In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-17-00248-CV

RICHARD HOWARD MCDUFF AND SARA SULLIVAN MCDUFF, INDIVIDUALLY AND AS CO-TRUSTEES OF THE MCDUFF TRUST, THE ERIN ELIZABETH MCDUFF TRUST, AND THE MACKIE ANN MCDUFF TRUST, ERIN ELIZABETH MCDUFF, INDIVIDUALLY AND AS CO-TRUSTEE OF THE ERIN ELIZABETH MCDUFF TRUST, AND MACKIE ANN MCDUFF, INDIVIDUALLY AND AS CO-TRUSTEE OF THE MACKIE ANN MCDUFF TRUST, APPELLANTS

V.

ANDY BRUMLEY AND SHERI BRUMLEY, APPELLEES

On Appeal from the 46th District Court
Wilbarger County, Texas
Trial Court No. 27,103, Honorable Stuart Messer, Presiding

August 8, 2022

MEMORANDUM OPINION ON REMAND

Before PARKER and DOSS, JJ., and PIRTLE, S.J.[1]

This appeal concerns a claim of adverse possession and acquisition of title by limitations. Appellees, Andy Brumley and Sheri Brumley, brought a trespass to try title action against Appellants, which include Richard Howard McDuff, Sara Sullivan McDuff, Erin

[1] Patrick A. Pirtle, Justice (Ret.), Seventh Court of Appeals, sitting by assignment.

Elizabeth McDuff, and Mackie Ann McDuff, in their individual capacities and as co-trustees of various trusts. The Brumleys allege they have acquired title by limitations to a 345.9 acre tract (the "Disputed Property") located along the Pease River in Wilbarger County near Vernon, Texas. The jury's verdict and the district court's judgment were for the Brumleys. Our original decision in this appeal was reversed and remanded by the Supreme Court of Texas.[2] Now on remand we have considered the McDuffs' two issues challenging the sufficiency of the evidence and claims of jury charge error. We overrule both issues and affirm the judgment of the district court.

Background

In 1984, Richard and Sara McDuff purchased approximately 533 acres of land from A.M. Hiatt. The conveyance included the Disputed Property. At closing, Hiatt reportedly told Richard and Sara that A.K. Coker occupied the property and should be told to "pack his stuff and leave." During the 1980s, Coker sued Richard in justice court and district court over the Disputed Property. The justice of the peace's decision in favor of Coker was appealed de novo to county court; the matter settled without judgment. The district court case was dismissed for want of prosecution. Richard testified that Coker's animals were removed from the property and that Coker never returned.

In February 2001, the Brumleys purportedly contracted to purchase the Disputed Property via a special warranty deed from J.A. and Beth Coker, the son and daughter-in-law of A.K. J.A. and Beth claimed to have acquired the Disputed Property from A.K. and Aline

[2] *Brumley v. McDuff*, 616 S.W.3d 826 (Tex. 2021).

Coker. A.K. claimed to have held actual and peaceable possession of the Disputed Property since the 1940s.

On the morning of trial, counsel for the Brumleys announced to the trial court that Coker "did not have record title in which to convey to" the Brumleys, and later noted "[the Brumleys are] not claiming record title." The Brumleys therefore pursued an alternative theory alleged as early as their original petition—that since 2001 the Brumleys' "possession, use, and enjoyment of the [Disputed] Property has been actual, open, notorious, exclusive, adverse, and hostile to the claims of all others, including the McDuffs."[3]

Andy Brumley testified that on the day of closing for their attempted purchase of the Disputed Property from the Cokers, Andy contacted Richard at his work to inform him the Brumleys had purchased the Disputed Property from the Cokers; the McDuffs therefore had new neighbors. Richard allegedly responded to Andy that the Cokers had no interest to sell in the Disputed Property. When Andy replied that if there was a problem with the purchase, they needed "to go to the courthouse and get it straightened out," Richard responded he "had been to the courthouse twice, got beat both times and I ain't going back."

