IN THE
TENTH COURT OF APPEALS

No. 10-14-00061-CV

CURTIS CAPPS,

Appellant

v.

THE KNOWN AND UNKNOWN HEIRS OF PRISCILLA FOSTER, ET AL,

Appellees

From the 272nd District Court
Brazos County, Texas
Trial Court No. 12-001362-CV-272

MEMORANDUM OPINION

In four issues, appellant, Curtis Capps, challenges the trial court's judgment entered in favor of appellees, the known and unknown heirs of Priscilla Foster, in a dispute involving title to land in Brazos County, Texas. Because we conclude that the trial court's judgment in favor of appellees is supported by legally and factually sufficient evidence, and because we cannot say that the trial court's judgment is void under the principles of comity, we affirm the portion of the judgment regarding title to the land in

question. We also reverse and render judgment in favor of appellees/cross-appellants with regard to the taxation of costs.[1]

I. BACKGROUND

This case involves a 285.5-acre tract of land in Brazos County, Texas, with a storied past. Witnesses at trial testified that Priscilla Foster was a slave who was born in or around 1827. The witnesses testified that her "master" was Sam Foster who did not marry Priscilla but fathered seven children with her. The record evidence demonstrates that in 1875, the land in question was put "in trust" with four men: Nelson Constant, Alex Scott, Wyatt Butler, and Peter Morgan "as trustees for various and sundry parties." Apparently, the terms and reasons for the trust were lost, but it appears that Priscilla's heirs began to use and enjoy this tract of land at this time.

In 1922, Nelson Constant, the last surviving "trustee" of the land, made a number of conveyances to the aging children of Priscilla as grantees.[2] The face of the deeds reflect that the grantees had paid for the land many years ago, but a deed was never made for them. In this appeal, the Priscilla Foster, Henry Foster, Tom Hill, and Mattie Carter tracts are at issue, and Capps asserts that the tracts comprise 64.351 surface acres of the 285.5-acre tract.[3]

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[1] All motions not expressly ruled upon in this memorandum opinion are dismissed as moot.

[2] Appellees allege that Constant conveyed the property to Priscilla's aging children "to rectify a wrong."

[3] In their live answer, appellees claim that: (1) the Priscilla Foster tract contains 25.12 acres; (2) the Henry Foster tract contains 29.3 acres; (3) the Tom Hill tract contains 13.5 acres; and (4) the Mattie Carter tract contains 12.85 acres.

Testimony also showed that around 1935, the family began operating on the tracts using "caretakers" or "trustees." Clephus Lyons, James Robison, and Billy Lyons are among the alleged "caretakers" or "trustees." Nevertheless, no written trust or caretaking agreement has been located. However, Billy Lyons, the most recent "caretaker" or "trustee," testified that he has maintained the tracts for the family since 1985.

In any event, in 1941, Phillips Petroleum Company ("Phillips") began to acquire a series of leases covering the land at issue. In these leases, Phillips refers to the tracts as being owned by Priscilla Foster, Henry Foster, Tom Hill, and Mattie Carter. Additionally, appellees presented royalty deeds from various members of the family of Priscilla Foster granted in favor of Roy Nunn. In each of these deeds, the tracts of land are referenced as being owned by the family of Priscilla Foster.

Capps, on the other hand, has a different version of the facts. Capps notes that in 2010, the 85th District Court in Brazos County awarded title to the 285.5-acre tract, including the tracts at issue here, to Rajena and Buetta Scott. Capps asserts that Rajena and Buetta are heirs of Alex Scott, one of the original "trustees" who received the property in 1875. After the 2010 judgment was entered, Buetta conveyed her interest in the property to Rajena, who, in turn, conveyed title to Capps.

Thereafter, Capps filed suit to remove four clouds on the title that he received from Rajena—namely, the purported deeds corresponding with the Priscilla Foster, Henry Foster, Tom Hill, and Mattie Carter tracts. Throughout trial, Capps maintained that he is the record title owner of the tracts, and therefore, appellees did not have a claim to the

property. In their live answer, appellees generally denied Capps's allegations and asserted the affirmative defenses of adverse possession, title by lost grant, and the "ancient boundary rule." Appellees also asserted a cross-claim to remove the cloud created by Capps's deed under the same affirmative defenses.

