Opinion issued December 29, 2011.

In The

Court of Appeals

For The

First District of Texas

NO. 01-09-00282-CV

REID ESTATES CIVIC CLUB, Appellant

V.

BOYER, INC.; LONESTAR PRESTRESS MFG., INC.; MARK BOYER; LAUREEN BOYER; JOHN L. BOYER; AND LYDA BOYER; Appellees

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On Appeal from the 55th District Court
Harris County, Texas
Trial Court Case No. 2006-38390

MEMORANDUM OPINION

Reid Estates Civic Club (RECC) appeals from a judgment rendered in favor of John Boyer and his wife Lyda Boyer, Mark Boyer and his wife Laureen Boyer, and two family-owned businesses, Boyer, Inc. and Lonestar Prestress Mfg., Inc.

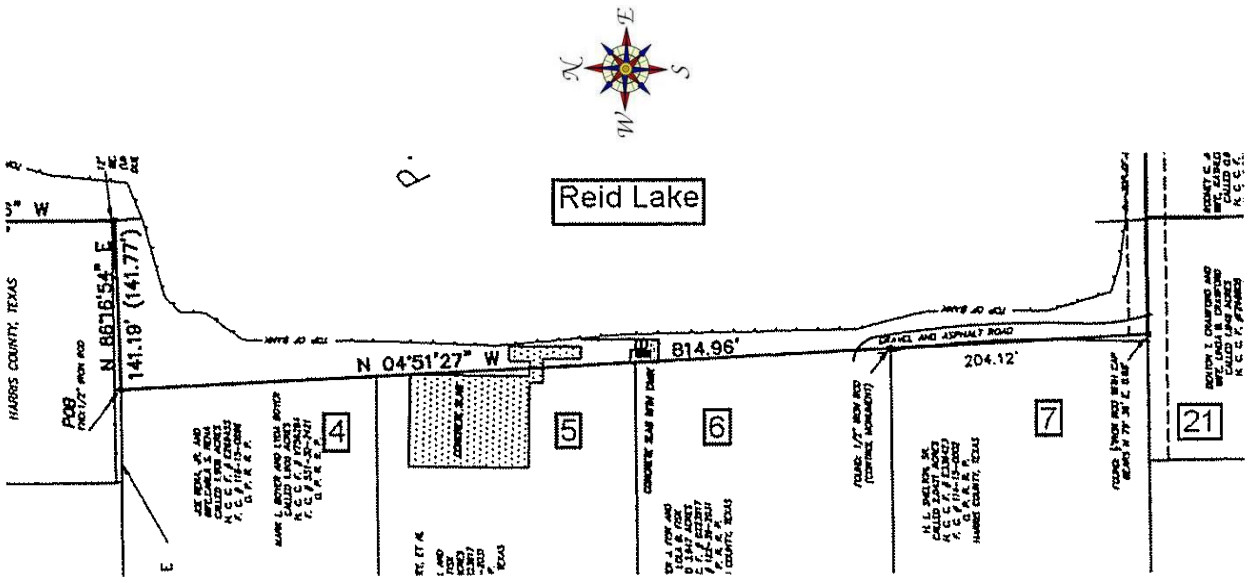
(collectively, the Boyers) following a jury trial. We affirm the portions of the trial court's judgment awarding (1) John the land east of lot 5 and to the water's edge by adverse possession and (2) Mark the land east of lot 6 and to the water's edge by adverse possession. We reverse the remaining portions of the trial court's judgment and render judgment that (1) Mark, John, and Boyer, Inc. take nothing on their prescriptive easement and easement by estoppel claims, (2) Lonestar take nothing on its easement by estoppel claim, (3) Lyda and Laureen take nothing on their adverse possession claims, and (4) RECC succeed on its trespass claims against Boyer Inc. and Lonestar for the land east of Lots 6 and 7. We remand the case to the trial court for further proceedings limited to (1) RECC's trespass claims against Boyer Inc. and Lonestar for the land east of lot 4 and (2) determination of damages for RECC's trespass claims.

BACKGROUND

Reid Lake Estates is an unrecorded subdivision comprised of a mixture of residential and commercial properties located in northwest Harris County, Texas. In the late 1970's, some of the subdivision's property owners created RECC as a non-profit corporation to "support and promote community activities favorable to the continued growth and prosperity of Reid Lake Estates subdivision." On September 20, 1978, Elsie Ruth Henry Patrick, Trustee, deeded RECC title to a 14.5457-acre tract of land within the subdivision that contains a large man-made

lake, commonly referred to as Reid Lake. RECC's property is surrounded by individually-owned lots, four of which are currently owned by members of the Boyer family.

John and his wife Lyda have owned or occupied lots in Reid Lake Estates since the late 1980's. In 1988, John and Lyda began renting lot 5, on the western side of Reid Lake, which they used both as their residence and for the business operations of Boyer, Inc., a family-owned business that provides public works services for City of Houston water and sewer treatment plants and parks and recreation facilities. In 1991, John and Lyda purchased lot 5 and their son, Mark, and daughter-in-law, Laureen, purchased lot 6.



Soon thereafter, Mark began making inquiries into who was responsible for the maintenance of the lake and its banks, which abutted the eastern edges of lots 5 and 6. Mark testified that as a result of poor maintenance of the lake, the eastern

edges of lots 5 and 6 were subsiding into Reid Lake. According to Mark, the constant erosion of the lake's banks worsened when it rained. After he hired a service to perform a title search, Mark learned that the lake, its banks, and the remainder of a 14-acre parcel, had been deeded to RECC in 1978. Mark also learned that RECC's corporate charter had been revoked, and he could not locate anyone associated with RECC who would agree to accept mail on its behalf, much less agree to repair and maintain the banks of the lake. At that point, Mark and his family took it upon themselves to repair the western bank of Reid Lake on the eastern edges of lots 5 and 6.

Mark testified that as part of the repair and maintenance efforts that began in 1992, he and his family removed trash from the lake and its banks along both lots. After they acquired a development permit from the Harris County Engineer's office, they also installed a drainage pipe and built up the banks of the lake with top soil that Mark had hauled in for that purpose. Mark also testified that they planted grass and shrubberies on the top soil, not only to prevent future erosion, but to create a grassy, flat area along the banks of the lake that the Boyer family could use for recreational purposes. The Boyers hired a lawn service to maintain the property, which needed to be mowed on a weekly basis during the summer months.

Mark and John testified that, beginning in 1992, they used the grassy, flat area that they had created along the lake's edge behind lots 5 and 6 for a variety of family and recreational functions, and considered the property their own. Among other activities, Mark's daughter kept and fed about 50 ducks and geese on the banks of the lake, Mark and John rode golf carts and motorcycles along the improved bank, and the Boyer family used the area for picnics and fishing. They did not fence the area to take any action to prevent their neighbors from fishing from their banks. Mark testified that the Boyer family used the property on a weekly basis.

