951. *See Hoskins*, 117 S.W.2d at 182 ("[T]he general rule is that natural and permanent monuments are the most satisfactory evidence and control all other means of description."). Simmons (and Smith) properly utilized the white oak in establishing Line 4. It was fully within the circuit court's authority, as the finder of fact, to rely on Simmons's expert opinion. Accordingly, we find the circuit court properly adopted Simmons's opinion as to the initial location of Line 4.

The question then remains whether the Allards acquired the property between Line 4 and the fence by means of adverse possession. Adverse-possession law in Kentucky is clear.

> In order to establish title through adverse possession, a claimant must show possession of disputed property under a claim of right that is hostile to the title owner's interest. Further, the possession must be shown to be actual, open and notorious, exclusive, and continuous for a period of fifteen years.

McAlpin v. Bailey, 376 S.W.3d 613, 618 (Ky. App. 2012) (citation omitted). A claimant must prove these elements by clear and convincing evidence. *Moore v. Stills*, 307 S.W.3d 71, 78 (Ky. 2010). The absence of even one element will cause an adverse-possession claim to fail. *See id.*

In its order denying the Allards' motion for post-judgment relief, the circuit court explained that it "was not convinced that adverse possession was

shown by [the Allards] with regard to this line, as no hostile intention was shown. Furthermore, actual and continuous use of the property for the statutory period was not shown." (R. at 403). The Allards argue the circuit court's decision is not supported by substantial evidence. They spend considerable time in their brief refuting the circuit court's factual finding that "the old fence line [along Line 4] is down and apparently has been down for several years." As is to be expected, the record contains conflicting evidence. We have reviewed that evidence and found substantial evidence to support the circuit court's finding. Specifically, Simmons's survey reveals only a portion (37%) of the fence is actually standing. The remainder of the "fence" consists only of standing and fallen rotted wooden posts. Simmons testified there is not a continuous fence near Line 4, and that there were several down fence posts lying near Line 4. Similarly, Noel Brantley, whose family previously owned Winchell Tract 2, testified that the fence near Line 4 "has always been there" but it is an old fence that is only half standing. Brantley explained that, when he lived in the area between 1982 and 1992, the fence was in such a dilapidated state that it could not hold livestock, such as cattle.

The Allards also direct us to Kentucky cases indicating that a fence in a bad state of disrepair does not negate a party's claim of adverse possession. *See Mudwilder v. Claxton*, 301 S.W.2d 3, 4 (Ky. 1957) (explaining, with respect to a claim for adverse possession, "[t]he condition of the fence is relatively unimportant, so long as it is a well-marked boundary"); *Newman v. Sharp*, 248 S.W.2d 413, 415 (Ky. 1952). We agree it is not the condition of the fence, but its

existence that is the crucial factor here. No one disputes the fence's existence. The fence, no matter its condition, is certainly evidence of the Allards' hostile intent to hold all the property enclosed by the fence as their own. *See Appalachian Regional Healthcare, Inc. v. Royal Crown Bottling Co.*, Inc., 824 S.W.2d 878, 880 (Ky. 1992) (noting that physical improvements to the property, such as fences and buildings, demonstrate the possessor's intent to adversely hold the property); *Tartar v. Tucker*, 280 S.W.2d 150 (Ky. 1955) (even when an occupant obtains possession of land under the mistaken belief that the property is his, if he conveys no intention of surrendering the disputed property, he is, in fact, holding the property hostile to the title owners' interest).

A claimant's hostile possession of property is not enough to sustain a claim of adverse possession. That possession must also be actual and continuous for the requisite fifteen-year period. *McAlpin*, 376 S.W.3d at 618. As explained in *Thompson v. Ratcliff*, 245 S.W.2d 592 (Ky. 1952), the element of continuous possession "does not mean that the disseizor in person need be present on the premises at all times." *Id.* at 593. Rather, the important consideration is whether the claimant continues to assert "dominion over the property." *Id.* "Kentucky law has long rejected adverse possession claims based on the sporadic or insubstantial use of another's property." *Moore v. Stills*, 307 S.W.3d 71, 83 (Ky. 2010).

As evidence of their actual and continuous possession, William testified that: (i) his father erected the fence along Line 4 in 1951; (ii) he maintained that fence, at least for a period of time; and (iii) his family has farmed

up to the fence since 1951. William also pointed to PVA photographs, which he thought supported his testimony that his family continually farmed up to the fence line. Further, Noel Brantley, the Winchells' predecessor-in-title, testified that he thought the fence was the boundary line when he lived on the property from 1982 to 1992, and Smith, during the course of his testimony, often referred to the fence as the "possession line."

