

¶ 3

FACTS

¶ 4 On April 21, 2009, the plaintiff filed a two-count complaint. Count I was a request to quiet title, alleging that the plaintiff had acquired title by adverse possession to certain property to which the defendants claimed ownership. Count II was a request for a permanent injunction, to forbid the defendants from entering onto the plaintiff's allegedly adversely possessed real estate and to forbid the defendants from destroying a fence that the plaintiff contended marked the alleged existing boundary line.

¶ 5 A bench trial was conducted on May 28, 2010. Morris Mott testified that he has been in the construction business since 1977 and that he uses bulldozers in his business to do general work for farmers. Mott testified that in the 1990s or late 1980s he had the occasion to clear a fence row for defendant Doyle Coonce so a new fence could be built. Mott testified that the old fence had been there for a long time. Mott explained that when he cleared the old fence, pursuant to defendant Doyle Coonce's instructions, he left some of the corner posts and some of the larger trees that the barbed wire had been fastened to in lieu of fence posts. Mott testified that he had the occasion to again view the disputed property site in April 2010. At that time, Mott was present on the property with the plaintiff. Mott testified that he observed a new fence standing in virtually the same spot where the old fence had been. On cross-examination, Mott confirmed that he walked the entire length of the fence in question, on the plaintiff's side of the fence. Mott described the property on the plaintiff's side of the fence as wooded, specifying that some of the property was good woods, some of it was "crappy" woods, and other parts of the property were not actual woods, but deer hunting ground. In contrast, Mott testified that the defendants' property on the other side of the fence was maintained as a pasture.

¶ 6 Mitchell Garrett testified that he is employed as a professional land surveyor, that he has been so employed since 1977, and that he has been licensed as such since 1993. Garrett

testified that he conducted a survey on the plaintiff's property on February 18, 2009, at the request of the plaintiff. Garrett noted that at the time of the survey, there was not a dispute between the parties. Garrett distinguished between "occupation lines" and "deed lines" and noted that after speaking with both parties, he discovered that the fence in this case marks the occupation line. Garrett testified that the amount of land between the occupation line and the deed line comprises 5.19 acres. A copy of the survey in the record reveals that the 5.19 acres are composed of a narrow strip of ground running parallel to 3,491.44 feet of the fence line. After making comparisons between the survey and aerial photographs from 1938 and 2004, Garrett confirmed that the fence line had not moved to any significant degree since 1938, indicating a long-standing occupation line. Garrett added that he observed no indicators of occupation other than the fence.

¶ 7 Garrett testified that after conducting the survey, he called the parties into his office to discuss the discrepancy between the deed line and the occupation line, in hopes of reaching a resolution because over five acres of land were involved. Garrett testified that during the meeting, both parties confirmed that the occupation line was the fence. In addition, Garrett learned that defendant Doyle Coonce had removed the old fence and erected a new fence in virtually the same location where the old fence had been. Garrett testified that neither party was aware of the discrepancy between the deed line and the occupation line until after the survey was completed.

¶ 8 The plaintiff, Stephen Short, testified that he purchased property, consisting of 165 acres, in the summer of 1988 and that he uses the land to hunt, fish, and ride his four-wheeler. He reported that he began using the disputed area immediately when he purchased the property in 1988 and that his use of the area has been continuous and without permission because he thought it was his. He noted that the defendants have not used the disputed area at all since he purchased the property in 1988 and that nobody other than himself and his

invitees have used the disputed area. He averred that his activity has been open and visible, except when he is hunting he is camouflaged and wants to be hidden.

¶ 9 Pursuant to Short's testimony, after buying the property in 1988, he immediately began cutting firewood on it, including portions of the disputed area, although he never cut any live trees from the disputed area, only fallen trees and dead wood. According to Short, when he purchased the property he cleaned it up, including portions of the disputed area, using a bulldozer, because it was grown up and had not been maintained for many years. Short testified that he had always considered the fence to be the boundary line because when he purchased the land, the seller showed him the old fence row and identified it as the boundary line. He took the seller's word for it and did not have a survey conducted because he could not afford it at the time.

¶ 10 Short confirmed that the old fence was torn down and replaced by defendant Doyle Coonce in 1989 or 1990 and that the new fence was installed in virtually the same place where the old fence had been. Photographs were admitted into evidence depicting the position of the new fence in relation to the old fence. Short testified that after the new fence was installed, he finished clearing the land on his side all the way up to the fence and subsequently commenced farming some of the land, including portions of the disputed area, and did so for two or three years. He added that due to the limited tillable acres on the property, his farming was not done for profit, but to plant food plots to feed the wildlife. He noted that it took one weekend to plant the food plots every year in the disputed area in particular and that he used a tractor and seeder to plant clover, grass, and turnips for the wildlife to eat.

