2017 IL App (5th) 160288-U

NO. 5-16-0288

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

TERRY L. ZWEIG, Trustee and Successor Trustee of the Terry L. Zweig Living Trust Dated April 4, 2007; SHERRY L. KEIM, Trustee and Successor Trustee of the Sherry L. Keim Living Trust Dated April 4, 2007; and HENRY E. ZWEIG, JR., Trustee and Successor Trustee of the Henry E. Zweig, Jr., Living Trust Dated April 4, 2007,	)	Appeal from the Circuit Court of Madison County.
Plaintiffs-Appellees,	)	
v.	)	No. 14-CH-506
RANDY SCHON, ARTHUR SCHON, and ARLINE WESTFALL,	)	Honorable Clarence W. Harrison II,
Defendant-Appellants.	)	Judge, presiding.

PRESIDING JUSTICE MOORE delivered the judgment of the court.
Justices Welch and Barberis concurred in the judgment.

ORDER

¶ 1 *Held*: Circuit court's ruling that the plaintiffs proved, by clear and convincing evidence, part of their claim for adverse possession is affirmed because the court's finding is not against the manifest weight of the evidence. The court's ruling that the plaintiffs failed to prove the other part of their claim is not challenged on appeal; therefore, it is affirmed as well.

¶ 2 The defendants (Randy Schon, Arthur Schon, and Arline Westfall) appeal the June 7, 2016, ruling of the circuit court of Madison County that found that the plaintiffs (Terry

L. Zweig, trustee and successor trustee of the Terry L. Zweig Living Trust dated April 4, 2007; Sherry L. Keim, trustee and successor trustee of the Sherry L. Keim Living Trust dated April 4, 2007; and Henry E. Zweig, Jr., trustee and successor trustee of the Henry E. Zweig, Jr., Living Trust dated April 4, 2007) successfully proved part of their claim of adverse possession against the defendants. For the reasons that follow, we affirm.

¶ 3 FACTS

¶ 4 The facts necessary to our disposition of this appeal follow. On August 14, 2014, the plaintiffs filed their two-count complaint for adverse possession. On December 17, 2014, the defendants answered the complaint. Discovery followed, and the case was subsequently set for a bench trial on January 29, 2016. At the January 29, 2016, bench trial, after opening statements were given by each party's attorney, the following evidence was adduced.

¶ 5 Plaintiff Sherry Keim testified that the property in question in this case is located at 25 West Ingle, in Glen Carbon. She described the property as being bordered by Interstate 270 to the south, Ingle Drive to the north, and a private landowner to the east. She first referred to this section to the east as the "Peters" tract, but later testified that also to the east, but to the north of the Peters tract, was a second bordering tract of land, which she referred to as the "Polley" tract. She testified that her family purchased land to the west of these two tracts when she was a sophomore in high school, in approximately 1976 or 1977, and that the plaintiffs have owned the land continuously since that time. She was presented with what was marked as plaintiff's exhibit 1, which her attorney described as a survey from 1977 that was filed with the Madison County recorder's

Office, and with what was marked as defendant's exhibit 1, which her attorney described as "just an aerial photograph of the overall land."

¶ 6 Keim agreed with her attorney that the exhibits showed that a one-foot strip of land ran north-to-south along the eastern boundary of the plaintiffs' property, both with regard to the Peters tract and with regard to the much-smaller Polley tract. She testified that part of the plaintiffs' property is farmland, and part is an area where a house is located and there are woods. When asked if, with regard to the farm portion, anyone had ever given the plaintiffs permission to use the one-foot strip of land, she testified, "We have always used it." When asked how the land was used, she testified that the plaintiffs farmed it and took "care of it in every way." Keim testified that the plaintiffs used a bush hog to cut the grass, picked up downed trees and branches, and told hunters they could not hunt in the wooded areas. She testified that the plaintiffs leased the land to someone who "had a fence in there and there were different configurations of that fence over the years."