Richard testified he recalled the events differently. According to Richard, the conversation with Andy occurred before the Brumley purchase and that he warned against it. He also denied seeing the Brumleys on the Disputed Property, and that the two sides never again discussed the property until the underlying litigation was filed in 2014.

[3] The McDuffs articulated their understanding that the Brumleys were pursuing an adverse possession theory more than six months before trial began.

Other evidence presented at trial, however, called into question the accuracy of Richard's memory. For example, testimony also showed that the day after closing, the Brumleys began bulldozing roads on the Disputed Property. Jurors also heard that the Brumleys assessed the dilapidated fences on the Disputed Property and spent two or more months in the fall of 2001 constructing a new perimeter fence around the entire property. The north side of the Disputed Property borders the remainder of the McDuffs' property. It is notable that in this area, where an existing border fence remained, testimony indicates the Brumleys built a second, new fence inside the existing fence line. Two gates on the border fence line were blocked, one by the new Brumley fence, and the other initially blocked by the growth of trees. The Brumleys also constructed cross-fences dividing the interior of the Disputed Property.

Andy and his son, Cody, each testified that every day or every other day from February 2001 to the time of trial, they were physically on the Disputed Property working, farming, caring for livestock, hunting, or recreating. The Brumleys testified that during this time they constructed and maintained roads, built livestock corrals, stored surplus irrigation pipe, installed large mining truck tires used as livestock watering troughs, and stored farm equipment on the Disputed Property. The Brumleys also presented evidence they installed water storage tanks and underground water lines, installed deer blinds, feeders, and deer cameras, and annually planted wheat for grazing out cattle on the land. Andy Brumley told the jury he farmed two spots on the Disputed Property "every year" since 2001. And he testified he kept cattle on the Disputed Property from the day of closing until the time of trial. The Brumleys also offered evidence of participating in

government agricultural assistance programs, where they applied for and received federal assistance to construct livestock improvements on the Disputed Property.

In August 2001, an employee or contractor of the McDuffs entered the Disputed Property to clear a road with a tractor. The Brumleys told the man they owned the land and that he must leave. After his departure, the Brumleys' attorney sent the McDuffs a letter describing the Disputed Property and concerning the incident. The letter provided notice to the McDuffs in relevant part as follows:

> As you know, the Brumleys are successors in title through J.A. Coker. You will recall certain litigation which occurred in the 1980's and was resolved in favor of the Cokers against you with respect to this property. In addition, Mr. Brumley advises that in the effort to be a good neighbor, he discussed with you the fact of his purchase from Coker.
>
> Therefore, you can understand Mr. Brumley's surprise and disappointment that you had instructed your hired hand to commence the building of a road on this proeprty [sic]. In this process, trespass was committed which we attribute to you, and trees and other property were destroyed along the length of about 150 yards. The trespass and the destruction of trees are damages sustained by the Brumleys in an amount as yet undetermined.
>
> Since it would appear that you are responsible for this trespass and the resulting damages, I am awaiting your reply.

Richard acknowledged receiving the letter and meeting with an attorney, but says he saw no activity on the Disputed Property.[4] The Brumleys also installed about two dozen metal no trespassing signs on the Disputed Property. Along the northern perimeter of the Disputed Property bordering the McDuff land, the no trespassing signs faced the McDuff property.

The jury also had the opportunity to assess the credibility of testimony about the Brumleys sending the McDuffs a criminal trespass warning. Receipt of the warning, which

[4] Richard McDuff also qualified many of his denials by saying he was not on the Disputed Property much.

was mailed to the McDuffs' residential address, was signed for by Bobbie McDuff, Richard's mother who lived in their home for eighteen years. At trial, the McDuffs denied receipt or knowledge about the criminal trespass warning. However, Richard also appeared to acknowledge in the following colloquy he indeed received the trespass warning:

> Q. How many times, do you think, before this lawsuit was filed have you been down there [on the Disputed Property]?
>
> A. A limited basis. We really didn't have any reason to go, you know.
>
> Q. Okay. And that's what I am trying to help the jury understand. What do you mean when you say a limited basis? Is that -- is that one, two, three, more than a dozen?
>
> A. Maybe half a dozen or something through a portion of time, period of time.
>
> Q. Okay. So since the -- *since you got the criminal trespass* -- *since the Brumleys notified you that they were on the property*, you have been down there maybe six times. Is that accurate?
>
> A. Total, yes.