Mark testified that when he and his wife, Laureen, purchased lot 6 in 1992, there was already a passable dirt road running in a north-south direction to the east of lot 7, starting toward the southern side of lot 6 and running to lot 21. In addition to the dirt, the road was created using bricks, tile, mortar and "whatever they had." The roadway, which was barely passable because it was covered by debris and a canopy of trees, intersected a Harris County drainage easement that runs across the northern border of lot 21. According to Mark, the dirt roadway, which was built by previous residents, had been used by a dump truck company that had once occupied lot 6, and by other residents to connect to the bank of land behind lot 21. Mark testified that he had "occasionally" driven golf carts on the roadway before 2002. When he reached the end of the roadway, he could not enter lot 21 due to a

large amount of debris located at the back of that property, so he would either turn around or continue down the Harris County easement that ran along the edge of lot 21.

Mark and his mother, Lyda, purchased lot 4 in April 2002 and lot 21 five months later. Mark testified that after he purchased lot 21, they extended the roadway running behind lots 6 and 7 and at the edge of 21 into lot 21 itself and improved the surface of the dirt roadway with crushed concrete and milled asphalt installed by a bulldozer, compacter and maintainer. The two family-owned businesses, Boyer, Inc. and Lonestar, have made extensive commercial use of the roadway since 2002 to connect with their business on lot 21.[1]

In 2006, officers of the newly-reactivated RECC wrote a letter to Lonestar and Boyer, Inc. claiming that the companies were trespassing on RECC's property and demanded that they vacate the premises. Mark testified that until this time, no one from RECC had told him that they could not use the property east of lots 5 and 6 or the roadway behind lot 7. Lonestar, Boyer, Inc., and members of the Boyer family subsequently filed suit against RECC seeking a declaratory judgment regarding their rights to an easement across RECC's property and attorneys' fees, and they asserted claims for trespass, cost of maintenance, and foreclosure of a

[1] In 2002, Boyer, Inc. and Lonestar were tenants of lots 5 and 6, respectively. Boyer, Inc. outgrew the space and moved to a new location across the street a few years later. Lonestar now occupies both spaces.

mechanic's lien. RECC counterclaimed for trespass and sought a declaratory judgment, attorneys' fees, and injunctive relief.

The jury reached a verdict in favor of the Boyers, Lonestar, and Boyer, Inc. RECC filed a motion for judgment notwithstanding the verdict which was granted in part and denied in part. The trial court rendered a final judgment and awarded (1) John and Lyda title to RECC's property east of lot 5 and to the water's edge by adverse possession, (2) Mark and Laureen title to RECC's property east of lot 6 and to the water's edge by adverse possession, and (3) Boyer, Inc., Lonestar, Mark, and John a "roadway easement" over RECC's property east of lots 6 and 7. The trial court rendered judgment that RECC take nothing on its counterclaims and did not award attorneys' fees to either side. This appeal followed.

ISSUES ON APPEAL

The Boyers concede that the following portions of the judgment should be reversed: (1) the portion of the judgment awarding Lyda and Laureen title by adverse possession to the land east of lots 5 and 6 to the water's edge and (2) the portion of the judgment awarding John, Boyer, Inc. and Lonestar a "roadway easement" appurtenant over RECC's property east of lots 6 and 7.[2] Accordingly, we reverse those portions of the judgment and render judgment that (1) Lyda and

[2] They also concede that the trespass question contained an improper instruction, and contend that a limited remand on the issue of liability and damages for trespass is therefore appropriate. We address this issue below.

Laureen take nothing on their adverse possession claims, (2) John and Boyer, Inc., take nothing on their prescriptive easement and easement by estoppel claims, and (3) Lonestar take nothing on its easement by estoppel claim.

In light of these concessions, it is unnecessary for us to address each of the issues raised by RECC. Therefore, while retaining their numbers, we have re-characterized RECC's issues on appeal to narrow the focus on the remaining issues:

(1) Did the trial court err in overruling RECC's motion for JNOV with respect to the establishment of a prescriptive roadway easement in favor of Mark over RECC's property east of lots 6 and 7 and connecting to lot 21;

(2) Did the trial court err in submitting Mark's easement by estoppel claim to the jury and in overruling RECC's motion for JNOV with respect to the establishment of a roadway easement by estoppel in favor of Mark over RECC's property east of lots 6 and 7 and connecting to lot 21;

(3) Did the trial court err in overruling RECC's motion for JNOV with respect to John and Mark's adverse possession claims;

(4) Did the trial court err in overruling RECC's motion for JNOV with respect to RECC's counterclaims for trespass against Lonestar and Boyer, Inc.;

(5) Is the judgment's description of the property awarded to Mark through an easement appurtenant unenforceable because it is (a) ambiguous, (b) unsupported by the pleadings, and (c) "overreaching" by depriving an unrepresented third party of its property;

(6) Did the trial court err in asking the jury to determine whether Mark established an easement without also asking the jury to determine the particular use or scope of that easement; and

(7) Did the trial court err in submitting a good-faith instruction to the jury as part of the special issue on trespass?

I. EASEMENTS

RECC's first, second, fifth, and sixth issues pertain to the trial court's grant of a roadway easement appurtenant in favor of Mark over RECC's property east of lots 6 and 7 and connecting to lot 21. Mark was awarded an easement by prescription and easement by estoppel.

A. Prescriptive Easement

In its first issue on appeal, RECC contends that the trial court erred in overruling its motion for JNOV because there was no evidence to support the jury's finding of a prescriptive easement in favor of Mark. Specifically, RECC contends that Mark's usage of the property was neither continuous nor of such a nature as to put RECC on notice that Mark was asserting a claim to the property.

We review the grant or denial of a motion for JNOV under a legal-sufficiency standard, crediting evidence favoring the jury verdict if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not. *Tanner v. Nationwide Mut. Fire Ins. Co.*, 289 S.W.3d 828, 830 (Tex. 2009) (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 823 (Tex. 2005)); *Whitney Nat'l Bank v. Baker*, 122 S.W.3d 204, 207 (Tex. App.—Houston [1st Dist.] 2003, no pet.). In doing so, we recognize that the fact-finder is the sole judge of the

witnesses' credibility and the weight to be given their testimony, and we cannot substitute our judgment for that of the fact-finder so long as the evidence falls within the zone of reasonable disagreement. *City of Keller*, 168 S.W.3d at 821–28.

RECC was entitled to judgment notwithstanding the verdict if the record shows: (1) a complete lack of evidence of a vital fact; (2) the trial court is barred by the rules of law or evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is not more than a mere scintilla; or (4) the evidence establishes conclusively the opposite of a vital fact. *City of Keller*, 168 S.W.3d at 810, 823; *Requena v. Otis Elevator Co.*, 305 S.W.3d 156, 162 (Tex. App.—Houston [1st Dist.] 2009, no pet.). More than a scintilla of evidence exists if the evidence "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997). However, "[w]hen the evidence offered to prove a vital fact is so weak as to do no more than create a mere surmise or suspicion of its existence, the evidence is no more than a scintilla and, in legal effect, is no evidence." *Kindred v. Con/Chem., Inc.*, 650 S.W.2d 61, 63 (Tex. 1983). Anything more than a scintilla of evidence is legally sufficient to support the finding. *Cont'l Coffee Prods. Co. v. Cazarez*, 937 S.W.2d 444, 450 (Tex. 1996).