At trial, numerous witnesses testified about the deed history of the land and to appellees' usage of the land over the years. At the conclusion of the evidence, the trial court awarded the disputed tracts to appellees. For the Priscilla Foster, Henry Foster, and Tom Hill tracts, the trial court did not proffer a reason for vesting title in appellees. However, for the Mattie Carter tract, the trial court included the following in its judgment: "The deed offered by Plaintiff into Mattie Carter is void but that is trumped by the Defendants' adverse possession of the tract." The trial court assessed costs of court against appellees "because they let their title get into a state of disrepair." Capps filed various post-judgment motions, including a motion for new trial that was denied on April 28, 2014. Thereafter, both Capps and appellees filed notices of appeal.[4]

[4] After filing his notice of appeal, Capps filed a motion to partially dismiss appellees' cross-appeal, arguing that appellees' appellate counsel, W. Stephen Rodgers, seeks to represent non-clients on appeal. The record reflects that Capps sued the known and unknown heirs of Priscilla Foster. At trial, the unknown heirs were represented by an attorney ad litem, Jack W. Dillard, while Rodgers represented the known heirs. The record does not show that Dillard filed a notice of appeal on behalf of the unknown heirs. *See Motor Vehicle Bd. of Tex. v. El Paso Auto. Dealers Ass'n*, 1 S.W.3d 108, 110 (Tex. 1999) (stating that only parties of record may appeal a trial court's judgment). However, the Texas Supreme Court has recognized that "a person or entity who was not a named party in the trial court may pursue an appeal in order to vindicate important rights." *Id.* In his response to Capps's motion, Rodgers relies on the virtual-representation doctrine, which allows a litigant to be deemed a party if it will be bound by the judgment, its privity of interest appears from the record, and there is an identity of interest between the litigant and a named party to the judgment. *Id.*; see *BJVSD Bird Family P'ship, L.P. v. Star Electricity, L.L.C.*, 413 S.W.3d 780, 783-84 (Tex. App.—Houston [1st Dist.] 2013, no pet.). Based on our review of the record, we find that the unknown heirs of Priscilla Foster are bound by the trial court's judgment as to ownership of the land; that the privity of interest is apparent from the record; and that the known and unknown heirs of Priscilla Foster have similar interests in the land. Accordingly, we conclude that the virtual-representation doctrine applies in

II. JUDGMENTS OF COURTS OF EQUAL JURISDICTION

In his first issue, Capps argues that the judgment in this case is void because it purports to alter the 2010 judgment of another court of equal jurisdiction.

A review of the 2010 judgment shows that Buetta and Rajena successfully sued the known and unknown heirs of Alex Scott for title to the 285.5-acre tract. However, Capps has not claimed that every appellee in this case is a known or unknown heir of Alex Scott. Therefore, not all of the appellees were parties to that judgment. And as such, not all of the appellees are bound by the 2010 judgment. *See In re M.M.O.*, 981 S.W.2d 72, 80 (Tex. App.—San Antonio 1998, no pet.) ("A judicial declaration is generally not binding on persons who are not parties to the proceeding or who, although named as parties, did not receive notice of the proceeding.") (citing *Avila v. St. Luke's Lutheran Hosp.*, 948 S.W.2d 841, 847 (Tex. App.—San Antonio 1997, pet. denied)); *see also Charvis v. Charvis*, 529 S.W.2d 814, 815 (Tex. Civ. App.—Tyler 1975, no writ) (noting that a judgment "is not binding upon strangers" (citing *Kirby Lumber Corp. v. S. Lumber Co.*, 145 Tex. 151, 196

