

NOTICE  
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2019 IL App (5th) 180362-U

NO. 5-18-0362

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE  
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

GEORGE W. LITTLE,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Fayette County.
	)	
v.	)	
	)	
MICHAEL W. WEHRLE, not individually but	)	
as Trustee of Michael W. Wehrle Revocable	)	
Trust created by Trust Agreement dated	)	No. 15-MR-79
January 22, 1991, and JO ELLEN WEHRLE,	)	
not individually but as Trustee of Jo Ellen	)	
Wehrle Revocable Trust created by Trust	)	
Agreement dated January 22, 1991,	)	Honorable
	)	Kevin S. Parker,
Defendants-Appellants.	)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.  
Justices Chapman and Cates concurred in the judgment.

**ORDER**

¶ 1 *Held:* The order of the circuit court entering summary judgment in favor of the plaintiff for declaration of title by adverse possession is reversed and the cause is remanded for a trial on the merits of the case.

¶ 2 The plaintiff, George W. Little, is the fee simple owner of the east half of the southeast quarter of section 12 in Bear Grove Township, Fayette County, Illinois. The defendants, Michael W. Wehrle and Jo Ellen Wehrle, in their capacities as trustees, are

the fee simple owners of the west half of the southeast quarter of section 12. The properties have a common boundary line; a 2647-foot north-south border separates the defendants' property from the plaintiff's property. In 2013, the defendants purchased the property from the Deal family and, in 2014, conducted a survey of the property. Thereafter, a dispute arose as to the boundary line between the parties' properties.

¶ 3 On December 16, 2016, the plaintiff filed an amended complaint for declaration of title by adverse possession, seeking title to a parcel of land owned by the defendants lying between the parties' north-south border and a line to the west of that border "established by a fence extending immediately adjacent to and along power poles," also running north-south from the south line of section 12 to the east-west centerline of section 12. The complaint alleged that the plaintiff and his predecessors in title have been in actual, continuous, open, notorious, exclusive, adverse, and unchallenged possession of the disputed land for more than 40 years.

¶ 4 The complaint requested that the plaintiff be made owner of the property described in Exhibit A. Exhibit A contained the legal description of the surveyed area, which was depicted in Exhibit B, the surveyor's plat. The legal description and survey in these exhibits describe an approximately .90-acre area between the deeded property line and a line of six utility poles that stand at varying distances from it, ranging from 12.5 feet to 17 feet west of the line. Neither exhibit identifies or describes a fence on the disputed property, although the surveyor's plat notes a fence post in an area to the south of the disputed property.

¶ 5 On February 17, 2017, discovery depositions were completed of persons who may have had knowledge of the disputed property. The plaintiff, who has Alzheimer's disease, was unable to testify.

¶ 6 Shirley Little, the plaintiff's wife, testified that the plaintiff and his predecessors in title have owned the property east of the disputed tract for at least 65 years. The plaintiff and his sons have farmed this property, and the property up to the existing utility poles and fence (the disputed property), since 1960. Her son, Jay Little, also farmed part of the Deal property until 2009, but she did not know "what the deal was" between Jay and the Deal family.<sup>1</sup>

¶ 7 Shirley believed that the fence constituted the boundary line between the parties' respective properties. She stated that she and the plaintiff lived within one-quarter mile of the disputed tract between 1955 and 1981; the utility poles and fence were visible from their home. She did not know when the fence was built, but stated that Jay tore the fence down in 2011. She stated that the fence was six to eight inches east of the utility poles and did not touch them at any point.

¶ 8 The plaintiff's son, Jeff Little, testified that he helped farm his father's land until 1979. His brother, Jay, helped his father farm until 2009; in 2010, the Cripe cousins, Jacob and Shawn, started farming the plaintiff's land as cash/rent tenants. The cousins also farmed the Deal property beginning in 2010, though they stopped farming that property in 2014 when it was sold to the defendants.

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<sup>1</sup>Jay Little was also unable to testify, as he was deceased at the time that the witnesses' depositions were taken in this case.

¶ 9 Jeff testified that the fence was on the east side of the utility poles but it was removed in 2011. He described the fence as "adjacent" to the utility poles and "probably touching [them] in places," though he agreed that the distance "varied." He stated that, from 1960 to 2009, his family continuously farmed the land up to the fence.

¶ 10 Dale Konrad testified that he farmed for the Deal family from 1972 to 1993. In 1993, Jay Little took over farming the Deal property. He stated that a fence separated the parties' properties the entire time that he farmed for the Deal family. He testified that the fence was on the west side of the utility poles and was situated "right up next to" them. When farming for the Deal family, he farmed the land up to a grass strip located on the west side of the utility poles that ran "from the fence out west to about 10 feet." He did not remember a fence on the east side of the poles.