A prescriptive easement is "a non-possessory interest that authorizes its holder to use property for a particular purpose." *See Koelsch v. Indus. Gas Supply Corp.*, 132 S.W.3d 494, 497 (Tex. App.—Houston [1st Dist.] 2004, pet. denied) (citing *Marcus Cable Assocs. v. Krohn*, 90 S.W.3d 697, 700 (Tex. 2002)). Burdening another's property with a prescriptive easement is not favored in the law. *Toal v. Smith*, 54 S.W.3d 431, 435 (Tex. App.—Waco 2001, pet. denied). Unlike other types of easements, an easement by prescription rests on the claimant's adverse actions taken under color of right. *See Scott v. Cannon*, 959 S.W.2d 712, 721 (Tex. App.—Austin 1998, pet. denied). In order to acquire a prescriptive easement, the claimant must prove that the property's use has been open and notorious, continuous, exclusive, hostile, and adverse for the requisite time period of ten years. *See Mack v. Landry*, 22 S.W.3d 524, 531 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (citing *Brooks v. Jones*, 578 S.W.2d 669, 673 (Tex. 1979)); *see also State v. Beeson*, 232 S.W.3d 265, 274–75 (Tex. App.—Eastland 2007, pet. dism'd).

The hostile and adverse character of the use necessary to establish an easement by prescription is the same as that necessary to establish title by adverse possession. *Mack*, 22 S.W.3d at 531 (*citing Othen v. Rosier*, 148 Tex. 485, 226 S.W.2d 622, 626 (1950)). As such, the claimant must demonstrate that the property's use was of such a nature that it reasonably notified the true owner that a

hostile claim to the land was being asserted. *See Masonic Bldg. Ass'n v. McWhorter*, 177 S.W.3d 465, 472 (Tex. App.—Houston [1st Dist.] 2005, no pet.) ("The test for hostility [in an adverse possession proceeding] is whether the acts performed by the claimant on the land and the use made of the land were of such a nature and character as to reasonably notify the true owner of the land that a hostile claim was being asserted to the property."); *see also Scott v. Cannon*, 959 S.W.2d 712, 722 (Tex. App.—Austin 1998, pet. denied) (requiring owner of servient estate have actual or constructive notice of adverse and hostile claim against property in prescriptive easement case). The jury charge here instructed the jury both on the limited purpose of easements and on each of the elements of a prescriptive easement:

> An easement is a right to use land for a limited purpose. An easement does not provide its holder with title to property or a right to possess property, only a right of use.
>
> . . .
>
> A prescriptive easement is shown when a party's use of the land was (1) open and notorious, (2) hostile and adverse to the [owner's] claim of right, (3) exclusive of the owner's use, (4) uninterrupted, and (5) continuous for a ten year period.
> Open and notorious means such open and visible act or acts that knowledge on the part of the landowner will be presumed.
> Hostile and adverse means acts of such nature as to notify the true owner that the claimant is asserting a claim to the land as his own.

Because Mark did not object to the charge, we determine the sufficiency of the evidence based upon that charge. *See Romero v. KPH Consol., Inc.*, 166 S.W.3d 212, 221 (Tex. 2005).

The evidence of Mark's usage of the roadway is insufficient to establish his entitlement to a prescriptive easement. Mark testified that he extended the roadway and improved the surface of the roadway by adding crushed concrete and milled asphalt after he and his mother, Lyda, purchased lot 21 in 2002.[3] Although the roadway improvements were arguably of such a nature that they should have put RECC on notice that Mark was asserting a claim of right with respect to the roadway (an issue which we do not decide), the improvements were not made until after Mark purchased lot 21 in 2002—far short of the ten-year period required to establish a prescriptive easement. The only evidence of Mark's usage of the roadway before 2002 is his testimony that he "occasionally" drove a golf cart down the tree-covered roadway. This evidence of Mark's sporadic use of the roadway before 2002 is so weak that it amounts to no more than a scintilla. Mark also testified that they mowed the "pathway" area every week during the summer. It

[3] There is also evidence in the record that prior to Mark and Lyda's purchase of lot 21 in 2002, John drove a golf cart and jeep on the roadway "any number of times" and that Boyer, Inc. and Lonestar made extensive commercial use of the roadway from 2002 until 2006. Even if we were to consider this evidence for purposes of our analysis (an issue which we do not decide), the evidence would still be insufficient to entitle Mark to an easement by prescription with respect to the roadway.

appears from the record that this testimony does not concern the roadway from lot 6 to lot 21, but the pathway behind lots 5 and 6. Moreover, Mark did not state when they began mowing or who did the mowing—him, his brother or one of their companies. He unequivocally testified that they did not use it for business purposes until after they purchased lot 21.[4]

In conclusion, there is no evidence that Mark used the easement in an open and notorious, continuous, exclusive, hostile, and adverse manner for ten years before the jury verdict, and the trial court erred in overruling RECC's motion for JNOV with respect to the establishment of a prescriptive easement in favor of Mark. *See Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004) (stating that scintilla of evidence is "no evidence" at all).

We sustain RECC's first issue, reverse the trial court's judgment in part and render judgment that Mark take nothing on his prescriptive easement claim.

B. Easement by Estoppel

In its second issue on appeal, RECC argues that the trial court erred in submitting Mark's easement by estoppel claim to the jury because the claim was

[4] According to Mark, they also used it "a couple of times" to assist their neighbor, Dell Webb, with his road. Mark did not describe when this action occurred before 2002 nor the actions taken to assist Webb.

not raised by the pleadings. We agree.[5]

Jury questions must be supported by the pleadings and the pleadings must contain a short statement of the cause of action sufficient to give fair notice of the claims involved. *See* TEX. R. CIV. P. 278 ("The court shall submit the questions, instructions, and definitions in the form provided by Rule 277, which are raised by the written pleadings and the evidence."); TEX. R. CIV. P. 47(a) (pleadings "shall contain . . . a short statement of the cause of action sufficient to give fair notice of the claim involved . . ."). In determining whether a pleading is adequate, we examine whether an opposing attorney of reasonable competence, on review of the pleadings, can ascertain the nature and the basic issues of the controversy. *Bowen v. Robinson*, 227 S.W.3d 86, 91 (Tex. App.—Houston [1st Dist.] 2006, pet. denied). Furthermore, because RECC did not specially except to Mark's petition, we must liberally construe the pleadings in his favor. *See Whaley v. Cent. Church of Christ of Pearland*, 2004 WL 1405701 at *3 (Tex. App.—Houston [1st Dist.] 2004, no pet.) (citing *Home Sav. of Am. FSB v. Harris Cnty. Water Control & Improvement Dist. No. 70*, 928 S.W.2d 217, 218 (Tex. App.—Houston [14th Dist.] 1996, no writ)). "The 'fair notice' requirement of Texas pleading relieves the pleader of the burden of pleading evidentiary matters with meticulous

[5] It is unnecessary, therefore, for us to reach RECC's additional contention that even if the issue of easement by estoppel was properly before the jury, there was no evidence to support the trial court's judgment with respect to this issue.

particularity." *Bowen*, 227 S.W.3d at 91. Even if we conclude that the trial court erred in submitting the claim to the jury, we may not reverse unless the error probably caused the rendition of an improper judgment. TEX. R. APP. P. 44.1(a)(1); *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 388 (Tex. 2000).