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this case, especially given that this case involves important property interests; that the known and unknown heirs are similarly situated with common interests; and that to hold otherwise would leave the unknown heirs unrepresented in this appeal. *See In re Lumbermens Mut. Cas. Co.*, 184 S.W.3d 718, 725 (Tex. 2006) ("Virtual representation is best understood as an equitable theory rather than as a crisp rule with sharp corners and clear factual predicates . . . such that a party's status as a virtual representative of a nonparty must be determined on a case-by-case basis." (quoting *Gonzalez v. Banco Cent. Corp.*, 27 F.3d 751, 761 (1st Cir. 1994))); *City of San Benito v. Rio Grande Valley Gas Co.*, 109 S.W.3d 750, 754 (Tex. 2003) (noting that one who has been virtually represented may be entitled to invoke the right of participation as a named party after the judgment has been rendered because "to hold otherwise would deprive [parties who will be bound by a judgment] of the power to preserve their own interests"). This conclusion comports with the Texas Supreme Court's pronouncement that "our procedural rules favor the resolution of cases based upon substantive principles." *In re Lumbermens Mut. Cas. Co.*, 184 S.W.3d at 728 (citing TEX. R. CIV. P. 1; *Verburgt v. Dorner*, 959 S.W.2d 615, 616-17 (1997) (disfavoring disposition of appeals based upon harmless procedural defects)). Therefore, based on the foregoing, we deny Capps's partial motion to dismiss appellees' cross-appeal.

S.W.2d 387, 388-89 (1946))). Accordingly, contrary to Capps's assertion, we cannot say that the trial court's judgment in this case is void under the principles of comity. *But see Pursley v. Ussery*, 937 S.W.2d 566, 568 (Tex. App.—San Antonio 1996, no writ) ("Under the principles of comity, a court should not be permitted to interfere with the final judgment of another court of equal jurisdiction.").

Moreover, even assuming that some of the appellees are bound by the 2010 judgment, Capps's litigation strategy would not necessitate a reversal of the trial court's judgment in this case. Prior to trial, appellees filed special exceptions to Capps's pleadings,

> because they do not place the Defendants on notice as to which of the various tracts of land the Plaintiff claims to be attempting to divest title from a specific Defendant. The global nature of the Plaintiff's pleading makes it impractical or even impossible to properly defend against the Plaintiff's claim that he is entitled to legal relief divesting ownership of land from a specific owner.

When presented to the trial court, rather than re-pleading, Capps alleged that he,

> owns 100 percent fee title to the property. Same is confirmed by title reports, University Title, Brazos County Abstract. I go on to say in every paragraph we own 100 percent.
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> . . . .
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> And this was—I did, as soon as he filed special exception, I said, okay, if you can't understand what we're doing by what I have already, let me re-plead it so you can. So I had 100 percent in everything.

Based on his allegation, if Capps's proof failed as to any defendant, then Capps's proof failed as to all defendants on the tracts in question. Therefore, because he alleged that he owned "100 percent in everything," and because he elected to broadly and generally claim ownership to the entire 285.5-acre tract, Capps risked the loss of his claim because

of the way he pleaded and offered proof. *See Dames v. Strong*, 659 S.W.2d 127, 129 (Tex. App.—Houston [14th Dist.] 1983, no writ) ("As a general rule, a plaintiff who specially pleads his title is restricted in his proof to evidence of the title thus pleaded. He may not introduce proof of any other title. The theory behind this rule is that by pleading one title the party impliedly admits that he claims under the title so pleaded, and under no other." (quoting 56 TEX. JUR. 2d *Trespass To Try Title* § 111 (1964))). Indeed, as we show later, Capps loses his claim as to all defendants because we conclude that the trial court's determination that appellees acquired title to the land by adverse possession is supported by legally and factually sufficient evidence. We therefore overrule Capps's first issue.

III. CAPPS'S REMAINING CLAIMS

In his second, third, and fourth issues, Capps asserts various arguments for why he believes the trial court erred in granting appellees limitations title to the disputed land.

A. Findings of Fact and Conclusions of Law

Here, the trial court did not enter any findings of fact or conclusions of law.[5] Thus, Capps has not challenged any particular finding made by the trial court and, instead, complains generally about the trial court's judgment.