(emphasis added). The jury also heard Richard's testimony about the trespass notice at a later portion of his testimony:

> Q. Isn't the truth, Mr. McDuff, you never asked about [a lock discovered on the gate to the Disputed Property] because you-all didn't go down there?
>
> A. Not much. We didn't do any activity there.
>
> Q. And isn't it true that when *the Brumleys sent you the criminal trespass letter and the demand letter from their attorney*, you and your wife made a conscious decision not to do anything with respect to that property? Isn't that right?
>
> A. We didn't see anything going on at that time with that property, and we talked to [an attorney] about it.

(emphasis added).

Andy Brumley testified that on one occasion in 2003 or 2004, Richard McDuff was burning tumbleweeds on the McDuff property near the border of the Disputed Property. Seeing smoke, Andy and Cody went to investigate, where Andy (standing on the Disputed Property side) had a conversation with Richard (standing on the McDuff side) across the fence. According to Andy, Richard asked, "How far west do you own property?" Andy said he responded, "All the way to the bridge." At trial, Richard denied that the conversation occurred and denied seeing the Brumleys on the Disputed Property.

Dennis Gilchrest, who lived on the adjacent McDuff property from 2001 to 2003, testified he saw the Brumleys on the Disputed Property two to three times per week. Dean Gfeller, who leased all the McDuffs' land for farming from 2004 until 2014 or 2015, said he saw the Brumleys on the Disputed Property "a few times," but never saw the McDuffs. He also testified the McDuffs never offered to lease him the Disputed Property. When asked about his discussions with Richard regarding ownership of the Disputed Property, Gfeller testified Richard had once commented he owned more acreage, "but the [boundary] fence was pretty well what we went by."

Greg English, who cared for Gfeller's cattle on the McDuffs' land, testified he saw the Brumleys use the roads on the Disputed Property (which he characterized during trial as "Andy Brumley's" property). When cattle from the McDuffs' land would crawl through the fence and stray onto the Disputed Property, English sought and obtained permission from Andy or Cody to enter the Disputed Property, or said Andy and Cody "would pen them themselves for me and I would pick them up." According to English, he would contact the Brumleys for access to the land because he thought the Disputed Property was theirs. English found the tree-overgrown gate separating the McDuff land from the Disputed Property and cleared the opening.

It is undisputed that the Brumleys leased the surface of the Disputed Property for mining sand and gravel in 2007; in 2011, they leased the mineral estate. The Brumleys were also paid for seismic surveys performed on the Disputed Property in 2013.

Richard McDuff acknowledged his family "ha[s] been kind of absentee" on the Disputed Property "until we made changes and we started taking the property back." Richard said the family considered the Disputed Property to be a buffer to protect the rest of their property from flood waters. At some point between 2001 and 2005, his daughters picked plums on the Disputed Property, and Richard has gone there to look for deer antlers, firewood, and to look at wildlife. Richard acknowledged that at some unspecified time between 2001 and the time of suit, he discovered a locked gate between the McDuff land and the Disputed Property, but never attempted to determine why.

The McDuffs' daughter, Erin McDuff Oliver, and her husband, Casey, lived on the McDuff property adjoining the Disputed Property from January 2005 until August 2016. Erin testified she was never barred from entering the Disputed Property and went upon that land anytime she desired. Casey testified he entered the Disputed Property whenever he desired; by his estimation that numbered over 20 times since 2001. His activities on the Disputed Property included firing guns, driving an ATV, and hunting deer. He further testified of once driving around the Disputed Property looking for a runaway dog. Casey said his presence on the Disputed Property was never challenged. He denied seeing improvements on the land.