Mark contends that, when liberally construed, his pleadings were sufficient to put RECC on notice that he was claiming an easement by estoppel with respect to the "roadway" behind lots 6 and 7 because he alleged that (1) RECC had failed to maintain Reid Lake and its banks, (2) RECC had represented to him that RECC would not maintain Reid Lake and its banks in the future, and (3) he was entitled to an easement to use the roadway connecting lots 6 and 21. Mark also contends that it would be reasonable to infer that he was raising an easement by estoppel claim because he asserted "estoppel" as an affirmative defense to RECC's trespass claim.[6]

The elements of easement by estoppel are (1) a representation was communicated, either by word or by action, to the promisee, (2) the promisee believed the communication, and (3) the promisee relied on the communication to his detriment. *Stallman v. Newman*, 9 S.W.3d 243, 246 (Tex. App.—Houston [14th Dist.] 1999, pet. denied). Mark claimed in his petition that RECC's failure to

[6] The trial court was not asked to grant a trial amendment based on lack of surprise as a result of the estoppel affirmative defense.

maintain the banks of Reid Lake was damaging his adjoining property and that he and his family had spent their own funds to improve and maintain the banks of the lake behind their property. The easement granted to Mark in the judgment is not an easement to access the banks of the lake behind his property; it is a roadway that runs north and south behind lots 6 and 7 and connects lots 6 and 21. The claims alleged by Mark only pertain to the banks of Reid Lake and do not identify any representations by RECC regarding the use of the roadway or any action taken in reliance on any such representation.[7] Even if we were to liberally read the petition as putting RECC on notice that Mark was raising an easement by estoppel claim with respect to his access to the banks of the lake, these allegations are insufficient to put RECC on notice that Mark was contending that he had an easement by estoppel with respect to the roadway on RECC's property that connects lots 6 and 21.

Mark contends that his petition raised all possible easement claims by asserting that he could not be a trespasser because he "now has an easement across defendant's property." But this statement must be read in context. The paragraph specifically cites the elements of a prescriptive easement and that their use of the property had exceeded ten years. Thus, a fair reading of the petition was that they

[7] The only statement identified in the Boyers' petitions (they filed an original and four supplemental petitions) is a statement in which RECC stated that it would not take action to arrest the encroachment of the lake onto the banks of the lakefront properties.

were claiming an easement by prescription, not by estoppel. Mark's petition was insufficient to give RECC fair notice that he was asserting easement by estoppel as a theory of recovery with respect to the roadway and therefore, the trial court erred in submitting the easement by estoppel claim to the jury.

Having determined that the trial court erred in submitting the claim to the jury, we must now consider whether the error probably caused the rendition of an improper judgment. Here, the jury found that Mark had both an easement by estoppel and a prescriptive easement. Because we determined that the trial court erred in overruling RECC's motion for JNOV with respect to Mark's prescriptive easement claim, we conclude that the trial court's erroneous submission of his easement by estoppel claim probably caused the rendition of an improper judgment. Accordingly, we sustain RECC's second issue, reverse the trial court's judgment in part, and render judgment that Mark take nothing on his easement by estoppel claim.[8]

C. Remaining Issues Pertaining to Easements

RECC raises two other issues pertaining to the award of an easement appurtenant in favor of Mark. In its fifth issue, RECC argues that the judgment's award of an appurtenant easement to Mark is defective because (a) it does not

[8] An easement by prescription was, however, properly plead as a defense to RECC's trespass claim and therefore was properly submitted to the jury as a defense.

adequately describe the easement awarded, (b) the portions of the judgment that awarded the easements are not supported by the pleadings, and (c) it granted Mark an easement over property that is owned by someone who is not a party to the present suit, thus depriving the owner of his due process rights.[9]

In its sixth issue, RECC contends that the trial court erred in submitting question one to the jury because although the question asked the jury to determine whether Mark and Laureen had an easement by prescription or by estoppel, it did not ask the jury to find any particular limited use of that easement (i.e., commercial use, recreational use, or ingress and egress). Having sustained RECC's challenge to the trial court's award of an easement to Mark and Laureen, we need not address these issues.

II. ADVERSE POSSESSION

In its third issue on appeal, RECC contends that the trial court erred in overruling its motion for JNOV because there was no evidence supporting the jury's finding that Mark or John adversely possessed the tracts of land located east of lots 5 and 6 to the water's edge by adverse possession.

Adverse possession is "an actual and visible appropriation of real property, commenced and continued under a claim of right that is inconsistent with and is

[9] Because the Boyers and Lonestar concede that the trial court's judgment erroneously awards John, Boyer Inc. and Lonestar an easement appurtenant, we have restated the issue to make it clear that we do not consider the issues related to that portion of the award.

hostile to the claim of another person." TEX. CIV. PRAC. & REM. CODE ANN. §16.021(1) (West 2002). An adverse possession claim requires proof of actual possession of the disputed real property that is open and notorious, peaceable, under a claim of right, adverse or hostile to the claim of the owner, and consistent and continuous for the duration of the statutory period. *See Dyer v. Cotton*, 333 S.W.3d 703, 710 (Tex. App.—Houston [1 Dist.] 2010, no pet.); *see also Rhodes v. Cahill*, 802 S.W.2d 643, 645 (Tex. 1990). The appropriate statutory time period is ten years. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.026 (West 2002).

To establish adverse possession, the claimant must demonstrate that he actually and visibly appropriated the land for ten or more consecutive years, such that his use of the land gives the true owner notice of the hostile claim. *Rhodes*, 802 S.W.2d at 645; *see also McWhorter*, 177 S.W.3d at 472. The possession of the land must "indicate unmistakably an assertion of a claim of exclusive ownership in the occupant." *Rhodes*, 802 S.W.2d at 645. If there is no verbal assertion of claim to the land brought to the landowner's knowledge, the adverse possession must be manifested by such open or visible act or acts that the landowner's knowledge will be presumed. *Orsborn v. Deep Rock Oil Corp.*, 267 S.W.2d 781, 787 (Tex. 1954).

A. Adverse Possession and Dissolved Corporations

The jury found that both Mark and John acquired property owned by RECC through adverse possession, even though RECC was dissolved during the majority

of the ten-year limitations period. The unique factual scenario presented by this case raises the question: Can a party act in a manner that is open and obvious and acquire property by adverse possession when the true owner is a dissolved corporation? The answer is yes. *See Fed. Crude Oil Co. v. Yount-Lee Oil Co.*, 73 S.W.2d 969 (Tex. Civ. App.—Beaumont 1934, no writ) (holding land may be adversely possessed against dissolved corporation); *see also Hendron v. Yount-Lee Oil Co.*, 119 S.W.2d 171, 174 (Tex. Civ. App.—Texarkana 1938, writ ref'd) (quoting with approval rule from *Federal Crude Oil* that disability to sue caused by party's own actions and which may be removed at any time "will not toll the running of the statues of limitations").

Federal Crude Oil not only adopts this rule but explains its rationale and has been approved in *Hendron*, a writ refused opinion which has the precedential value of a Texas Supreme Court opinion. *See Fed. Crude Oil Co.*, 73 S.W.2d at 974. In *Federal Crude Oil*, a corporation failed to pay its franchise taxes, after which the secretary of state declared that it had forfeited its right to do business in Texas. *Id.* at 970. Nearly 23 years later, the corporation paid its delinquent franchise taxes to bring it to good standing with the secretary of state. *Id*. In a subsequent lawsuit Yount-Lee obtained title to a tract of land owned by the corporation by adverse possession. *Id*. at 970. On appeal, the corporation argued that Yount-Lee could not obtain title by adverse possession because the corporation could not sue and be

sued because of its failure to pay its franchise tax, effectively tolling the ten-year adverse possession period. *Id.* at 974.