¶ 11 Gregory Scott Wright testified that he did some farming when he was a teenager with his cousin, Dale Konrad. He recalled that the fence was on the east side of the utility poles, believing that it was "within a foot" of the poles.

¶ 12 Jacob Cripe testified that he and his cousin, Shawn, were the tenant farmers of both parties' properties from 2010 until the Deal property was sold to the defendants. At the time of the deposition, the cousins continued to farm the plaintiff's land. He testified that there was a fence separating the parties' properties when he began farming for them, though he did not remember when it was removed. He also could not recall if the fence was on the east side or the west side of the utility poles but testified it was "on" the poles. When he was farming both parties' land, his assumption was that the fence was the property line.

¶ 13 One of the defendants, Michael Wehrle, testified that he purchased the Deal property at auction in September 2013 and had it surveyed in July 2014. After the survey, he spoke to Jeff and Jay Little and suggested that they look into moving the utility poles closer to the parties' boundary line. He noted that he had several conversations with Jeff after that, noting that Jeff told him that he did not agree with the results of the survey. He stated that letters from the company that owned the utility poles indicated that there was once a fence in close proximity to the poles.

¶ 14 Wehrle testified that, since his purchase, he had cleared brush, leveled, and grown some crop on the east side of the utility poles. He stated that he never removed crops from the land that he did not plant but noted that the plaintiff's tenant farmers, the Cripes, planted on his ground in 2013, before he owned the land, and that the Cripes harvested that crop in the fall of 2013. After the 2013 harvest, he asked the Cripes not to plant on his ground again, although they did plant and harvest again in 2014. He had no knowledge of his predecessors in title farming east of the poles.

¶ 15 All of the witnesses agreed that the utility poles were never moved.

¶ 16 The plaintiff also submitted affidavits from Shirley Little, Jeff Little, and Ricky Cox, who created the legal description (Exhibit A) and graphic representation (Exhibit B) of the disputed tract for the plaintiff.

¶ 17 On March 10, 2017, the plaintiff filed a motion for summary judgment, asking that the trial court find that he had acquired legal title to the disputed tract as described in his amended complaint. He stated that he and his family continuously farmed the disputed tract "up to the power poles and fence immediately adjacent on the east side of the line of

power poles" from 1960 through renting it to their tenants in 2010, and that the defendants' predecessors in title never farmed the land east of the utility poles until the defendants purchased the property. He asserted that there were no factual issues in dispute and that his acts of farming the disputed tract for the last 60 years have been continuous, open, notorious, visible, and unchallenged.

¶ 18 On March 29, 2017, the defendants filed a response to the plaintiff's motion for summary judgment and a cross-motion for summary judgment. The defendants argued that the plaintiff's possession was not hostile, as Jay Little farmed the Deal property through a farm tenancy agreement from 1987 to 2009 and the Cripes' possession from 2010 through 2013 was also via a tenancy agreement with the Deal family.

¶ 19 The defendants also asserted that the legal description created by the surveyor bears no relation to any fence line that was once located on the defendants' property. They noted that the survey defines an area between the defendants' deeded property line and a line of utility poles on their property, yet the plaintiff alleged his possession line was established by a fence extending immediately adjacent to and along the utility poles. They also noted that the testimony of all the plaintiff's witnesses was vague, indefinite, and conflicting. Citing the Illinois Supreme Court case *Schwartz v. Piper*, 4 Ill. 2d 488, 493 (1954), for the proposition that "it is essential that the [property] line to which adverse possession is claimed be ascertainable and that the evidence should establish its location with reasonable certainty," they asserted that the vagueness regarding the location of the removed fence means that "the [plaintiff has] failed to adequately describe

an ascertainable boundary," and the trial court should therefore deny the plaintiff's request for summary judgment and grant summary judgment in their favor.

¶ 20 The trial court issued a written order on February 12, 2018, granting the plaintiff's motion for summary judgment and denying the defendants' cross-motion for summary judgment. The court found that the plaintiff, his family, and his predecessors in title "have farmed their property and up to the existing utility poles and fence immediately adjacent to the east side of the line established by a fence extending immediately adjacent to and along a line of utility poles every year (the disputed tract) from 1960 until renting the ground, including the disputed tract, to their farm tenants Jacob Cripe and Mike [*sic*] Cripe." It found that, "[w]hile portions of the fence running adjacent to the utility poles no longer exists, there appears to be genuine issue of fact as to the existence of the fence and the fact that and [*sic*] the utility poles formed a line of demarcation as between the parties and their predecessors in title."<sup>2</sup> It found that the plaintiff believed that the disputed tract belonged to him and openly occupied it, while neither the defendants nor their predecessors in title ever attempted to assert ownership over it. It also noted that the defendants did not challenge the Cripes during the 2014 growing season when they occupied the disputed tract; it was only in the spring of 2015 when the defendants asserted dominion over it.