Both the McDuffs and the Brumleys paid *ad valorem* taxes on the Disputed Property. Richard testified that Andy requested a "settlement" of the Disputed Property in 2014. According to Richard, Andy explained he was working on his estate plan and wanted to clear

the issue of title to the Disputed Property. When the McDuffs refused, the underlying litigation ensued.

Analysis

Sufficiency of the Evidence

By their first issue, the McDuffs argue the evidence was legally and factually insufficient to support the Brumleys' assertion, and the jury's verdict, that the Brumleys held the Disputed Property in peaceable and adverse possession for at least ten years. The McDuffs divide the argument among multiple sub-issues.

A party challenging the legal sufficiency of evidence supporting an adverse finding on which it did not bear the burden of proof must show no evidence supports the finding. *Exxon Corp. v. Emerald Oil & Gas Co., L.C.,* 348 S.W.3d 194, 215 (Tex. 2011). A legal sufficiency or "no evidence" challenge will be sustained if the record demonstrates: (1) a complete absence of evidence of a vital fact; (2) rules of law or evidence bar the court from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a scintilla; or (4) the evidence establishes conclusively the opposite of the vital fact. *City of Keller v. Wilson,* 168 S.W.3d 802, 810 (Tex. 2005). In determining the legal sufficiency of the evidence, we consider all the evidence in the light most favorable to the challenged finding, crediting favorable evidence if a reasonable factfinder could, and disregarding contrary evidence unless a reasonable factfinder could not. *City of Keller,* 168 S.W.3d at 809.

When considering a factual sufficiency challenge of a finding on which the appellant did not bear the burden of proof, we examine all of the evidence; we set aside

the verdict only if the evidence is so weak or the finding is so against the great weight and preponderance of the evidence that it is clearly wrong and unjust. *Cain v. Bain,* 709 S.W.2d 175, 176 (Tex. 1986); *Garza v. Alviar,* 395 S.W.2d 821, 823 (Tex. 1965). The jury is the exclusive judge of witness credibility and the weight given their testimony. *Barnhart v. Morales*, 459 S.W.3d 733, 745 (Tex. App.—Houston [14th Dist.] 2015, no pet.). It may believe all, some, or none of the witness testimony. *Killion v. Lanehart,* 154 S.W.3d 183, 189 (Tex. App.—Amarillo 2004, pet. denied).

The jury was asked the following question, which included a number of instructions:

> Did the Brumleys hold the [Disputed] Property in peaceable and adverse possession for at least ten years before July 11, 2014?
>
> "Peaceable possession" means possession of real property that is continuous and is not interrupted by an adverse suit to recover the property.
>
> "Adverse possession" means an actual and visible and open and notorious appropriation of real property, commenced and continued under a claim of right that is inconsistent with and hostile to the claim of another person.
>
> "Claim of right" means an intention to claim the real property as one's own to the exclusion of all others.
>
> A claim of right is hostile only if either (1) it provides notice, either actual or by implication, of a hostile claim of right to the true owner; or (2) the acts performed on the real property, and the use made of the real property, were of such a nature and character that would reasonably notify the true owner of the real property that a hostile claim is being asserted to the property.
>
> For this question, to establish peaceable and adverse possession a claimant must also have cultivated, used, or enjoyed the property.
>
> Answer "Yes" or "No."

The jury unanimously answered, "Yes."

Several terms relevant to the law of adverse possession and the McDuffs' argument on appeal were not defined in the jury charge. When a word is not defined by the charge, jurors may use any reasonable, ordinary, or common understanding of the words used. *Dorton v. Chase,* 262 S.W.3d 396, 399 (Tex. App.—Waco 2008, pet. denied) (citing *Taylor v. Lewis,* 553 S.W.2d 153, 159 (Tex. Civ. App.—Amarillo 1977, writ ref'd n.r.e.) (A juror of average intelligence would be presumed to construe the use of a word in its usual and ordinary sense.)).