> When a party appeals from a nonjury trial, it must complain of specific findings and conclusions of the trial court, because a general complaint against the trial court's judgment does not present a justiciable question. *Fiduciary Mort. Co. v. City Nat'l Bank*, 762 S.W.2d 196, 204 (Tex. App.—Dallas 1988, writ denied). Accordingly, findings of fact and conclusions of law are mandatory for a party to file to avoid the onerous presumptions that apply in an appeal from a nonjury trial. When an appellant does not request or

[5] The record reflects that Capps requested that the trial court enter findings of fact and conclusions of law and that Capps also filed a notice of past-due findings. However, Capps took no further action to obtain the findings and conclusions.

> file findings and conclusions by the trial court, the appellate court presumes the trial court found all fact questions in support of its judgment, and the reviewing court must affirm that judgment on any legal theory finding support in the pleadings and evidence. *Point Lookout West, Inc. v. Whorton*, 742 S.W.2d 277, 278 (Tex. 1987).
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> If the appellant does not challenge the trial court's findings of fact, when filed, these facts are binding upon both the party and the appellate court. *Wade v. Anderson*, 602 S.W.2d 347, 349 (Tex. Civ. App.—Beaumont 1980, writ ref'd n.r.e.). Accordingly, it is incumbent for the appellant to attack the findings by the appropriate legal and factual sufficiency points of error. *Lovejoy v. Lillie*, 569 S.W.2d 501, 504 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.). In an appeal of a nonjury trial, findings are specifically and meaningfully tied to appropriate standards of appellate review and are therefore truly beneficial to appellate review. *See Chrysler Corp. v. Blackmon*, 841 S.W.2d 844, 853 (Tex. 1992).

Apodaca v. Rios, 163 S.W.3d 297, 303 (Tex. App.—El Paso 2005, no pet.). Therefore, because he only generally complains about the trial court's judgment, Capps has not presented a justiciable question. *See id*. (citing *Fiduciary Mort. Co.*, 762 S.W.2d at 204). As such, we presume that the trial court found all fact questions in support of its judgment and will affirm the trial court's judgment on any legal theory that finds support in the pleadings and evidence. *See Apodaca*, 163 S.W.3d at 303 (citing *Whorton*, 742 S.W.2d at 278).

B. Adverse Possession

Given that we are to presume that the trial court found all fact questions in support of its judgment and that the trial court's judgment can be affirmed on any legal theory that finds support in the pleadings and evidence, we will address the issue of adverse-possession in turn.[6]

[6] Appellees argue on appeal that the trial court's judgment could have been affirmed on their other affirmative defenses—namely, based on the doctrine of presumed lost deed or grant. However, we note that Texas courts have treated the doctrine of presumed lost deed or grant as the "common law form of

1. Applicable Law

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 hostile to the claim of another person" throughout the statutory period. TEX. CIV. PRAC. & REM. CODE ANN. § 16.021(1) (West 2002). The statute requires that such possession be "inconsistent with" and "hostile to" the claims of all others. *Tran v. Macha*, 213 S.W.3d 913, 914 (Tex. 2006); *see Rhodes v. Cahill*, 802 S.W.2d 643, 645 (Tex. 1990) (noting that "possession must be of such character as to indicate *unmistakably* an assertion of a claim of exclusive ownership in the occupant" (emphasis in original)). As the Texas Supreme Court mentioned in *Macha*,

> hostile use does not require an intention to dispossess the rightful owner, or even know that there is one. But there must be an intention to claim the property as one's own to the exclusion of all others; [m]ere occupancy of land without any intention to appropriate it will not support the statute of limitations.

213 S.W.3d at 915 (internal citations and quotations omitted); *see Bernal v. Chavez*, 198 S.W.3d 15, 19 (Tex. App.—El Paso 2006, no pet.).