¶ 11 Short testified that in the early 1990s, subsequent to using the subject land for food plots, he planted 200 to 300 pine trees on a 300- or 400-foot segment of the disputed area, up to the fence line, in the early 1990s, and marked the location of the trees with white

stakes. He clarified that he still uses one particular section of the disputed area for food plots, which he plants every year up to the fence in that particular area. Short added that he also hunts up to the fence and has done so since he purchased the property in 1988, when he put a permanent deer stand in a white oak tree located on the disputed area. According to Short, he hunted from that particular deer stand until 2005 or 2006, at which time he quit doing so because he felt the deer stand was no longer safe. In addition to hunting on the disputed property and planting the food plots, Short described additional activities, such as mowing portions of the disputed area up to the fence line two or three times a year, which he stopped doing three or four years ago when defendant Doyle Coonce began spraying herbicide along the other side of the fence. Short explained that the herbicide sprays across to his side of the fence and keeps it clean, obviating the need for him to mow in those locations.

¶ 12 In addition, Short noted that there is a lane, part of which is located very close to the fence on the disputed area, which he has used since purchasing the property in 1988, to access a rear portion of his property. He elaborated that he drives tractors and farm equipment on the lane, as well as four-wheelers and pickup trucks. In addition, a bulldozer operator used the lane to access the property to be cleared and loggers used the lane to access the property in a forest management plan. Short explained that he also uses the lane when he is hunting, as do other hunters to whom he leases the property during shotgun season. He testified that he began leasing the land for hunting in 1989 or 1990. In particular, some of the hunters use portions of the disputed area and Short places portable deer stands there and instructs the hunters not to shoot on the defendants' side of the line. According to Short, the portable deer stands are up from October through January and are then removed to prevent rusting.

¶ 13 Randy McElroy testified that he is 49 years old and has known the plaintiff for nearly

his whole life. McElroy testified that in 1988, the plaintiff showed him the property he purchased. Every year since then, McElroy has hunted and fished on the plaintiff's property. McElroy recalled the old fence on the property and also recalled that it was replaced while the plaintiff was on vacation. He confirmed that the new fence is very close to where the old fence had been and is in the exact same location in some places. McElroy testified that when defendant Doyle Coonce replaced the fence he also "cleaned up" the plaintiff's side, which McElroy recalled the plaintiff disliked but never discussed with Coonce. McElroy testified that when he hunts on the plaintiff's property he does so up to the fence but never crosses it because he always thought the fence was the property line. McElroy confirmed that the plaintiff leases the property to other hunters. He also stated his familiarity with the lane and with the pine trees that the plaintiff planted on the disputed area.

¶ 14 The defendants did not testify at the hearing. On August 13, 2010, the circuit court entered an order finding the plaintiff had failed to meet his burden of proof in establishing all of the elements of adverse possession for the requisite 20 years. The circuit court specified that the plaintiff's hunting on the disputed property during hunting season, wearing camouflage clothing in his endeavors not to be seen, setting up and removing deer stands, and occasionally cutting dead, fallen trees was conduct which was not visible, continuous, open, notorious, or adverse to the rightful owners. The circuit court added that the plaintiff's planting pine trees and food plots was not shown to have occurred over the requisite 20 years.

¶ 15 Moreover, the circuit court stated a lack of proof that the defendant Doyle Coonce ever considered the fence to be the property line and added that his acts of tearing down the old fence, cleaning both sides of the fence line, erecting a new fence, and spraying weed killer on both sides of the fence constituted exercise of domain and control over the property. Accordingly, the circuit court denied the plaintiff's request of title to the disputed property,

denied the plaintiff's request for a permanent injunction, and declared the defendants the rightful titleholders of the disputed property, free and clear of any claims of the plaintiff. The plaintiff filed a timely notice of appeal.

¶ 16

ANALYSIS

¶ 17 The plaintiff's issue on appeal is whether the trial court erred by finding that he failed to prove title to the disputed property by adverse possession. The standard of review used when a trial court's findings regarding the proof of the elements of adverse possession are being challenged is whether those findings are against the manifest weight of the evidence. *Estate of Welliver v. Alberts*, 278 Ill. App. 3d 1028, 1036 (1996). "A finding is against the manifest weight of the evidence if, when viewing the ruling in the light most favorable to the prevailing party, an opposite conclusion is clearly evident." *Bogner v. Villiger*, 343 Ill. App. 3d 264, 269 (2003).

¶ 18 "What is essential to establish title under the *** doctrine of adverse possession [citation] is the concurrent existence of *** five elements *** for 20 years: (1) continuous, (2) hostile or adverse, (3) actual, (4) open, notorious, and exclusive possession of the premises, and (5) under claim of title inconsistent with that of the true owner." *Martin v. My Farm, Inc.*, 111 Ill. App. 3d 1097, 1102-03 (1983). "All presumptions are in favor of the title owner, and 'the burden of proof upon the adverse possessor requires that each element be proved by clear and unequivocal evidence.'" *Estate of Welliver*, 278 Ill. App. 3d at 1036 (quoting *Joiner v. Janssen*, 85 Ill. 2d 74, 81 (1981)).