1. *Evidence of Actual, Visible, Hostile, Appropriation*

The trial court defined "adverse possession" as "an actual and visible and open and notorious appropriation of real property, commenced and continued under a claim of right that is inconsistent with and hostile to the claim of another person." McDuff begins by complaining of insufficient evidence of the Brumleys' actual and visible appropriation of the Disputed Property, as well as of the Brumleys' hostility of their claim of right to the Disputed Property. "Actual" means "existing in fact and not merely potentially." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 13 (11th ed. 2003). "Visible" means "capable of being seen." *Id*. at 1399. "Appropriate," as a verb, means "to take exclusive possession of." *Id.* at 61. "Claim of right" was defined in the court's charge to mean "an intention to claim the real property as one's own to the exclusion of all others." A "hostile"[5] claim of right was likewise described in the charge.

[5] The jury was instructed that a claim of right was hostile "only if either (1) it provides notice, either actual or by implication, of a hostile claim of right to the true owner; or (2) the acts performed on the real property, and the use made of the real property, were of such a nature and character that would reasonably notify the true owner of the real property that a hostile claim is being asserted to the property" but the court did not define the term "hostile."

We find that sufficient evidence exists of an actual, visible, and hostile appropriation of the Disputed Property by the Brumleys that began as early as 2001, when the Brumleys expressly declared their hostile entry onto and possession of the Disputed Property as their own. *See Commander v. Winkler,* 67 S.W.3d 265, 270 (Tex. App.—Tyler 2001, pet denied) ("Express notice must be brought home to the landowner and adverse possession will run only from the time of such express notice to the landowner.") (cleaned up). Viewing the evidence in a light most favorable to the jury's verdict, we find that on the day of closing, Andy Brumley told Richard McDuff he was the new neighbor on the Disputed Property, and if that was not acceptable any controversy about title would need to be straightened out at the courthouse. Very soon thereafter, the McDuffs' employee was ejected from the Disputed Property by the Brumleys; the Brumleys' attorney sent the McDuffs a demand letter charging the McDuffs with trespassing and damages on the Disputed Property. Moreover, the Brumleys sent the McDuffs a criminal trespass warning, with some evidence that it was received. The McDuffs then conferred with an attorney and decided to make no response to the Brumleys' claim of ownership in the Disputed Property.

Also in 2001, Cody Brumley fenced the perimeter of the Disputed Property (including a second fence inside the fence bordering the McDuff land), and the Brumleys placed no trespassing signs on their fence line (including on the border to the McDuff land) and locked gates adjoining the property. As early as 2003, Richard McDuff had a conversation with Andy Brumley across the fence bordering the McDuff land and the Disputed Property. McDuff did not eject the Brumleys from the land. Instead, Richard allegedly asked,

"How far west do you own property?" Andy replied, "All the way to the bridge." The jury had the opportunity to assess Richard's credibility and denial of the event.

Between 2001 and the time of trial, the evidence viewed in a light most favorable to the verdict showed the Brumleys also made multiple visible improvements to the land: they grated roads; built a livestock corral; stored surplus irrigation pipe, large mining truck tires, and farm equipment; installed water tanks and water lines; built hunting blinds and game feeders and installed deer cameras; and annually planted wheat for cattle grazing. The jury had the ability to assess the credibility of the McDuffs' denial of knowledge about the Brumleys' activities on the Disputed Property. Under the standards of review we must apply, we hold that sufficient evidence supports a finding that as early as 2001, the McDuffs' cause of action to recover the Disputed Property accrued and the ten-year limitation period began running. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.026(a).