Despite this evidence, the circuit court was not convinced. The circuit court found William's testimony suspect, and it was certainly within the circuit court's authority to reject it. Moreover, the PVA photographs are less than ideal depictions of the farming activity William claims they represent; they cannot be considered dispositive evidence that the Allards actually farmed up to the fence line. We agree with the Allards that the fence constitutes some evidence of their actual and continuous possession of the property. However, at some point between 1951 and 1982 that fence fell into disrepair; it was reasonable for the circuit court to infer from this that the Allards no longer sought to assert dominion over the property.

It was the Allards' burden to prove each and every element of adverse possession by clear and convincing evidence. The circuit court was not convinced of the Allards' actual and continuous use of the property up to the fence line for the requisite statutory period. We have said it before, but feel compelled to say it again: "Regardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding, 'due regard shall

be given to the opportunity of the trial court to judge the credibility of witnesses' because judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court." *Moore*, 110 S.W.3d 336, 354 (Ky. 2003) (quoting CR 52.01) (internal citations omitted). We affirm the circuit court's decision.

C. Adverse Possession of Triangular Tract of Land

The Allards also assert the circuit court should have found that they adversely possessed the cropland in the triangular tract of land. We disagree.

At trial, the Allards claimed adverse possession of a triangular tract of land located south (on the Winchells' side) of Line 3. The triangular tract consists of two segments: (1) .045 acres of cropland north of two fence posts; and (2) a separate wooded area south of the two fence posts. The Allards only claim to have adversely possessed the northern cropland portion of the triangular tract.

Suffice it to say that there was conflicting evidence on the Allards' claim of adverse possession. William Allard testified that, before this dispute arose, he regularly farmed the .045-acre tract. William explained that he has stayed away from the triangular tract of land for the past two years because of the parties' disagreement as to the location of the boundary line; this does account, however, for its overgrown state. The Allards also submitted PVA photographs they claim demonstrate they farmed the .045-acre tract as cropland for well over 15 years.

In opposition, Charles Winchell testified that he never saw signs that the Allards had entered the area – except for occasional mowing – or were otherwise occupying the area. Charles explained that the unique shape of the area prevented anyone, including the Allards, from accessing it with bush hog equipment or a planter. Smith also testified that he saw no evidence of farming or adverse possession of this triangular tract. Like Charles, Smith claimed the triangular tract was grown up with weeds.

There was certainly evidence in the record from which the circuit court could have concluded that the Allards adversely possessed the .045-acre tract for the requisite time period. *See Jones v. Hargis*, 286 Ky. 353, 150 S.W.2d 928, 931 (1941) (continuous cultivation sufficient to establish adverse possession). Unfortunately for the Allards, the circuit court did not find this evidence persuasive. The circuit court was in the best position to weigh the evidence and judge the credibility of the witnesses. *Moore,* 110 S.W.3d at 354. Based upon our review of the record, we conclude the testimony presented by Charles and Smith constitutes substantial evidence in support of the circuit court's findings.

D. Trespass along Line 1

Finally, the Allards contend the circuit court erred when it rejected their claim that the Winchells trespassed across Line 1. And this is a slightly trickier question.

In their complaint, the Allards asserted the Winchells bush hogged around a 26-inch oak tree located on the Allards' side of Line 1, thereby destroying

four trees. The circuit court, in rejecting the Allards' trespass claim, concluded that, "due to the placement of line one (1) in accordance with the Smith survey, no trespass occurred upon the Allards' property at line one (1)." (R. at 307).

On appeal, the Allards point out that, at trial, Smith testified that, even accepting his placement of Line 1, the oak tree around which the Winchells bush hogged was located on the Allards' side of that line. Smith agreed that, no matter whose survey line is chosen for Line 1, if the Winchells worked around the 26-inch oak tree they would have crossed the boundary line.[2] The Winchells do not dispute the accuracy of Smith's testimony.[3]

We pause to reiterate that the circuit court issued no finding that the bush hogging did not take place. Instead, the circuit court rejected the trespass claim based on its mistaken belief that the adoption of Smith's survey line for Line 1 placed the oak tree on the Winchell's side of the property. This finding is not supported by substantial evidence. We conclude that the trial court erred when it failed to find that the Winchells trespassed on the Allard's property. For that reason we must reverse.