¶ 19 In this case, the circuit court's judgment is against the manifest weight of the evidence. The circuit court discussed some of the uses of the property by the plaintiff and omitted others. Specifically, the circuit court failed to observe the plaintiff's testimony that he mowed the disputed area, that he cleaned it up, using a bulldozer, and that the lane covering portions of the disputed area were used regularly by the plaintiff, and occasionally by others.

Moreover, notwithstanding the absence of testimony by the defendants, the trial court emphasized the lack of proof that defendant Doyle Counce ever considered the fence to be the property line—which is refuted by the testimony of Mitchell Garrett—and speculated as to Counce's reasoning for placing the fence where he did. Any thoughts, reasoning, or considerations of the defendants are of no consequence to this appeal. The burden of proof rests solely on the plaintiff (see *Estate of Welliver*, 278 Ill. App. 3d at 1036) to put on evidence relative to his possession (see *Martin*, 111 Ill. App. 3d at 1102-03), rather than evidence of the mind-set of the defendants.

¶ 20 In this case, the plaintiff's possession is under a claim of title inconsistent with that of the defendants as the true owners. See *Martin*, 111 Ill. App. 3d at 1103. As established by Mitchell Garrett's testimony and demonstrated by copies of the survey in the record, a discrepancy of 5.19 acres exists between the deed line and the occupation line. This particular element of adverse possession is undisputed.

¶ 21 "For purposes of the 'actual' requirement to adverse possession, *** the plaintiff[] must prove that [he] made 'improvements or [performed] acts of dominion' [citation] sufficient to 'provide the reasonably diligent owner with visible evidence of another's exercise of dominion and control.'" *Estate of Welliver*, 278 Ill. App. 3d at 1036 (quoting *Joiner*, 85 Ill. 2d at 82; *Nome 2000 v. Fagerstrom*, 799 P.2d 304, 311 (Alaska 1990)). "The law of this State is clear that '[t]he possession necessary to constitute adverse possession is not required to be fuller than the character of the land admits.'" *Estate of Welliver*, 278 Ill. App. 3d at 1036 (quoting *McMillin v. Economics Laboratory, Inc.*, 127 Ill. App. 3d 517, 523 (1984)). In this case, Morris Mott described the land on the plaintiff's side of the fence as good woods, "crappy" woods, and deer hunting ground. With such character of the land in mind, we turn now to the plaintiff's acts of dominion over and improvements made to the property.

¶ 22 Pursuant to the plaintiff's testimony, he began using the disputed area for hunting immediately after purchasing the property, and a permanent deer stand was placed on the disputed area and used until it became unsafe in 2005 or 2006. In addition to the permanent deer stand, the plaintiff places portable deer stands on the disputed area that remain in place throughout the hunting season each year. The plaintiff testified further that immediately after purchasing the property, he began cleaning it up, including the disputed area, and cutting fallen trees there to use as firewood. He specified that a bulldozer was used to clean up his side of the fence and that the bulldozer operator used the lane, part of which is on the disputed area, to access the property. According to the plaintiff, he has driven pickup trucks, tractors, farm equipment, and four-wheelers on the lane, loggers used the lane for a forest management project, and hunters who lease the ground every year also use the lane.

¶ 23 In addition, the plaintiff's testimony established that after the defendants replaced the fence, he finished clearing his property all the way up to the fence and began planting food plots consisting of clover, grass, and turnips. He specified that he uses farm equipment to plant the food plots, adding that it requires one weekend each year to plant on the disputed area. The plaintiff further testified that he mowed two to three times per year, all the way up to the fence, until three or four years ago, when the defendant started using herbicide along the fence row. The plaintiff also described pine trees that he planted in the early 1990s, on a 300 to 400 segment of the disputed area, and marked with white stakes.

¶ 24 In light of the evidence and given the nature of the land, we find the plaintiff fulfilled the actual requirement of adverse possession in this case. The disputed area has been in some form of use by the plaintiff since he purchased the property in 1988. Accordingly, the "continuous" requirement of adverse possession has also been met. Notwithstanding the changes in and/or the variety of uses over the years, the uses were nonetheless appropriate to the character of the land. See *Estate of Welliver*, 278 Ill. App. 3d at 1036. Moreover, the

visible evidence of the uses to which the plaintiff put the disputed area over the years could have been discovered had the defendants been reasonably diligent. See *Id.*

¶ 25 Regarding the open, notorious, and exclusive requirements of the possession, the plaintiff testified that the defendants have not used the disputed area at all since 1988, nor has anyone other than the plaintiff and his invitees. The plaintiff testified that he no longer needs to mow up to his side of the fence because Doyle Counce now sprays herbicide along the fence, which also kills the vegetation on the plaintiff's side. There is no evidence that Counce actually crosses to the plaintiff's side of the fence to spray the herbicide. To the contrary, the plaintiff testified that the herbicide sprays across to his side of the fence. This testimony is unrefuted.