2. Discussion

Here, Capps filed a trespass-to-try-title suit, seeking to remove clouds on the title to the land in question. A trespass-to-try-title action is a procedure by which rival claims

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adverse possession." *See Fair v. Arp Club Lake, Inc.*, 437 S.W.3d 619, 626 (Tex. App.—Tyler 2014, no pet.) ("The doctrine of presumed lost deed or grant, which is also referred to as title by circumstantial evidence, has been described as a common law form of adverse possession.") (citing *Conley v. Comstock Oil & Gas LP*, 356 S.W.3d 755, 765 (Tex. App.—Beaumont 2011, no pet.)); *see also Haby v. Howard*, 757 S.W.2d 34, 39 (Tex. App.—San Antonio 1988, writ denied); *Miller-Vidor Lumber Co. v. Schreiber*, 298 S.W. 154, 161 (Tex. Civ. App.—Beaumont 1927, writ ref'd). Accordingly, we will address the issue of adverse possession instead.

to title or right of possession may be adjudicated. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 755 (Tex. 2003). To recover in a trespass-to-try-title action, the plaintiff is required to prevail on the superiority of his own title, not on the weakness of the defendant's title. *Rogers v. Ricane Enters., Inc.*, 884 S.W.2d 763, 768 (Tex. 1994). The plaintiff may recover (1) by proving a regular chain of conveyances from the sovereign, (2) by establishing superior title out of a common source, (3) by proving title by limitations, or (4) by proving title by prior possession coupled with proof that possession was not abandoned. *Id.* To prove a prima facie case of common source, the plaintiff must connect his title and the defendant's title through complete chains of title to the common source and then show that his title is superior to the one that the defendant derived from the common source. *Id.*

In his trespass-to-try-title action, Capps claimed record title from a deed dating back to 1875. Appellees responded to Capps's claims by asserting the affirmative defense of adverse possession and filing a cross-claim claiming adverse possession, among other things. In other words, Capps argued that his chain of title is superior to appellees' claim of ownership to the land under adverse possession. Like the trial court, we disagree with Capps.

Despite Capps's assertion in his original petition that his chain of title dated back to 1875, June Van Etten, the vice president and supervisor of the abstract department of Brazos County Abstract Company, testified that there were no further deeds on which appellant could base his claims. In fact, until 2010, there was not any action taken by a "record title" holder to recover possession of the land in question. During this time, the

evidence shows that appellees and their predecessors used and enjoyed the land, including using the land for farming, living, raising livestock, building and stocking lakes, and making other improvements.

Billy Joe Lyons testified that he had personal knowledge that appellees had been using the land in question since he was "about 10 or 11." When asked how old he was at trial, Billy noted that he was sixty-two. Therefore, Billy's testimony established that appellees had been using the land for at least fifty years. Additionally, Billy stated that he had been using the land for appellees since 1985 or 1986 and that appellees have been paying taxes on the land since 1985—testimony that is supported by numerous tax receipts issued by the Brazos County tax assessor.[7] *See Mem'l Park Med. Ctr., Inc. v. River Bend Dev. Group, L.P.*, 264 S.W.3d 810, 818 (Tex. App.—Eastland 2008, no pet.) (noting that the consecutive payment of taxes on the land supports a claim for adverse possession); *Holasek v. Janek*, 244 S.W. 285, 286 (Tex. Civ. App.—Dallas 1922, no writ) (stating that the payment of taxes may be established "by receipt issued by tax collector, the record of taxes collected kept in the office of the tax collector, or by direct or circumstantial evidence" and that the payment need not "be established by any particular

[7] The receipts indicate that the Brazos County tax assessor lists some of the appellees as owners of the land in question.