¶ 7 When asked if the fence "include[d] and enclose[d]" the one-foot strip, Keim testified, "Without a doubt. Without a doubt." She testified that she filed a lawsuit in Madison County to evict someone named Gary Wagner from her property, including the one-foot strip, and agreed that "within the course of the last 20 years or so," she had called the police at times to remove "people off the property." She testified that she had never seen the defendants on the property, and agreed that the defendants had never come to her to tell her the one-foot strip was their property or to offer to give her permission to use it.

¶ 8 With regard to the one-foot strip as it pertained to the "house parcel" part of the property, Keim testified that "there's a no trespassing sign when you go down the driveway," and that the plaintiffs maintained the property, including landscaping and clearing on the one-foot strip. When asked if the fence she had testified about earlier included the one-foot strip on the house parcel, Keim testified that the fence "didn't go up that far," and that it began near "the wood line and then it wound around and it went down. It did not go by the–it didn't go through the one-foot" strip. When asked if the one-foot strip was marked by a group of stones or markers, Keim testified that "[o]ver the years there was some stone" in the area that was the boundary of the house parcel and the farmland, but that she had not "seen that for years." She clarified, however, that she nevertheless was aware that the one-foot strip was there. She testified that she and her family had claimed the one-foot strip for "[c]lose to forty years," and that they "kept everybody else off of it." She testified that to her knowledge, no one but the plaintiffs had used the one-foot strip, on either the farmland or the house parcel.

¶ 9 On cross-examination, Keim testified that she had heard about the stone she referenced in her direct examination for "thirty plus years." She acknowledged that the plaintiffs had planned to sell land that included the one-foot strip in 2014, but that the sale fell through because of the controversy over the one-foot strip. She conceded that the real estate agent acting on her behalf had contacted the defendants to attempt to get them to sign a deed, for no consideration, releasing the strip to the plaintiffs. She also testified that she recalled discussing purchasing the strip from the defendants, but agreed that she never authorized the real estate agent to offer money to the defendants for the

strip. Keim testified that she personally contacted defendant Arline Westfall about the strip.

¶ 10 When asked, "if we went out to that property right now, could you point me to the one-foot strip," Keim testified, "Yes." When asked how she would be able to do so, Keim testified, "if you're standing at the southern portion that is by Interstate 270, and you look out, you'll look at the center line of where the tree line comes out. And it's just to the left of that and it goes all the way through." When asked how she knew that, she testified that when she was a child, "[t]here was like a pin or stone–a survey stone" in the area that was the boundary of the house parcel and the farmland. She reiterated that she did not know if the stone was still there. She testified that she did not know of any other boundary markings. She testified that the fence was not present when she was a child, and that it had various configurations since it was constructed. Keim testified that "[p]robably in the 90's maybe," her father had allowed a tenant, Gary Wagner, to put in the fence, and that now, only "a remnant" of the fence was left, which she had described in her direct examination. With regard to whether a fence ever encompassed the entire one-foot strip, she testified that to her knowledge the answer was "no." When asked to describe the survey stone, Keim testified that she could not remember "exactly what the stone looked like."

¶ 11 Keim was then asked again about her contact with defendant Arline Westfall. Keim testified that she called Westfall and asked her if the plaintiffs "could purchase the property, what they wanted for it." The trial judge sustained counsel's objection to any discussion of the amount offered or other settlement negotiations.

¶ 12 On redirect examination, Keim agreed that in documents submitted to the federal government, farmers who leased the farmland from the plaintiffs included the one-foot strip as part of the area they farmed. She testified that she had instructed the farmers to farm the one-foot strip. She agreed that what was marked as plaintiff's exhibit 2 was a Farm Service Agency aerial map of the property that showed her farm property as including the one-foot strip. With regard to leasing to Wagner, Keim testified he "had junk everywhere on that property," including on the one-foot strip, and that when Wagner was evicted, the plaintiffs had to "clean up everything," including things he left on the one-foot strip. When asked, she opined that the plaintiffs had "clearly" continuously claimed the one-foot strip for more than 20 years, and believed they were in possession of it that entire time as well. Following the testimony of Keim, the plaintiffs rested.