2. *Evidence of Exclusivity*

The definition of a "claim of right" charged the jury with determining whether the Brumleys intended "to claim the real property as one's own to the exclusion of all others." The McDuffs argue their evidence of going upon the Disputed Property to pick wild plums, hunt, look for a lost dog, and holding a key to a gate padlock demonstrate joint use and thereby defeat continuous and exclusive possession. But, again, the jury had the ability to assess the credibility of the testifying witnesses. Moreover, this "joint use" argument overlooks the fact that the alleged acts occurred after the 2001 exchange of verbal and written communications from the Brumleys claiming ownership to the land, instructing the McDuffs not to trespass, and inviting judicial determination of ownership to the Disputed

Property. This evidence of unilateral acts by the McDuffs does not conclusively show that such use was "joint;" nor does it conclusively defeat the Brumleys evidence of exclusive possession in a manner hostile to the McDuffs' legal interests. *See Scott v. Cannon,* 959 S.W.2d 712, 721–23 (Tex. App.—Austin 1998, pet. denied) (noting in prescriptive easement case that owners' knowledge of contents in deed records stating the subject road was public amounted to a distinct and positive assertion establishing adverse use).

We conclude that sufficient evidence supports a finding that the Brumleys actually and visibly appropriated the Disputed Property under a claim of right that was hostile to the McDuffs' claim.

3. *Evidence of Continuous Possession*

The McDuffs also argue the Brumleys did not continuously hold the Disputed Property for the requisite ten-year period.[6] In the jury's charge, the trial court defined "peaceable possession" as meaning "possession of real property that is continuous and is not interrupted by an adverse suit to recover the property." Continuous means, "[M]arked by uninterrupted extension in space, time or sequence[.]" MERRIAM-WEBSTER'S at 270.

Andy and Cody testified that on a daily or near-daily basis from February 2001 to the time of trial, they were physically on the Disputed Property working, farming, caring for livestock, hunting, or recreating. In addition to all of the visible improvements the Brumleys made to the land during the possession period, Andy testified that from the day of closing

[6] The McDuffs append to their complaint here that the Brumleys' possession of the Disputed Property was not consistent. But the trial court did not ask or instruct the jury of consistency.

until the time of trial he farmed and kept cattle on the Disputed Property.[7] The Brumleys installed new fencing surrounding the perimeter of the Disputed Property in 2001. As noted above, the evidence shows that new fencing was placed inside the existing fencing along the boundary between the McDuff property and the Disputed Property.

Dennis Gilchrest, who lived on the adjacent McDuff property from 2001 to 2003, testified he saw the Brumleys on the Disputed Property two to three times per week. Evidence was presented that in 2003 or 2004, Richard McDuff had a conversation with Andy across the fence adjoining the McDuff land and the Disputed Property. Dean Gfeller, who leased the adjacent McDuff property for farming from 2004 to either 2014 or 2015, said he observed the Brumleys on the Disputed Property "a few times," and noted he seldom went to the fence bordering the McDuff land and the Disputed Property. From 2006 through 2015, Greg English, who also had a limited vantage point of the matters occurring on the Disputed Property, saw the Brumleys on the land two or three times, and would contact the Brumleys to seek permission to access the land to recover straying cattle.

It is undisputed that the Brumleys leased the surface of the Disputed Property for mining sand and gravel in 2007; in 2011, they leased the mineral estate. They were paid for seismic surveys on the Property in 2013. When viewed in the light most favorable to

[7] The McDuffs essentially challenge Andy's statement as conclusory, arguing Andy also testified he sold all the cows grazing on the Disputed Property in December 2010 or January 2011. But Brumley further testified the longhorns remained on the Disputed Property. The jury was empowered to resolve this disputed evidence.

the verdict and in a neutral light, sufficient evidence shows the Brumleys continuously possessed the Disputed Property for the requisite ten-year limitations period.

4. *Evidence of the Area Enclosed*

In passing, the McDuffs argue the evidence was insufficient to establish the disputed property was enclosed as required by Civil Practice and Remedies Code section 16.026(b),[8] thus resulting in an improper verdict or limiting the scope of property the Brumleys could adversely claim. We disagree. There was no jury submission and therefore no finding of contested facts necessary for determination of this complaint. Moreover, in addition to Cody's testimony about installing new fencing around the entire Disputed Property, the special warranty deed the Brumleys received from the Cokers describing the bounds of the Disputed Property was admitted into evidence.[9]

Having concluded the challenged attributes of the jury's findings were supported by legally and factually sufficient evidence, we overrule the McDuffs' first issue.