The court disagreed, holding the corporation's land could be adversely possessed. *Id.* "We think it a sound proposition to say that a disability to sue, which is due wholly to the default of the person claiming its benefits and which at all times he had the power to remove, will not toll the running of the statutes of limitation. At any time during that period of time appellant had the right to revive its charter rights and resume all its corporate powers." *Id.*

In reaching its holding, the court noted that "[i]t is not the policy of the law to permit a party against whom the statute runs to defeat its operation by neglecting to do an act which devolves upon him in order to perfect his remedy against another. If this were so, a party would have it in his own power to defeat the purpose of the statute in all cases of this character." *Id.* (quoting 17 R. C. L. *Limitation of Actions* § 121, at 756 (1917)). The court also noted that the statute of limitations specifically detailed the legal disabilities that would toll the ten-year adverse possession period. *Id.* The court noted that there was no explicit exception for dissolved corporations in the statute, and the court refused to read such a new exception into the statute. *Id.* The court also relied on the general principle that no one can claim exception from adverse possession statutes except those excluded expressly or by necessary implication. *Id.*

Like the corporate entity in that case, RECC was dissolved by the secretary of state for its own failure to comply with the law, with the option to be reinstated once the organization was brought into compliance. As a matter of policy, RECC should not be allowed to toll the ten-year statutory adverse possession period merely because of its own voluntary failure to file paperwork; otherwise, every corporation could simply stop filing mandatory paperwork to prevent any close-to-maturity adverse possession claims against them and "defeat the purpose of the statute in all cases of this character." *Id.* at 974 (quoting 17 R. C. L. *Limitation of Actions* § 121, at 756 (1917)). Additionally, like in *Federal Crude Oil*, the statute in question provides no explicit exemption for dissolved corporations. Under our current statute, the only persons exempt from adverse possession are those with a legal disability (i.e., persons younger than 18 years of age, persons of unsound mind, and persons serving in the United States Armed Forces during a time of war). *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.022 (West 2002). And unlike age, insanity, or war, corporate dissolution due to failure to file mandatory paperwork is a legal disability that RECC voluntarily imposed upon itself.

We hold that land may be adversely possessed against a dissolved corporation when that corporation was wholly at fault for its own dissolution and could have been reinstated during the period during which adverse possession was claimed.

B. Mark and John

RECC contends that there was no evidence that Mark or John intended to claim the property as their own or that they exclusively and continuously occupied the property in question for a ten-year period. According to RECC, Mark and John's non-exclusive recreational use of the property was insufficient to put RECC on notice that they were claiming the property as their own. RECC further contends that the evidence conclusively establishes that Mark and John acknowledged RECC as the true owner of the property, thus, defeating their adverse possession claims as a matter of law.

Mark and John respond that they adversely possessed the land in question because they restored and maintained the property and they used the land as it was intended—for recreational purposes. According to Mark and John, all of this was done in an open and visible manner.

1. Hostile

A use of property is considered hostile for purposes of adverse possession when the use was of such a nature and character as to reasonably notify the true owner of the land that a hostile claim was being asserted to the property. *See McWhorter*, 177 S.W.3d at 472. The character of use required to establish adverse possession varies with the nature of the land and with its adaptability to a particular use. *Kazmir v. Benavides*, 288 S.W.3d 557, 561 (Tex. App.—Houston [14th Dist.]

2009, no pet.); *Vaughan v. Anderson*, 495 S.W.2d 327, 332 (Tex. Civ. App.—Texarkana 1973, writ ref'd n.r.e.). The adverse possession claimant need only use the land for some purpose to which it is adaptable, and in the same manner an ordinary owner would use the property. *Kazmir*, 288 S.W.3d at 561; *Fuentes v. Garcia*, 696 S.W.2d 482, 485 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.).

The Boyers presented evidence that they began making substantial and costly repairs to the banks of the lake behind lots 5 and 6 in 1992. Mark testified that as part of the repair and maintenance efforts that began in 1992, he and his family cleaned debris people had dumped in the area, installed a drainage pipe, and built up the eroded banks of the lake with several loads of top soil that Mark had hauled in for that purpose. All of this work was done with a "field permit" obtained from the Harris County Engineer after reviewing the drainage plan. Mark also testified that they planted grass and shrubberies on the top soil, not only to prevent future erosion, but to create a grassy, flat area along the banks of the lake that the Boyer family could use for recreational purposes. According to Mark, this area requires regular mowing and maintenance, sometimes as often as once-a-week during the summer months. In all, Mark testified that the Boyers have incurred approximately $150,000 in expenses as a result of their repair and ongoing maintenance efforts. Although there is also evidence in the record that other residents made some arguably similar improvements to the banks of the lake

behind their property over the years, the testimony establishes that the Boyers' improvements and on-going maintenance efforts were far more extensive.

There was evidence that the Boyers not only dramatically improved the property behind lots 5 and 6, but used it regularly for recreational purposes. RECC acknowledges that recreational use is the only purpose to which the property is adaptable (and which presumably is how an ordinary user would use the property).[10] Here, the uncontroverted testimony establishes that since the Boyers improved the lakeshore in 1992, members of the Boyer family have used the land behind lots 5 and 6 for a variety of family and recreational functions, and considered the property their own. Among other things, Mark's daughter kept and fed approximately 50 ducks on the banks of the lake, Mark and John regularly rode golf carts and motorcycles through that area, and the family used the banks for picnics and fishing and occasionally allowed neighbors to fish from their banks. According to Mark, the Boyer family uses the property on a weekly basis. He also

[10] Although it might appear, as RECC contends in its brief, that fishing, feeding ducks and other recreational activity are insufficient to establish hostile use of the land, such recreational activities can be sufficient to establish hostile use with respect to land that both parties concede is only suitable for recreational pursuits. Otherwise, it would be impossible as a matter of law for anyone to adversely possess land intended for recreational purposes, which would be contrary to our precedent that holds that no one can claim exemption from these statutes unless they are excluded expressly or by necessary implication. *See Trustees of College of De Kalb v. Williams*, 143 S.W. 348, 350 (Tex. Civ. App.—Texarkana 1912, writ ref'd) (stating no one can claim exception from adverse possession statutes except those excluded expressly or by necessary implication).

testified that the areas that he and John are claiming by adverse possession are out in the open and visible to other neighbors with a property abutting the lake.

As set forth above, a party seeking to adversely possess land only needs to use or enjoy the land in a manner to which the land is adaptable and as an ordinary user would use the property. Here Mark and John used the property as an ordinary user would—by making significant, costly improvements to the property (regardless of whether they made the improvements themselves, or had a family member, or family business do it), by using the property recreationally, and by allowing friends and family to use the property for recreation. Thus, there was some evidence from which the jury was entitled to find that Mark and John's use of the property, although similar to their neighbors in some respects, was of such a nature as to reasonably notify RECC that a hostile claim was being asserted to the property.