Additionally, on appeal, Capps has proffered additional evidence regarding the taxes on the property that was not considered by the trial court. Because this evidence was not included in the appellate record, we will not consider it in this appeal. *See Gonzalez v. Villarreal*, 251 S.W.3d 763, 777 n.17 (Tex. App.—Corpus Christi 2008, pet. dism'd w.o.j.) (holding that attachment of documents as exhibits or appendices to appellate briefs is not formal inclusion in the appellate record); *see also Till v. Thomas*, 10 S.W.3d 730, 733-34 (Tex. App.—Houston [1st Dist.] 1999, no pet.) ("We cannot consider documents attached to an appellate brief that do not appear in the record.").

form of evidence to an absolute certainty, but only to a reasonable certainty like any other ordinary fact in dispute and required to be established in the course of a judicial investigation"); *see also McDonough v. Jefferson County*, 79 Tex. 535, 15 S.W. 490, 491 (1891) ("There was not error committed in permitting the payment of taxes to be proved by oral evidence over the objection that the tax receipts or record evidence should be produced, nor over the objection that the evidence was general and did not show the amount paid for any particular year.").

Billy recalled that his Uncle James Robison was in charge of the land on behalf of appellees for the prior twenty-seven years and that his grandfather, Clephus Lyons, was the caretaker for "about 25 years" before James. In other words, at the time of trial, appellees established that their "caretakers" had used the land for a consecutive period of approximately eighty years. Billy further mentioned that Clephus's mother lived in a house on the property before Billy was born in 1951. Billy also recounted that he was born and raised in Clephus's home and that Clephus farmed the property on his own and for his mother. Billy noted that the "caretaking" done on behalf of appellees was a task that was passed down from family member to family member.

Other testimony showed that appellees' caretakers raised cattle, horses, and hay since the 1980s and that Clephus was farming the land in the 1940s and 1950s. *See McDonnold v. Weinacht*, 465 S.W.2d 136, 145 (Tex. 1971) (stating that a showing of grazing and a sufficient enclosure will support an adverse-possession claim); *see also Baughn v. Capps*, No. 10-09-00111-CV, 2010 Tex. App. LEXIS 1580, at *15 (Tex. App.—Waco Mar. 3, 2010, no pet.) (mem. op.). In particular, the land was used for the farming of corn and

watermelons and the cultivation of hay. *See De Alonzo v. Solis*, 709 S.W.2d 690, 693 (Tex. App.—San Antonio 1988, writ ref'd n.r.e.) (concluding that appellees established adverse possession "by showing that they farmed the land" and noting that cultivating the land continuously over a ten-year period is generally sufficient to establish open, notorious, and hostile possession); *Doyle v. Ellis*, 549 S.W.2d 62, 64 (Tex. Civ. App.—Waco 1977, no writ); *Wiggins v. Houston Oil Co.*, 203 S.W.2d 252, 256 (Tex. App.—Beaumont 1947, writ ref'd n.r.e.) (holding that the claimant took sufficient adverse possession by annually cultivating the 160 acres with corn, cotton, sweet potatoes, and peas, even though the land was only partially fenced and the claimant did not reside there). Billy also testified that he has built a "corral, two-and-quarter-inch oil field pipe corral catch-pen for cattle" and that he has a "930K tractor" on the land in question. *See Anderton v. Lane*, 439 S.W.3d 514, 518 (Tex. App.—El Paso 2014, pet. denied) ("Under Texas law, use of land for grazing cattle, fails to establish adverse possession as a matter of law, unless the fence used is a 'designed enclosure' as opposed to 'casual fences.'" (citing *Rhodes*, 802 S.W.2d at 646; *McDonnold*, 465 S.W.2d at 141-43)).

Moreover, Billy stated that he and his brother made improvements to the land, including digging tanks for cattle and lakes for fish that were stocked with special fish for family use. Billy also noted that he uses a 10-foot brush hog, a 16-foot deep disk, and another cutter to maintain the property and that he has built and maintained family fences and fences with adjoining landowners. *See Kinder Morgan N. Tex. Pipeline, L.P. v. Justiss*, 202 S.W.3d 427, 439-40 (Tex. App.—Texarkana 2006, no pet.) ("The fencing of land has long been recognized as visible appropriation." (citing *Stafford v. Jackson*, 687 S.W.2d

784, 787 (Tex. App.—Houston [14th Dist.] no writ); *Mixon v. Clark*, 518 S.W.2d 402, 406 (Tex. Civ. App.—Tyler 1974, writ ref'd n.r.e.); *Peveto v. Herring*, 198 S.W.2d 921, 928 (Tex. Civ. App.—Beaumont 1946, no writ))); *see also Shouse v. Roberts*, 737 S.W.2d 354, 357 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.).