Alleged Error in Submission of the Jury Charge

By their second issue, the McDuffs argue the trial court reversibly erred by refusing to submit requested instructions and questions in the jury charge. Generally, an appellate court reviews a trial court's decision to submit or refuse a particular instruction under an

[8] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.026(b) ("Without a title instrument, peaceable and adverse possession is limited in [section 16.026] to 160 acres, including improvements, unless the number of acres actually enclosed exceeds 160. If the number of enclosed acres exceeds 160 acres, peaceable and adverse possession extends to the real property actually enclosed.").

[9] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.026(c) ("Peaceable possession of real property held under a duly registered deed or other memorandum of title that fixes the boundaries of the possessor's claim extends to the boundaries specified in the instrument.").

abuse of discretion standard. *Omega Contracting, Inc. v. Torres,* 191 S.W.3d 828, 838 (Tex. App.—Fort Worth 2006) (citing *James v. Kloos,* 75 S.W.3d 153, 162 (Tex. App.—Fort Worth 2002, no pet.)). "A trial court is required to submit only ultimate or controlling factual issues which are essential to a right of action or defense. Questions that are not ultimate or controlling need not be submitted; if they are submitted, they may be disregarded as immaterial." *C&C Partners v. Sun Exploration & Prod. Co.,* 783 S.W.2d 707, 721 (Tex. App.—Dallas 1989, writ denied)*, disapproved on other grounds by Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.,* 960 S.W.2d 41, 47 (Tex. 1998); *see also Triplex Commc'ns v. Riley,* 900 S.W.2d 716, 718 (Tex. 1995) (noting "[i]f an issue is properly pleaded and is supported by some evidence, a litigant is entitled to have controlling questions submitted to the jury."). A controlling issue is one that if answered favorably to the submitted theory will form the basis for a judgment in favor of the issue's proponent. *Stone v. Metro Rest. Supply, Inc.*, 629 S.W.2d 254, 256 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.).

1. *Requested Submission of "Clear and Satisfactory" Proof*

The trial court instructed the jury on the proper burden of proof:

> The term "preponderance of the evidence" means the greater weight of credible evidence presented in this case. If you do not find that a preponderance of the evidence supports a "Yes" answer, then answer "No." A preponderance of the evidence is not measured by the number of witnesses or by the number of documents admitted in evidence. For a fact to be proved by a preponderance of the evidence, you must find that the fact is more likely true than not true.

The McDuffs requested the court further instruct the jury on the burden of proof by adding, "[t]he proof must be 'clear and satisfactory,' which means you must exercise great caution in weighing the evidence."

The trial court refused this requested submission. On appeal, the McDuffs argue that refusal was an abuse of discretion constituting reversible error. We disagree.

It has been said in some adverse possession cases that the proof must be "clear and satisfactory." *Rhodes v. Cahill,* 802 S.W.2d 643, 645 n.2 (Tex. 1990) (citing *Orsborn v. Deep Rock Oil Corp.,* 153 Tex. 281, 290, 267 S.W.2d 781, 787 (1954)). But the Supreme Court of Texas has observed this language is an admonition to exercise great caution in weighing the evidence; it does not supplant the usual preponderance of the evidence standard of proof. *Cahill,* 802 S.W.2d at 645 n.2. Indeed, unless otherwise required in extraordinary circumstances where a more onerous burden is mandated by law, it is settled that in civil cases, "issues of fact are resolved from a preponderance of the evidence" standard. *See Sanders v. Harder,* 148 Tex. 593, 598, 227 S.W.2d 206, 209 (1950); *Ellis Cty. State Bank v. Keever,* 888 S.W.2d 790, 792 (Tex. 1994) (op. on reh'g). Adding to the preponderance-of-the-evidence instruction the McDuffs' requested language would have yielded nothing more than juror confusion, and would potentially misstate the law regarding the proper burden of proof as articulated by our Supreme Court. We therefore conclude the trial court did not abuse its discretion by refusing to submit McDuff's "clear and satisfactory" instruction.