2. Intent

RECC argues that the Boyers did not "intend" to claim the land as their own, and therefore cannot prevail on their adverse possession claim. *Orsborn*, 267 S.W.2d at 787 ("No matter how exclusive and hostile to the true owner the possession may be in appearance, it cannot be adverse unless accompanied by the intent on the part of the occupant to make it so.") It is true that a party seeking to claim land by adverse possession must demonstrate an intent to claim the land;

however, the requisite "intent" is not to take title to another's property but an intent to claim the land, as demonstrated by "external circumstances." *Id.* "[A]dverse possession is not dependent on the possessor's intent to assert title hostile to a known true owner, but rather on the intent to claim the land. . . . [H]ostile use does not require an intention to dispossess the rightful owner, or even know that there is one." *BP Am. Prod. Co. v. Marshall*, 342 S.W.3d 59, 72 (Tex. 2011) (internal quotation marks and citations omitted). Therefore, our focus is not on the Boyers internal thought process, but on what they did or did not *do* to manifest their intent to claim the land. RECC argues that Mark and John's failure to pay taxes on the land in question and their request for reimbursement in 2006 from RECC for the improvements they made to the land are evidence that Mark and John were not claiming the land as their own. Neither of these factors, however, is dispositive. At most, they merely constitute some evidence for the jury to consider. *See Rhodes*, 802 S.W.2d at 645—46 (payment of taxes did not "demonstrate actual and visible appropriation of the land as a matter of law"); *Orsborn,* 267 S.W.2d at 787 (noting absence of payment of taxes as part of the evidence demonstrating a lack of intent to claim the property). As previously discussed, there was some evidence adduced at trial from which the jury was entitled to find that Mark and John's use of the property was of such a nature as to reasonably notify RECC that a hostile

claim was being asserted to the property. This same evidence is also sufficient for a reasonable jury to find that they had the requisite intent to claim the land.

3. Continuous

Mark and John presented evidence that they and their families have been occupying and using the property behind lots 5 and 6 since the repair and maintenance efforts began in 1992. The trial testimony also establishes that the Boyer family has been using the property in question on a weekly basis and that no one tried to stop them from using the property or informed them that they were trespassing until RECC's March 2006 letter. As such, there was some evidence from which the jury was entitled to find that Mark and John's use of the property was continuous.

4. Exclusive

RECC contends that the Boyer's use was not exclusive because they allowed their neighbors to use the property behind lots 5 and 6 for recreational purposes. But that limited use, with their permission, does not render their use of the property non-exclusive. The established rule in Texas is that an adverse possession claimant's use need not be exclusive to the entire world, but only to the title holders. *Smith v. Jones*, 132 S.W. 469, 471 (Tex. 1910) ("We . . . do not agree that it is always true that a possession, in order to be sufficient, must be adverse to the whole world."); *see also Ellett v. Mitcham*, 145 S.W.2d 917, 918–19 (Tex. Civ.

App.—Eastland 1940, writ dism'd, judgm't cor.); *but see Werchan v. Lakewood Estates Ass'n*, 2009 WL 2567937, at *5 (Tex. App.—Austin Aug. 21, 2009, no pet.) ("The exclusivity element requires that the claimant's use be exclusive of all other persons, especially the property owner.") There is no evidence in the record that any members of RECC—the title holder—ever entered the land at issue between 1992 and 2006. As such, there was some evidence from which the jury was entitled to find that Mark and John's use of the property was exclusive to the title holder. Furthermore, "allowing" use of the property during that same time period suggests that the Boyers believed they could have prevented such use if they so desired.

5. Acknowledgement of RECC as Title Holder

Quoting from *Bruni v. Vidaurri*, 140 Tex. 138, 150, 166 S.W.2d 81, 88 (1942), for the proposition that "a possessor's acknowledgment of title in another" within the statutory ten-year period "will defeat" an adverse possession claim, RECC contends that Mark and John are barred as a matter of law from claiming the land in question by adverse possession because they acknowledged RECC as the true owner of the property in 1992 and 2000 and in their original petition which was filed in 2006.

Whether an adverse claimant's conduct constitutes an acknowledgment of title in another, however, is normally a question of fact. *Bruni*, 166 S.W.2d at 88;

Cuniff v. Bernard Corp., 94 S.W.2d 577 (Tex. Civ. App.—Beaumont 1936, writ ref'd). The 1992 fax sent by Mark merely inquires as to who owns the lake and the land surrounding the lake without acknowledging who owns it. RECC also argues that the 2000 letter that Mark sent to his attorney is an "obvious" attempt to purchase the land and therefore an acknowledgment of title in RECC. In the letter, Mark stated in relevant part, "The General Warranty deed I have shows the Reid Estates Civic Club as the titleholder. . . Due to the increased activity by the local taxing districts to return property to the tax rolls, we would ask that you verify ownership of the [tract] and the possible ways we may obtain title to this tract of land." When questioned about this letter at trial, Mark explained that he had possession of the land, which he considered to be his property, and he sent the letter because he wanted to obtain a recorded title to the property. Thus, the jury could reasonably infer from Mark's testimony that the letter was not an attempt to purchase the property as RECC argues, because Mark believed that he was already the rightful owner—albeit without a recorded deed evidencing title. RECC also argues that Mark and John's pleadings also acknowledge RECC's ownership of the property. The pleadings, however, which were filed in 2006—more than ten years after the Boyers took possession of the property—would only be at most some evidence for the jury to consider. *See Bruni*, 166 S.W.2d at 88 (stating that acknowledgment of title after statutory period elapsed is not fatal to claim but is

only some evidence for the jury to consider). *See also Kinder Morgan N. Tex. Pipeline, L.P. v. Justiss*, 202 S.W.3d 427, 439 (Tex. App.—Texarkana 2006, no pet.) (stating that "whether an adverse claimant's conduct constitutes an acknowledgment of title in another is a question of fact" and that "such admissions constitute evidence contrary to a claim of adverse possession, but are not conclusive, and must be weighed along with all other evidence of adverse possession").

Because these factors are merely some evidence for the jury to consider with respect to Mark and John's adverse possession claims, the evidence does not conclusively disprove Mark or John's adverse possession claim.

6. Conclusion

There is some evidence that Mark and John had actual possession of the property behind lot 6, that John had actual possession of the property behind lot 5, and that their possession was open and notorious, peaceable, under a claim of right, adverse or hostile to the claim of the owner, and continuous and consistent for the ten-year statutory period. The evidence does not conclusively establish otherwise. Although a reasonable jury could disagree as to whether their use of the land met all of the required criteria, we may not overturn the jury's verdict so long as the evidence falls within a zone of reasonable disagreement. *City of Keller*, 168 S.W.3d at 822. Because the evidence falls within a zone of reasonable

disagreement, we conclude that the trial court did not err in overruling RECC's motion for JNOV with respect to Mark and John's adverse possession claims.

We overrule RECC's third issue.

III. SUFFICIENCY OF JUDGMENT

In its fifth issue on appeal, RECC contends that the judgment is defective because it does not adequately describe the real property behind lots 5 and 6 that was awarded by adverse possession to either Mark or John, and because Mark and John's pleadings do not support the judgment.[11]

A. Description of the Property in the Judgment

RECC argues that the judgment's description is insufficient because it does not specify the northern and southern boundaries of the property awarded to Mark and John by adverse possession, and the maps attached to the judgment do not identify the lots by number.