¶ 26 Randy McElroy testified that when Doyle Counce replaced the fence, he also "cleaned up" the plaintiff's side of the fence. No details were elicited regarding the amount of property that Counce "cleaned up." Moreover, the plaintiff testified that after the fence was replaced, he finished clearing his property all the way up to the fence and began planting food plots. McElroy's testimony, in and of itself, is insufficient to yield a determination that Counce exhibited any use, dominion, or control of the disputed area, nor is there any additional evidence that Counce was ever on the plaintiff's side of the fence. Also noteworthy to the requirement of exclusive possession is Mitchell Garrett's testimony that defendant Doyle Counce confirmed at Garrett's office that the fence was the line of occupation. Accordingly, we find that the plaintiff's possession was exclusive.

¶ 27 "[T]he test for open and notorious possession is whether the community is *or could be apprised* of the claimant's possession and exclusive use and enjoyment." (Emphasis in original.) *Knauf v. Ryan*, 338 Ill. App. 3d 265, 271 (2003). The appellate court held in *Knauf* that the open and notorious requirement was fulfilled because the boundary line to the plaintiffs' claim in that case marked a "stark visible contrast" between the character of the

properties. 338 Ill. App. 3d at 271. The same is true in this case. The fence line marks the boundary line to the plaintiff's claim. As testified to by Morris Mott, the land on the plaintiff's side of the fence is woods and deer hunting ground, in contrast to the defendants' property on the other side of the fence, which is maintained as a pasture. Due to this contrast, anyone passing by would likely assume that the disputed area is a part of the plaintiff's hunting property. See *Knauf*, 338 Ill. App. 3d at 271.

¶ 28 For purposes of the hostile or adverse requirement, " [t]he "hostile" nature of the possession does not imply actual ill will, but only the assertion of ownership incompatible with that of the true owner and all others.' " *Hermes v. Fischer*, 226 Ill. App. 3d 820, 824 (1992) (quoting *Joiner*, 85 Ill. 2d at 81). "The controlling factor in determining whether possession to a mistaken boundary is hostile is the exercise of acts of ownership incompatible with that of the record owner, through the use and control of disputed property to demonstrable parameters." *Id.* at 825. Moreover, "[i]n order to establish the extent of the land possessed under a claim of ownership, a claimant must demonstrate by clear and convincing proof the visible and ascertainable boundaries to which he claims at the inception, throughout continuance, and at completion of the period of adverse possession." *Id.* "Further, because the possession must be of a 'definitely defined tract' [citation], where a boundary line is in dispute, an adverse possessor 'bears the burden of establishing by clear and convincing proof the location of the boundary.' " *Estate of Welliver*, 278 Ill. App. 3d at 1035-36 (quoting *Schwartz v. Piper*, 4 Ill. 2d 488, 493 (1954); *Joiner v. Jannsen*, 85 Ill. 2d 74, 83 (1981)).

¶ 29 In this case, the evidence establishes that the plaintiff's possession is of a definitely defined tract. See *Estate of Welliver*, 278 Ill. App. 3d at 1035-36. Uncontroverted testimony established the fence as the occupation line between the parties and that the plaintiff occupied the property all the way up to the fence. Mitchell Garrett testified that aerial photographs

showed the fence to be the occupation line as early as 1938. Copies of the survey clearly show the fence to be the occupation line. The evidence also establishes that this case is one of mistaken boundaries. As mentioned above, Mitchell Garrett testified that both parties confirmed that the occupation line is the fence and that neither party was aware of the discrepancy between the deed line and the occupation line until after the survey was completed. This testimony was unrefuted. The evidence further shows that the plaintiff asserted ownership incompatible with that of the true owners (see *Hermes*, 226 Ill. App. 3d at 824) and used the disputed area up to demonstrable parameters (*id.*), namely the fence line, as demonstrated by all of the uses discussed above. Accordingly, the hostile or adverse requirement has been satisfied.

¶ 30

CONCLUSION

¶ 31 Based on the foregoing, we find all of the elements of adverse possession were fulfilled by the plaintiff in this case. Accordingly, the circuit court's August 13, 2010, judgment was against the manifest weight of the evidence, and we reverse the judgment and remand with directions that the circuit court enter an order quieting title to the disputed property, in favor of the plaintiff.

¶ 32 Reversed and remanded with directions.