¶ 13 The first witness to testify on behalf of the defendants was defendant Arthur Schon. He testified that he lived in Madison County until 2013, and that his great-grandmother, Annie Schon, acquired the property in question in 1907. Schon testified that his family owned the Peters tract until 1978, when it was sold to the Peters, and that he "thought" his family might have continued to farm it "for a year or two" after 1978. He testified that Don Lange farmed the Peters tract from then until "probably into the early two thousands." Schon testified that Lange "cleared some of the brush and overhanging limbs off the tree line [on the one-foot strip] so he could farm closer to the trees." He testified that the tree line had varied somewhat over the past 20 years, due to "storms and removing trees and things that have fallen down or whatever." He agreed that recent aerial photographs such as those admitted into evidence were "not necessarily

consistent" with the condition of the property "15, 20 years ago." Schon testified that his only memory of a fence in the area was from "50 some years ago, 60." He believed "the fence line–that one-foot strip was somewhere in between the 8 or 10 or 12 feet of trees." When asked if he knew where the one-foot strip was, he testified, "I have no idea." He also did not know where the stone that Keim had testified about was located. Schon testified that he was aware that his grandmother "intentionally kept" the one-foot strip when selling adjacent property, and why. He began to testify about a dispute between his grandmother and other previous landowners (not the plaintiffs), but was halted when a hearsay objection was sustained. Schon was not cross-examined.

¶ 14 The next witness to testify for the defendants was defendant Arline Westfall. She agreed with counsel that everything her cousin Schon had testified to was correct. She then testified that Keim called her, and that after Keim asked about the one-foot strip, she told Keim that the defendants still owned it. On cross-examination, she testified that she had not been on the one-foot strip since 1980, although she drove past it on Interstate 270 and sometimes commented to her children about it. When asked if she had "exercised any indication of ownership of that one-foot strip by chasing people off the one-foot strip" since 1980, she answered, "No." She also answered "No" when asked if she had farmed or maintained the strip since 1980, or had been involved in the 2007 lawsuit Keim initiated to evict Wagner.

¶ 15 After closing arguments were presented by each side, the trial judge stated that the evidence before him demonstrated that the plaintiffs had shown they met the elements of adverse possession with regard to the farmland area of the one-foot strip, but not with

regard to the wooded area of the one-foot strip. Accordingly, he ruled that the plaintiffs were "entitled to adverse possession of the one-foot strip from the point on the map at the close of the tree line at the top[,] to the area that is the essentially non-crop or tree line area at the bottom of the property, which will really make it a mess, but that's actually what's been proven in the case." He specifically noted that, even when factoring in the testimony about the lawsuit to evict Wagner, the plaintiffs had failed to meet "the elevated burden" of "clear and convincing evidence" as applied to the wooded area. He then asked counsel for the plaintiffs to draft an order "that sets forth the new hybrid legal description that now essentially the middle probably three-fifths of the one-foot tract has been gained by adverse possession, but the remaining portion above and below is still owned by the [defendants], which is an absolute mess." He subsequently added, "Originally I was going to say I didn't think we could adequately define it and then I started going through it and it was like, no, everybody is exactly talking about the same thing." He conceded that a survey would be needed so that a proper legal description of the newly-divided property, in accordance with his ruling, could be rendered.

¶ 16 Approximately four months later, on June 7, 2016, the trial judge entered a written order in conformity with his oral pronouncements. The written order included, as an exhibit, a quitclaim deed the parties had drafted after the bench trial. This timely appeal, filed by the defendants, followed. The plaintiffs have not filed a cross-appeal, or otherwise challenged the trial judge's order with regard to the trial judge's finding that they did not prove their case for adverse possession of the wooded area of the one-foot strip.