2. *Requested Instruction Regarding McDuffs' Ownership by Title*

The McDuffs also requested the trial court instruct the jury that, "the McDuffs have established their title to the [Disputed] Property through deeds traced back to patents from the State of Texas, the sovereign." Alternatively, they sought a question inquiring "[w]ho owns the [Disputed] Property under the regular chain of title from the sovereign?" But there was no question about who owned title to the Disputed Property; the Brumleys even conceded this fact prior to trial. Construing unambiguous deeds is a question of law for the trial court, thus presenting no question of fact. *See Stribling v. Millican DPC Partners, LP,* 458 S.W.3d 17, 20 (Tex. 2015) (per curiam).

Ownership by record title was not the issue in this case. The sole means for the Brumleys to prevail on their trespass to try title action was by proving title by limitations. The proposed instruction or question did not concern a controlling issue. To instruct or inquire as requested by the McDuffs would only confuse the jury and might have produced conflicting findings. We conclude the trial court did not abuse its discretion by refusing the requested instruction or alternatively-requested question.

3. *Requested Question Regarding Classification of Fencing*

The McDuffs also complain about the trial court's refusal to submit a question inquiring, "Do you find from a preponderance of the evidence that there was a design fence on the property at the time -- as of the year 2000?" The McDuffs also urge error in the trial court's refusal to instruct the jury in the following manner: (1) "[y]ou will be instructed that adverse possession does not include fencing or re-fencing over fencing that was there prior to the occupant's arrival on the premises in 2001"; and (2) "you are

instructed that a design fence is not an act which constitutes - constructing a casual fence where a design fence previously existed is not an act that constitutes adverse possession." We hold that the trial court did not abuse its discretion in refusing the requested question or instructions.

"The adverse claimant who relies upon grazing only as evidence of his adverse use and enjoyment must show as part of his case that the land in dispute was designedly enclosed." *McDonnold v. Weinacht*, 465 S.W.2d 136, 142 (Tex. 1971) (citing multiple decisions). However, the Brumleys pursued title by limitations through evidence that went well beyond proof of grazing cattle and repair/replacement of border fencing. They presented evidence of their overt declarations of ownership and through other open and visible acts. The question was therefore not of a controlling issue. In light of this other evidence admitted at trial, the McDuffs fail to show how the trial court's refusal to give the requested instruction or question is harmful. TEX. R. APP. P. 44.1. We conclude the trial court did not commit reversible error in its charge determinations concerning the type fencing employed.

Finding no abuse of discretion by the trial court in refusing submission of the requested instructions and questions, we overrule the McDuffs' second issue.

Addressing the Views from the Dissenting Opinion

Aside from the dissenting opinion's views of alleged procedural unfairness about the trial (an argument not advanced by Appellants), we briefly address the dissent's rationale why it believes the evidence supporting the jury's verdict is legally insufficient. No member of this Court personally observed when, if ever, the Brumleys took

possession of the land. No one on the Court personally observed whether the Brumleys actually performed acts to improve the land that the witnesses testified about at trial.

What we have, instead, is the record of the testimony and exhibits admitted at trial, along with the long-standing rule that evidence is legally sufficient if it "would enable reasonable and fair-minded people to reach the verdict under review." *City of Keller*, 168 S.W.3d at 827; Robert W. Calvert, *"No Evidence" & "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361 (1960). Because jurors are "the sole judges of the credibility of witnesses and the weight to give their testimony," we are mindful of our limited role in this story; jurors, not the members of this Court, are empowered to credit evidence that was favorable to the verdict and to disbelieve the contrary evidence. *See id.* at 819. In light of the applicable law and the proper lens for appellate review, we conclude that reasonable and fair-minded jurors possessed sufficient evidence to answer "Yes" to the question submitted by the trial court.

Conclusion

Having overruled the McDuffs two appellate issues, we affirm the judgment of the trial court.

Lawrence M. Doss
Justice

Pirtle, S.J., dissenting.