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<sup>2</sup>This quote is not a typographical error by this court; the trial court stated that there appeared to be "genuine issue of fact" as to the existence of the fence and the fact that the utility poles formed a line of demarcation between the properties. However, it later states in its order that it found no genuine issue of material fact. Given that it granted the plaintiff's motion for summary judgment, we assume that the court intended to say that it found *no* genuine issue of material fact as to the fence's existence and the fact that the utility poles formed a boundary line between the parties' properties.

¶ 21 The trial court concluded that no genuine issue of material fact existed as to the elements for the plaintiff to sustain a claim of adverse possession and that he had met his burden of proof as to each element by clear and convincing evidence. Specifically, it rejected the defendants' argument that the plaintiff had not shown continuous and hostile possession, noting that "[t]he record shows scant little evidence of any detail or specifics as to those prior farm tenancies between the Deal family, the Plaintiff, the Plaintiff's wife, sons, or tenants the Cripes" and that it was "abundantly clear" that "nobody intended the disputed tract to be a part of any such tenancy whereby the Deal family was a landlord." It also rejected the argument that no facts were shown to establish the exact location of the plaintiff's claim to possession of the disputed tract, noting that "[t]he existing utility poles and an adjacent fence have served as a constant line of demarcation governing the parties farming practices at all times pertinent hereto." The court declared the plaintiff to be the owner by adverse possession of the disputed tract described in Exhibit A and depicted in Exhibit B.

¶ 22 The defendants filed a motion to reconsider. They argued that no facts existed to establish the western boundary of the disputed tract, as plaintiff was unable to establish with any degree of certainty the now-removed fence's location. They noted that Exhibit B contained reference to the deeded line between the parties' properties and the existing utility poles but mentioned nothing about the fence; Exhibit A included a legal description of the disputed parcel that referenced the utility poles, yet the plaintiff's amended complaint and the evidence adduced in discovery did not include the utility poles as part of the disputed tract. Therefore, they argued, the court granted title to the



parcel including an area for which no proof was provided. They noted that the location of the fence is material because (1) the plaintiff claimed that it is the western boundary of his property and (2) the plaintiff removed the fence. They argued that, at a minimum, the deposition testimony of the various witnesses regarding the location of the fence created a material issue of fact to be determined at trial in this case.

¶ 23 On June 26, 2018, the trial court denied the defendants' motion to reconsider. The defendants appeal.

¶ 24 A grant of summary judgment is only appropriate when the pleadings, depositions, admissions, and affidavits demonstrate no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2016).

In analyzing summary judgment motions, our supreme court has stated that:

"In determining whether a genuine issue as to any material fact exists, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent. A triable issue precluding summary judgment exists where the material facts are disputed or where, the material facts being undisputed, reasonable persons might draw different inferences from the undisputed facts. Although summary judgment can aid in the expeditious disposition of a lawsuit, it remains a drastic means of disposing of litigation and, therefore, should be allowed only where the right of the moving party is clear and free from doubt." *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008).

¶ 25 We review *de novo* the trial court's granting of a summary judgment motion. *Id.*

¶ 26 Here, the trial court found that summary judgment was proper because (1) there was no genuine issue of material fact as to the elements for the plaintiff to sustain a claim of adverse possession and (2) the plaintiff had met his burden of proof as to each element of adverse possession by clear and convincing evidence.

¶ 27 In order to establish title by adverse possession, a party must establish 20 years' concurrent existence of five elements: (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. *Joiner v. Janssen*, 85 Ill. 2d 74, 81 (1981). 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 convincing evidence. *Id.* The "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. *Id.*

¶ 28 On appeal, the defendants argue that the plaintiff was required to prove the exact location of the possession line with reasonable certainty; however, he was unable to do so due to the witnesses' vague, indefinite, and conflicting testimony. They cite *Schwartz*, 4 Ill. 2d 488, in support of their contention that the vagueness of the testimony regarding the location of the removed fence means that the plaintiff failed to adequately describe an ascertainable boundary; therefore, this court should reverse the trial court's grant of summary judgment and conclude that they were entitled to summary judgment in their favor. In their oral argument before this court, the defendants argued in the alternative that this court should conclude that the trial court's grant of summary judgment for the plaintiff was improper because there is a genuine issue of material fact regarding the location of the property line; therefore, this case should be remanded for trial.<sup>3</sup>

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<sup>3</sup>The defendants raised this issue before the trial court in their motion to reconsider and therefore have preserved it for our review. See Ill. S. Ct. R. 366(b) (eff. Feb. 1, 1994).