The sufficiency of the legal description in any instrument transferring a property interest is a question of law and subject to a de novo review. *Dixon v. Amoco Prod. Co.*, 150 S.W.3d 191, 194 (Tex. App.—Tyler 2004, pet. denied). In

[11] As previously discussed, RECC also argues that the judgment is defective because (1) it awarded an appurtenant easement to Boyer, Inc., Lonestar, John, and Mark, (2) it does not adequately describe the easement awarded, (3) the portion of the judgment that awarded the easement is not supported by the pleadings, and (4) it granted appellees an easement over property that is owned by someone who is not a party to the present suit, thus depriving the owner of his or her due process rights. Having sustained RECC's challenges to the trial court's award of an easement to Boyer, Inc., Lonestar, John, and Mark, we need not address these issues.

an adverse possession suit, the test for determining the sufficiency of a description of land is whether the tract can be identified with reasonable certainty. *Zobel v. Slim*, 576 S.W.2d 362, 369 (Tex. 1978); *see also Rinn v. Wennenweser*, No. 01-07-00763-CV, 2008 WL 2611921, at *2 (Tex. App.—Houston [1st Dist.] July 3, 2008, no pet.) (mem. op.). The judgment in an adverse possession case must identify the land with "reasonable certainty" such that an officer charged with the duty of executing a writ of possession could locate the property without exercising judicial functions. *Zobel*, 576 S.W.2d at 369; *see also Gilbreath v. Yarbrough*, 472 S.W.2d 185, 189 (Tex. App.—Tyler 1971, writ ref'd n.r.e.) (stating that test for sufficiency of description is whether judgment so identifies land that officer, charged with duty of executing writ of possession, can go on ground and identify it with assistance of competent surveyor). The description of property in a judgment is sufficient if "a surveyor could go upon the land and mark out the land designated." *Graff v. Berry*, No. 06-07-00058-CV, 2008 WL 704310, at *5 (Tex. App.—Texarkana 2008, pet. denied) (mem. op.) (quoting *Wooten v. State*, 177 S.W.2d 56, 57 (Tex. 1944)). A judgment may refer to other writings in identifying the land in question. *See Rinn*, 2008 WL 2611921 at *2; *but see Higginbotham v. Davis*, 35 S.W.3d 194, 198 (Tex. App.—Waco 2000, pet. denied) (stating, without citation to any authority, that judgment in trespass to try title actions "should contain a complete legal description of the property to which title has been established, so that

reference to extrinsic documents is unnecessary"). In reviewing a judgment for sufficiency of property description, Texas law does not require us to scrutinize the conveyance with a view to defeat it; instead, "every reasonable intendment will be made in their favor, so as to secure, if it can be done consistent with legal rules, the object they were intended to accomplish." *AIC Mgmt. v. Crews*, 246 S.W.3d 640, 645 (Tex. 2008) (quoting *Hermann v. Likens*, 39 S.W. 282, 284 (Tex. 1897)). Here, the jury found that John and Lyda had "adversely possessed the land east of lot 5 of Reid Lake Estates to the water's edge for at least a 10 year period" and that Mark and Laureen had "adversely possessed the land east of lot 6 of Reid Lake Estates to the water's edge for at least a 10 year period." The trial judge rendered a judgment on the verdict as follows:

> It is therefore ORDERED, ADJUDGED and DECREED that the plaintiffs John L. and Lyda Boyer be awarded fee simple title to the property east of lot 5 to the [water's] edge and Mark L. and Laureen Boyer be awarded fee simple title to the property east of lot 6 to the water's edge as shown on exhibits "A" and "B."

The trial court attached both exhibits to the judgment. Exhibit A is a topographical map of the eastern shore of Reid Lake and the properties abutting the lake; it identifies the water's edge. Exhibit B is a survey of Reid Lake and the properties abutting the lake shows the property lines of the lots surrounding the lake, identifies the property owners of each lot, and identifies the top of the bank for the entirety of Reid Lake.

RECC first argues that the description of the property in the judgment is insufficient because it does not specify the northern and southern boundaries of the awarded property located east of lots 5 and 6. According to RECC, there are two possible interpretations a surveyor might adopt for this provision in the judgment, and thus the location of the property cannot be determined with reasonable certainty. First, a surveyor could interpret the judgment as fixing the boundaries of the land east of Lots 5 and 6 by extending the northern and southern boundaries of those lots to the water's edge. Second, a surveyor might alternatively interpret the judgment as setting those boundaries only around the improvements that Mark and John made to the two lots. These two possible interpretations, according to RECC, require a decision exercised with discretion, and therefore the judgment is legally insufficient. RECC did not present any evidence that its suggested second interpretation would be an interpretation of a professional surveyor. During cross-examination, RECC's expert did not disagree that he could locate the northern and southern boundaries of the eastern property by drawing a straight line from the existing northern and southern boundaries for lots 5 and 6. We conclude that the judgment described the northerly and southern boundaries of the two tracts with reasonable certainty.

RECC next argues that the description is inadequate because the depth of the property to the east is uncertain. According to RECC, the property east might

reach the water's edge on the *other* side of the lake and therefore include the lake within those boundaries since all of that land is technically "east" of lots 5 and 6. Common sense, however, dictates that "east of [lot 5 and lot 6] to the water's edge" stops at the first water's edge.

We conclude that a reasonable, competent surveyor would read the judgment to mean what it says—in awarding the land east of lot 5 and lot 6 to the water's edge, the trial court awarded land immediately east of lot 5 and lot 6, bounded by extending the northern and southern boundaries of lot 5 and lot 6, ending at the water's edge on the western side of the lake. Such a reading does not require the surveyor to exercise his discretion, but merely his common sense.

RECC also contends the judgment insufficiently describes the property because although the judgment refers to the lots by number, the maps attached to the judgment do not. In order to locate those lots, RECC argues, one would need to rely upon tax maps that are not in evidence or referred to in the judgment. However, the Texas Supreme Court has stated that we should be willing "to read property descriptions in tax judgments alongside the property descriptions in related petitions and judgment rolls to identify the property conveyed, thus avoiding the inequity of erasing otherwise valid tax judgments at the public's expense." *AIC Mgmt.*, 246 S.W.3d at 647 (citing *Willoughby v. Jones*, 251 S.W.2d 508 (Tex. 1952)). Although the Supreme Court made this statement regarding

judgments conveying land to satisfy tax judgments, we conclude that the principle that surveyors can refer to public documents (like tax maps or appraisal records) in identifying property awarded at trial is equally applicable in cases involving adverse possession. *See Preston Exploration Co. v. Chesapeake Energy Corp.*, CIV.A. H-08-3341, 2010 WL 3155893, at *4 (S.D. Tex. Aug. 10, 2010) (interpreting *AIC Management* to hold that courts may refer to prior tax petitions, HCAD records, and tax tract maps, all of which are public records, in interpreting judgments awarding land in disputes over oil and gas interests).

Here, Mark and John's expert witness surveyor testified that he would be able to identify the land in question with the judgment, the attached maps, and a tax map. And RECC concedes in its brief that a person using the tax maps could locate lots 5 and 6. Accordingly, we hold that the judgment describes with reasonable certainty the land in question awarded to Mark and John by adverse possession.