We move on to the question of damages.

The Winchells argue that the Allards' trespass claim still fails because the Allards failed to prove their damages with reasonable certainty. The Winchells

[2] Simmons's plat identifies the 26-inch oak as being 20 feet on the Allards' side of Line 1, while Smith's plat identifies the oak as being 5.01 feet on the Allards' side of Line 1.

[3] In fact, they admitted in their response to the Allards' post-judgment motion that "it is true that the proof indicated that the Defendants bush hogged the area around the 26 inch white oak tree." (R. at 332).

point out that the Allards submitted no proof at trial as to the diminution of the fair market value (FMV) of their property resulting from the trespass. While the Winchells are correct in this assertion, it does not prohibit the Allards from recovering damages on their claim of trespass.

Diminution in FMV of the land trespassed upon is one method of measuring damages. *See Smith v. Carbide and Chemicals Corp.*, 226 S.W.3d 52, 55 (Ky. 2007)("[T]he diminution in fair market value is a recognized measure of damages."). But it is not the only measure.

A trespass may result in two types of damages to real estate – permanent and temporary. *Ellison v. R & B Contracting, Inc.*, 32 S.W.3d 66, 69 (Ky. 2000). If the injury is permanent, damages are determined by calculating the difference in the fair market value of the property "immediately prior to and after the trespass." *Id.* The resulting figure is the diminution in FMV. *Id.* However, if the injury is temporary, damages represent the cost of restoring the property to its original, pre-trespass state. *Id.* The burden of proving damages of this kind is, of course, on the claimant. *Id.* at 74. As described below, the Allards met that burden.

William Allard testified that the Winchells destroyed two trees on each side of the twenty-six-inch oak, for a total of four trees, each of which was at least two inches in diameter, when they bush hogged on the Allards' side of Line 1 in October 2008. The Allards also submitted evidence of PVA photographs, which they claim show the bush hogging that took place around the oak tree. Furthermore, Ryan Thompson, a horticulturist at Integrity Nursing, testified about

his estimate of the cost to replace the destroyed trees.[4] To the extent the Winchells' argument could be construed as claiming the Allards' trespass claim fails for want of proof of damages, we reject it.

And yet, there is a rule of law "that cost to repair damages are available only where . . . the property may be restored at an expense less than the total amount by which the injury decreased the property's value." *Id.* at 70. The Winchells would argue therefore that the Allards are not entitled to repair damages because they presented no evidence to establish that the repair damages they claim do not exceed the loss in FMV. That argument also fails.

"In the absence of evidence to the contrary, it may be presumed that the anticipated cost of repair would reduce the value by an equal amount." *Newsome v. Billips*, 671 S.W.2d 252, 255 (Ky. App. 1984). Our Supreme Court in *Ellison*, a trespass case, elaborated.

> [W]hen the owner has proved what it reasonably cost him to [repair the property] it should not be necessary for him to go into the question of market value unless that question is raised by the defense. In the absence of evidence to the contrary it would ordinarily be presumed (and our decisions have tacitly recognized this) that as between a willing seller and a willing buyer of a new building known to be in need of certain repair work the anticipated cost of the remedial work would reduce the price by an equivalent amount. So, unless there is evidence to inject it, the question of market value need not be considered . . . .

[4] Thompson testified as to the cost to replace fourteen trees the Allards claim were destroyed by the Winchells' trespass. That cost was $3,773.19. (Plaintiff's Exhibit 36). We are reversing on the basis of the trial court's error in failing to find liability on the trespass; as a natural consequence of that error, the trial court never reached a decision on damages and that question remains yet to be determined in accordance with this opinion.

Ellison, 32 S.W.3d at 75. In a trespass case such as this, where the claimant has presented proof of the cost of repair, "the question of market value [must be] raised by the defense" to overcome the presumption that the cost of repair equals, *i.e.*, does not exceed, the diminution of the property's FMV. *Id.* The Winchells failed to produce such evidence. Therefore, "the question of market value need not be considered[.]" *Id.*

IV. Conclusion

We reverse the Hancock Circuit Court's April 27, 2012 order only insofar as the circuit court erroneously found in favor of the Winchells regarding the Allards' trespass claim along Line 1. We remand the case on this ground for further proceedings consistent with this opinion. In all other respects, we affirm.

ALL CONCUR.

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