¶ 29 An adverse possessor bears the burden of establishing by clear and convincing evidence the location of the disputed boundary. *Id.* at 493. In *Schwartz*, the exact location of the alleged possession line was in dispute. *Id.* at 490. Plaintiffs claimed to have adversely possessed property to the north line of defendants' driveway, which ranged from six feet to nine feet south of a sidewalk located on plaintiff's property. *Id.* at 496. A fence that once separated the properties had been removed, so several witnesses testified regarding their recollection as to the location of the removed fence. *Id.* at 494-95. The witnesses' testimony as to the fence's estimated distance to the concrete sidewalk were as follows: "two or three or four feet" from the sidewalk; "about three feet south" of the sidewalk; "quite a ways" past the sidewalk to the south; "four or five feet south" of the sidewalk; and "barely nipped" the sidewalk. (Internal quotation marks omitted.) *Id.*

¶ 30 Noting that "[i]t is elementary that in any case involving a boundary dispute the claim of title by adverse possession must be to a visible or ascertainable boundary line," the court stated that, because the tract in dispute was only three feet wide at one point, a variation in the location of the line, "even if only a foot or two, is of grave importance." *Id.* at 493, 496. It found that "[i]t is essential that the line to which adverse possession is claimed be ascertainable and that the evidence should establish its location with reasonable certainty." *Id.* at 496. It concluded that the evidence as to the fence's location was "so vague and indefinite" that plaintiffs failed to establish an ascertainable boundary line by clear and convincing evidence. *Id.*

¶ 31 Thus, *Schwartz* informs us that, in order for the plaintiff to succeed on his claim to the disputed property by adverse possession, he must overcome the presumption in favor

of the defendants and prove each element of adverse possession by clear and convincing evidence; that proof must be such as to establish, with reasonable certainty, the boundaries of the tract to which the five elements of adverse possession are applied. *Id.* at 492-94.

¶ 32 The plaintiff's amended complaint sought title by adverse possession to the disputed property. It stated that one of the boundaries to the property was established by a line to the west of the parties' north-south border "established by a fence extending immediately adjacent to and along power poles." In his request for relief, however, the plaintiff asked that he be made owner of the property described in Exhibit A, which does not describe a fence. Rather, it describes a property between the deeded property line and a line of six utility poles that stand at varying distances from the poles. Therefore, in order to grant the relief requested by the plaintiff, the trial court was required to conclude that there was no genuine issue of material fact regarding the location of the fence relative to the utility poles, and, as such, the utility poles described in the exhibits were sufficiently accurate boundary markers pursuant to *Schwartz*. We disagree with this conclusion.

¶ 33 Shirley Little testified that the fence was six to eight inches east of the utility poles and did not touch them at any point. Jeff Little described the fence as "adjacent" to the utility poles and "probably touching [them] in places," though concluded that the distance "varied." Gregory Scott Wright thought that the fence was "within a foot" of the poles. Jacob Cripe could not recall if the fence was on the east side or the west side of the utility poles but testified it was "on" the poles. Dale Konrad testified that the fence was actually

on the west side of the utility poles. Construing the evidence against the plaintiff and liberally in favor of the defendants, this testimony is, at best, indefinite. Based on the substantial variation in the witnesses' deposition testimony as to the location of the fence relative to the utility poles, we conclude that there is a material issue of fact as to the location of the fence in relation to the utility poles. Consequently, summary judgment is precluded in this case.

¶ 34 Finally, we note that the defendants also argued before this court that, because the plaintiff was in possession of the defendants' property from 1993-2009 pursuant to a farm tenancy agreement with the Deal family, his adverse possession claim fails because he was not in hostile possession of the disputed property for the statutory 20-year period. However, as we have concluded that a genuine issue of material fact exists regarding the disputed boundary line, we decline to address this argument.

¶ 35 For the foregoing reasons, the order of the circuit court entering summary judgment in favor of the plaintiff is reversed and the cause is remanded for a trial on the merits of the case.

¶ 36 Reversed and remanded.