B. Sufficiency of Description of Land in Pleadings Claims

The Texas Rules of Civil Procedure state that "[t]he judgment of the court shall conform to the pleadings, the nature of the case proved and the verdict, if any." TEX. R. CIV. P. 301. A judgment in favor of the plaintiff in a suit for land must be based upon proper allegations and a sufficient description of the land must

be contained in the pleadings. *Stovall v. Finney*, 152 S.W.2d 887, 890 (Tex. Civ. App.—Amarillo 1941, no writ).

RECC argues the description of the land sought in Mark and John's pleadings is vague. The trial court rejected this contention, repeatedly stating that the pleading was "clear" and the parties were fully aware of the property that was at issue.

RECC specifically contends that the phrase "with regard to the property east of lots 4, 5, and 6 by limitation title" could be interpreted to mean that Mark and John are claiming *all* of the RECC property east of lots 4, 5 and 6 to the edge of Reid Lake, meaning the banks surrounding the *entire* lake.[12] We do not agree for the same reasons as described above for why we do not agree that the judgment itself is vague. The pleadings are describing land to the east of the lots to the water's edge. It would not be reasonable to interpret these pleadings as claiming property on the other side of the lake.

RECC also argues that an adverse possession claim may only be brought as a trespass to try title action under Texas Rule of Civil Procedure 738. Citing *Stewart v. Collatt*, RECC contends that the property description in Mark and John's pleadings is so vague that it does not satisfy Rule 738's strict pleading requirements. 111 S.W.2d 1131, 1132 (Tex. Civ. App.—Fort Worth 1937, no

[12] Mark abandoned his claim to RECC's property east of lot 4 by adverse possession.

writ). *Stewart*, however, is factually distinguishable from the present case. In *Stewart*, the plaintiffs brought a trespass to try title action under the predecessor to Rule 783. *Id*. The property was identified with three separate descriptions. The court of civil appeals held that the plaintiff's pleadings were "fatally defective because of uncertainty and repugnancy in the description of the land sought to be recovered." *Id.* The descriptions in Mark and John's pleadings, on the other hand, are fairly straightforward: property east of lot 5 and 6 to the water's edge, as shown on the map attached to the third supplement to their original petition.

Mark and John argue, and we agree, that their pleadings are sufficient even under the stricter pleading standards of a trespass to try title action, which requires a "description of the premises by metes and bounds, or with sufficient certainty to identify the same, so that from such description possession thereof may be delivered." TEX. R. CIV. P. 783. Mark and John's pleadings include a tax map that identifies the lots in question by lot number and is similar to the survey attached to the judgment as Exhibit B.

We conclude that Mark and John's pleadings sufficiently described the property in question, even under the stricter pleading standards of a trespass to try title action.

Having determined that the judgment describes with reasonable certainty the land in question awarded to Mark and John and that Mark and John's pleadings

sufficiently described the property in question even under the stricter pleading standards of a trespass to try title action, we overrule RECC's fifth issue.

IV. TRESPASS

A. Trespass as a Matter of Law

In response to question 4, the jury rejected RECC's claims that Boyer, Inc and Lonestar trespassed on its property. RECC raises two issues on appeal with respect to those claims. In its fourth issue, RECC contends that the trial court erred in overruling RECC's motion for JNOV because the evidence conclusively established that both Lonestar and Boyer, Inc. trespassed on RECC's property located east of lots 4, 6 and 7.

With respect to the property located to the east of lots 6 and 7, RECC maintains that a reversal of the trial court's judgment awarding a "roadway" easement to Boyer, Inc. and Lonestar over that portion of RECC's property requires a finding that both companies' undisputed use of the roadway constitutes a trespass. Boyer, Inc. and Lonestar do not disagree in their brief. Because Boyer, Inc. and Lonestar have conceded that they did not have an easement, and it therefore necessarily follows that they trespassed on RECC's property,[13] we sustain this limited portion of RECC's fourth issue, reverse this portion of the judgment of the trial court, and render judgment in favor of RECC that Boyer, Inc.

[13] For lot 6, the damages will be limited to the time ownership was acquired by Mark through adverse possession.

and Lonestar trespassed on RECC's property located east of lots 6 and 7 as a matter of law, and remand the case for the determination of damages for this trespass.

B. Jury Charge on Trespass

With respect to the area east of lot 4, RECC concedes that it did not prove trespass as a matter of law. Nevertheless, RECC contends that the judgment should be reversed and the case should be remanded for a new trial on this issue due to an error in the jury charge. Specifically, in its seventh issue, RECC contends that the trial court erred in submitting question four to the jury because it contained an incorrect statement of the law with respect to RECC's trespass claim. RECC argues that the trial court erred in instructing the jury that "[a] person is not a trespasser if he has a good faith belief that he is the true owner, and has reasonable grounds for the belief, but he must be ignorant that his title is contested by one having a better right." RECC argues, and the Boyers concede, that there is no "good faith" defense to the tort of trespass to real property and that the inclusion of the "good faith" trespasser instruction was erroneous.

We agree that the trial court's inclusion of the "good faith" trespasser instruction was erroneous. *See generally Wilen v. Falkenstein*, 191 S.W.3d 791, 798 (Tex. App.—Fort Worth 2006, pet. denied) (citing *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 827 (Tex. 1997) (stating that party's subjective intent

or awareness of property's ownership is irrelevant for purposes of determining whether party committed tort of trespass to real property). We also agree that the error, which misled the jury into believing that there was a "good faith" defense to the tort of trespass to real property, probably resulted in the rendition of an improper judgment. *See Transcon. Ins. Co. v. Crump*, 330 S.W.3d 211, 225 (Tex. 2010) (quoting *Columbia Rio Grande Healthcare, L.P. v. Hawley*, 284 S.W.3d 851, 856 (Tex. 2009)) (stating appellate court should not reverse judgment for charge error "unless the error was harmful because it probably caused the rendition of an improper verdict").

Accordingly, we reverse the judgment of the trial court and remand the case for a new trial on RECC's trespass claim with respect to RECC's property located to the east of lot 4.

CONCLUSION

We sustain RECC's first, second and fourth issues, and overrule RECC's third and fifth issues. Accordingly, we affirm the portions of the trial court's judgment awarding (1) John the land east of lot 5 and to the water's edge by adverse possession and (2) Mark the land east of lot 6 and to the water's edge by adverse possession. We reverse the remaining portions of the trial court's judgment and render judgment that (1) Mark, John, and Boyer, Inc. take nothing on their prescriptive easement and easement by estoppel claims, (2) Lonestar take

nothing on its easement by estoppel claim, (3) Lyda and Laureen take nothing on their adverse possession claims, and (4) RECC succeed on its trespass claims against Boyer Inc. and Lonestar for the land east of Lots 6 and 7. We remand the case to the trial court for further proceedings limited to (1) RECC's trespass claims against Boyer Inc. and Lonestar for the land east of lot 4 and (2) determination of damages for RECC's trespass claims.

Harvey Brown
Justice

Panel consists of Chief Justice Radack and Justices Sharp and Brown.

Justice Sharp concurring in the judgment only