¶ 17 ANALYSIS

¶ 18 We begin with our standard of review and other relevant legal principles. To prevail on a claim to property by adverse possession, a claimant must prove that he or she possessed the property in question for at least the 20-year statutory period. See 735 ILCS 5/13-101 (West 2014). The claimant must also prove that the possession was all of the following: (1) continuous; (2) hostile or adverse to the true owner; (3) actual; (4) open, notorious, and exclusive; and (5) under a claim of title that is inconsistent with that of the true owner. See, *e.g.*, *Brandhorst v. Johnson*, 2014 IL App (4th) 130923, ¶ 37. The Supreme Court of Illinois has added that a claimant must also prove " 'by clear and convincing evidence the exact location of the boundary line to which they claim.' " *Id.* (quoting *Schwartz v. Piper*, 4 Ill. 2d 488, 494 (1954)). The *Schwartz* court further noted that if the location of a boundary was once marked by a monument, but no longer is, then "the location of such boundary or the monument marking the same must be susceptible of definite proof" in any adverse possession action. 4 Ill. 2d at 493. We have held that even if a witness gives confusing testimony about boundaries, if the boundaries are clearly established by the exhibits entered into evidence, then there is no merit to a claim that the boundaries have not been adequately established. *Bridges v. Neighbors*, 32 Ill. App. 3d 704, 709 (1975).

¶ 19 In a case for adverse possession, all presumptions are indulged in favor of the true owner, and the party that seeks title by adverse possession " 'must prove each element by clear and unequivocal evidence.' " *Brandhorst*, 2014 IL App (4th) 130923, ¶ 38 (quoting *Knauf v. Ryan*, 338 Ill. App. 3d 265, 269 (2003)). Courts of review have employed the

clear and convincing burden of proof in such cases. *Id*. Following a bench trial in an adverse possession case, we will disturb a trial judge's findings only if the findings are against the manifest weight of the evidence. *Id*. A finding or judgment is against the manifest weight of the evidence " 'only when an opposite conclusion is apparent or when findings appear to be unreasonable, arbitrary, or not based on the evidence.' " *Id*. (quoting *Lawlor v. North American Corp. of Illinois*, 2012 IL 112530, ¶ 70).

¶ 20 In the case before us, the defendants first contend the trial judge's ruling was against the manifest weight of the evidence because, according to the defendants, "there was no proof of the exact location of the survey stone" cited by Keim in her testimony. The defendants theorize that "[w]ithout an accurate description of the stone or an exact location of the stone, it is impossible to determine an ascertainable boundary line based on" Keim's childhood memories. Moreover, the defendants contend that once the stone is discarded as an ascertainable boundary line, the only evidence left supporting the trial judge's ruling is the fence line, which the defendants claim "fails for the same reason." In support of this proposition, the defendants point to Keim's testimony that most of the fence no longer exists, that its location varied, and that it did not run exactly along the one-foot strip, and claim that as a result of this testimony, the plaintiffs "cannot prove an ascertainable boundary."

¶ 21 We do not agree. On cross-examination, during questioning by the defendants' counsel, Keim was asked, "if we went out to that property right now, could you point me to the one-foot strip?" She testified, "Yes." When asked how she would be able to do so, Keim testified, "if you're standing at the southern portion that is by Interstate 270, and

you look out, you'll look at the center line of where the tree line comes out. And it's just to the left of that and it goes all the way through." Importantly, although Keim testified that her childhood knowledge of the boundary was based on the location of the stone, and that later a fence existed, she did not testify that her present knowledge of the boundary was based on the current location of the stone or the fence. Instead, she clearly and unequivocally described, in the testimony above, the boundary as it presently exists, without reference to the stone or the fence. No testimony was given to rebut this evidence, and it was supported by the exhibits discussed with the various witnesses and entered into evidence by both parties. It is true that Keim's testimony about her memory of the fence and the survey stone was at times confusing, but her testimony about the present, exact boundary was not. It was clear and unrebutted. Moreover, as explained above, we have held that even if a witness gives confusing testimony about boundaries, if the boundaries are clearly established by the exhibits entered into evidence, then there is no merit to a claim that the boundaries have not been adequately established. *Bridges v. Neighbors*, 32 Ill. App. 3d 704, 709 (1975). We also note that although the defendants claim in their reply brief that the stone "no longer exists," this claim is not supported by the evidence in the record. No witness testified that the stone no longer exists. Keim testified that she had not seen the stone "for years" and that she did not know if the stone was still there. Schon testified that he also did not know where the stone that Keim had testified about was located.