Armatha Ross, who was ninety-three years old at the time of trial, stated that she would go out to the land in question when she was eight or nine years old to visit her grandmother, Nicie Foster Hill, who lived on the property. *See Tex-Wis Co. v. Johnson*, 525 S.W.2d 232, 235 (Tex. App.—Waco 1975), *aff'd*, 534 S.W.2d 895 (Tex. 1976) (concluding that plaintiffs established possession of two tracts of land by showing that the family lived on and farmed the land while raising livestock from 1934 to 1964 and that the property was enclosed by fences). Ross recalled that her family farmed the land for cotton, corn, and watermelons and that they had "horses and the mules out there." Ross also noted that the family had family reunions and gatherings on the land most years.

Phillip Wayne Johnson, who was fifty-five at the time of trial, testified that Priscilla Foster is his great, great grandmother and that he was first introduced to the land at the first family reunion in 1963. Phillip also asserted that his grandmother was "born on this land in 1912." Phillip recounted the following story told about his grandmother's birthplace: "She was born in this house right over here. We had horses and cows over here. Not only that, we had a house over here with a shed in the back of it as well, but the shed is gone." *See Tex-Wis Co.*, 525 S.W.2d at 235.

The testimony above shows that appellees and their caretakers have actually, exclusively, continuously, visibly, and notoriously possessed the land in question for a

period of at least eighty years.[8] *See Justiss*, 202 S.W.3d at 438 (citing *W. T. Carter & Bro. v. Holmes*, 131 Tex. 365, 113 S.W.2d 1225, 1226 (1938)). We hold that the evidence is legally and factually sufficient to support the trial court's finding that appellees adversely possessed the land in question as to all other potential owners. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.030 (West 2002); *Justiss*, 202 S.W.3d at 438; *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005) (stating that, under legal-sufficiency review, we ask "whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review" and credit favorable evidence if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not); *Checker Baq Co. v. Washington*, 27 S.W.3d 625, 633 (Tex. App.—Waco 2000, pet. denied) (noting that, under factual-sufficiency review, we "consider and weigh all of the evidence" and reverse only if the verdict is "so contrary to the overwhelming weight of the evidence that the verdict is clearly wrong and unjust"); *see also Baughn*, 2010 Tex. App. LEXIS 1580, at *21. We overrule Capps's second, third, and fourth issues.

[8] On appeal, Capps argues that appellees' use of the land was permissive because they used caretakers. Exclusive possession of the land is required to support an adverse-possession claim; the adverse-possession claimant must wholly exclude the owner of the property. *Turner v. Mullins*, 162 S.W.3d 356, 367 (Tex. App.—Fort Worth 2005, no pet.). Joint or common possession by the adverse possession claimant and the owner defeats the requisite quality of exclusiveness. *Id.* The record does not reflect that Capps, the person who purports to own the land, permitted appellees to use the land, which would therefore defeat the exclusiveness factor. *See id.* Furthermore, we emphasize that Capps alleged at trial that he owns "100 percent of everything" and that he filed a trespass-to-try-title suit, asserting that his claim to the land is superior to all others. Thus, the trial court was tasked with deciding whether appellees or Capps had superior title to the land, not whether appellees' caretakers had superior title. As such, we are not persuaded by Capps's argument.

IV. APPELLEES' CROSS-APPEAL

In one issue in their cross-appeal, appellees contend that the trial court abused its discretion in taxing court costs against them.[9]

A. Applicable Law

"We review a trial court's award of costs under an abuse of discretion standard." *Mitchell v. Bank of Am., N.A.*, 156 S.W.3d 622, 630 (Tex. App.—Dallas 2004, pet. denied) (citing *Hasty Inc. v. Inwood Buckhorn J.V.*, 908 S.W.2d 494, 502 (Tex. App.—Dallas 1995, writ denied)). A trial court abuses its discretion when it acts without regard to any guiding rules or principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985).