¶ 22 The defendants also contend that it was unreasonable for the trial judge to credit Keim's testimony, because Keim was inconsistent and uncertain in her testimony about

the survey stone and the fence. The defendants posit that "[n]o factfinder could conclude based on the uncertainty of her testimony that she or anyone else could provide an exact location of the stone or the fence." The defendants further posit that because Keim testified that her occupation was real estate appraiser, it is unbelievable that she would not have dealt with the issue of the one-foot strip prior to attempting to go forward with the real estate sale. We do not agree. We begin by noting that the trial judge could have found Keim to be not credible with regard to the boundary, but, for the reasons discussed above, nevertheless could have found that the boundary was proven by the clear and convincing evidence of the exhibits each party admitted into evidence. Moreover, as we long ago held, and as we continue to believe, when there is a dispute of fact in an adverse possession case, the trial judge is "in a better position to assess and judge the credibility of the witnesses." *Bridges v. Neighbors*, 32 Ill. App. 3d 704, 709 (1975). Indeed, that is why we review the trial judge's findings of fact under the manifest weight of the evidence standard. *Id*. In this case, our review of Keim's testimony does not lead us to conclude that, to the extent the trial judge found Keim to be a credible witness, such a finding is unreasonable, arbitrary, or not based on the evidence, nor is the opposite conclusion apparent. Accordingly, the trial judge's determination is not against the manifest weight of the evidence, and we will not disturb it on appeal. See, *e.g.*, *Brandhorst v. Johnson*, 2014 IL App (4th) 130923, ¶ 38.

¶ 23 Finally, the defendants contend that the failure of the plaintiffs to prove an ascertainable boundary is fatal to the plaintiffs' case, because without an ascertainable boundary, the plaintiffs cannot prove "continuous possession, exclusive possession, and

hostile possession." We have rejected the defendants' contention that no ascertainable boundary was clearly proven. Nevertheless, we consider the remainder of the defendants' arguments. With regard to continuous possession, the defendants posit that although Keim testified that she told tenant farmers to farm the one-foot strip, "she could have been off by a small distance or her farmer could have failed to farm the strip any year during the period of claimed adverse possession." With regard to exclusive possession, the defendants posit that without a definite boundary like a fence, "it is just as likely that Don Lange farmed the one-foot strip." With regard to hostile possession, the defendants posit that there is no definite proof that until the real estate sale fell through, the plaintiffs even knew the one-foot strip existed, and that if they did not know the strip existed, they could not have had hostile possession of it.

¶ 24 The defendants' contentions with regard to continuous, exclusive, and hostile possession are nothing more than invitations for this court to reweigh the evidence, which is set out in great detail above, and find in a manner contrary to the findings of the trial judge. We stress again that the trial judge is "in a better position to assess and judge the credibility of the witnesses" (*Bridges v. Neighbors*, 32 Ill. App. 3d 704, 709 (1975)) than is this court, which is why we review the trial judge's findings of fact under the manifest weight of the evidence standard. *Id*. We have thoroughly reviewed all the evidence adduced in this case, and the arguments of the defendants on appeal, and we do not conclude that any findings of the trial judge are unreasonable, arbitrary, or not based on the evidence, nor is the opposite conclusion to that of the trial judge apparent in this case. Therefore, the trial judge's ruling is not against the manifest weight of the evidence, and

we will not disturb it on appeal. See, *e.g.*, *Brandhorst v. Johnson*, 2014 IL App (4th) 130923, ¶ 38.

¶ 25 CONCLUSION

¶ 26 For the foregoing reasons, we affirm the judgment of the circuit court of Madison County.

¶ 27 Affirmed.