B. Discussion

Texas Rule of Civil Procedure 131 provides that a "successful party to a suit shall recover of his adversary all costs incurred therein, except where otherwise provided." TEX. R. CIV. P. 131. However, the trial "court may, for good cause, to be stated on the record, adjudge the costs otherwise than as provided by law or these rules." *Id.* at R. 141; *see Furr's Supermarkets, Inc. v. Bethune*, 53 S.W.3d 375, 376 (Tex. 2001). With respect to taxing costs under Rule 141, the Texas Supreme Court has stated:

> Taxing costs against a successful party in the trial court, therefore, generally contravenes Rule 131. Yet the trial court's ruling on costs under Rule 141 is permitted within its sound discretion, although that discretion is not unlimited.

[9] On June 3, 2014, appellees filed an explanation for the filing of their notice of cross-appeal more than ninety days after judgment or alternatively a motion for extension of time to file their notice of cross-appeal. After reviewing the filing, we grant appellees' motion and consider their cross-appeal to have been timely filed.

> Rule 141 has two requirements—that there be good cause and that it be stated on the record. "Good cause" is an elusive concept that varies from case to case. Typically though, "good cause" has meant that the prevailing party unnecessarily prolonged the proceedings, unreasonably increased costs, or otherwise did something that should be penalized.
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> Rule 131's underlying purpose is to ensure that the prevailing party is freed of the burden of court costs and that the losing party pays those costs. . . . Rather, Rule 141's good cause exception to the mandate of Rule 131 is designed to account for a prevailing party's questionable conduct that occurs during litigation, permitting the trial judge some discretion to reassess costs so that the cost attendant to that conduct is not visited on an innocent, but losing party.

Furr's Supermarkets, Inc., 53 S.W.3d at 376-78.

Here, despite the fact that appellees were clearly the prevailing party, the trial court taxed costs against appellees "because they let their title get into a state of disrepair." First, the trial court does not point to any action taken by appellees during litigation that was questionable. *See id.* Furthermore, the record does not reflect a finding by the trial court that appellees unnecessarily prolonged the proceedings, unreasonably increased costs, or otherwise did something during trial that should be penalized. *See id.*; *see also Roberts v. Williamson*, 111 S.W.3d 113, 124 (Tex. 2003) ("Grounds of perceived fairness, without more, are insufficient to constitute good cause."); *but see Rogers v. Walmart Stores, Inc.*, 686 S.W.2d 599, 601 (Tex. 1985) (affirming the taxation of costs against a prevailing party based on the trial court's finding that the party's trial strategy unnecessarily prolonged the trial); *Tex. Dep't of Transp. v. Pirtle*, 977 S.W.2d 657, 658 (Tex. App.—Fort Worth 1998, pet. denied) (affirming the taxation of costs against the Texas

Department of Transportation because it refused to mediate as ordered and failed to file any objection to the mediation). Any disrepair of appellee's title occurred long before this litigation. Therefore, based on the foregoing, we conclude that the trial court erred in taxing costs against appellees. *See* TEX. R. CIV. P. 131, 141; *Mitchell*, 156 S.W.3d at 630; *see also Furr's Supermarkets, Inc.*, 53 S.W.3d at 376-78. Accordingly, we sustain appellees' sole issue on cross-appeal.

V. CONCLUSION

Because we have concluded that the trial court erred in taxing costs against appellees, and because Texas Rule of Civil Procedure 131 provides that the prevailing party shall recover all costs incurred from the losing party, we reverse the portion of the trial court's judgment taxing costs against appellees and render judgment that all costs shall be taxed against Capps. We affirm the judgment in all other respects.

AL SCOGGINS
Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
Affirmed, in part, and reversed and rendered, in part
Opinion delivered and filed January 21, 2016
[CV06]