

NOTICE
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2014 IL App (5th) 130373-U

NO. 5-13-0373

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).

WARREN D. SCHLECHTE, as Trustee of)	Appeal from the
the Warren D. Schlechte Trust Dated the 1st Day)	Circuit Court of
of July, 1998, and ELOIS J. SCHLECHTE, as)	Clay County.
Trustee of the Elois J. Schlechte Trust Dated the)	
1st of July, 1998,)	
)	
Plaintiffs and Counterdefendants-Appellees,)	
)	
v.)	No. 12-LM-10
)	
LAWRENCE W. BUDDE, as Trustee Under a)	
Revocable Trust Declaration Dated the 12th day)	
of December, 1995, and VERA C. BUDDE,)	
as Trustee Under a Revocable Trust Declaration)	
Dated the 12th Day of December, 1995, and)	
LAWRENCE W. BUDDE,)	Honorable
)	Michael D. McHaney,
Defendants and Counterplaintiffs-Appellants.)	Judge, presiding.

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

ORDER

¶ 1 *Held*: The appellants' claim of adverse possession was properly denied where they failed to prove exclusive possession of the disputed property.

¶ 2 This case involves a boundary line dispute between owners of two adjacent 40-acre parcels of farmland. The appellees (Warren D. Schlechte, as trustee of the Warren

D. Schlechte Trust dated the 1st day of July, 1998, and Elois J. Schlechte, as trustee of the Elois J. Schlechte Trust dated the 1st day of July, 1998) (hereinafter the Schlechtes) own acreage to the west of that owned by the appellants (Lawrence W. Budde, as trustee under a revocable trust declaration dated the 12th day of December, 1995, and Vera C. Budde, as trustee under a revocable trust declaration dated the 12th day of December, 1995, and Lawrence W. Budde) (hereinafter the Buddes). The boundary line dispute centers on whether the boundary line between these two properties was an old, now removed, fence, or a drainage ditch just a few yards west of the fence. The Schlechtes assert that the boundary line on the eastern edge of their property was the old, and now removed, fence a few yards east of a drainage ditch; the Buddes assert that the boundary line of the western edge of their property was the middle of the drainage ditch, and that no such fence ever existed. Alternatively, the Buddes argue that regardless of where the actual boundary line is, they have acquired title to the disputed property by adverse possession, claiming that they had always farmed and maintained this land and the drainage ditch as their own.

¶ 3 After a bench trial, the circuit court of Clay County found that the old fence had, in fact, existed at one time. The court further found that the survey conducted on behalf of the Schlechtes was "more accurate, credible and reliable" than the one conducted on behalf of the Buddes and that the actual boundary line according to the plat of survey was at a point east of the drainage ditch, and not the middle of the ditch as claimed by the Buddes. The court further found that the Buddes had not established that they had adversely possessed the Schlechtes' land all the way west to the middle of the drainage

ditch. Accordingly, the Buddes were permanently enjoined from entering onto or trespassing on land west of the boundary line as established by the Schlechtes' surveyor.

¶ 4 On appeal, the Buddes do not challenge the circuit court's finding as to the boundary line as established by the Schlechtes' surveyor. They argue only that the circuit court erred in finding that they had not established their adverse possession of the disputed property. For reasons which follow, we affirm.

¶ 5 On June 25, 2012, the Schlechtes filed suit in the circuit court of Clay County against the Buddes seeking damages for trespass to their land, and an injunction against the Buddes coming upon their land. The Buddes filed an answer in which they deny the allegations of the complaint and assert as a first affirmative defense that the boundary line of the properties is the centerline of the drainage ditch and that they had not entered onto the Schlechtes' property, and as a second affirmative defense, that they had adversely possessed the land to the centerline of the drainage ditch.

¶ 6 On August 30, 2012, the Buddes filed a counterclaim against the Schlechtes seeking to quiet title to the disputed property in them, and seeking damages from the Schlechtes for their trespass onto the Buddes' land.

¶ 7 The case proceeded to bench trial, and the following evidence was adduced with respect to the issue of adverse possession, the only issue before us on appeal. As we have stated, the Buddes do not dispute the accuracy of the survey done on behalf of the Schlechtes and essentially concede that it places the boundary line somewhere east of the drainage ditch. The Buddes argue only that the circuit court erred in finding that the Buddes had not established the elements of their adverse possession all the way to the

centerline of the drainage ditch.

¶ 8 The Buddes began farming the Budde property in 1958, as tenants of its former owners, the Williams family. In 1985, the Buddes purchased the property from the Williams family and have farmed it continuously and exclusively since then. The Buddes also farmed the adjacent Schlechte property as tenants from 1977 through the 2000 crop year. The Buddes always farmed up to the drainage ditch as their own property, and they also maintained that ditch. The Buddes had always understood that the centerline of the drainage ditch was the common boundary line between the two properties. They claimed that no one had ever asserted any ownership interest in the property to the east of the drainage ditch other than the Buddes.

¶ 9 The Schleiches contend that there was for some time a livestock fence located east of the drainage ditch close to the common boundary line. They further contend that the Buddes wrongfully removed this fence in 1998. The Buddes contend that there had never existed such a fence since they began farming the land in 1958, and they deny removing any fence in the vicinity of the drainage ditch.

¶ 10 Warren Schlechte testified that the Schlechte property was originally owned by his wife's parents. On Thanksgiving Day, 1957, he inspected the newly built drainage ditch with his new father-in-law, then the owner of the Schlechte property. He remembers the day because it was the first Thanksgiving holiday he spent with his new wife's family. There was a fence located to the east of the drainage ditch and running largely parallel with it. According to Warren Schlechte, the fence appeared to mark the boundary line between the Schlechte property and the property to the east, now the Budde property.

The fence was used to contain cattle on the farm. Warren helped to repair the fence for the next five years after first seeing it.

¶ 11 In 1998, Warren Schlechte noticed that the fence was gone and a large tree on the fence line had been removed. At that time, the Buddes were farming the Schlechte property as tenants, as well as their own, adjacent, property. The Schlechtes did not complain to the Buddes about the removal of the fence. Warren stated that he never farmed on the east side of the ditch between the ditch and the fence and so he was not overly concerned about the fence being gone. After the property was surveyed in 2011, the Schlechtes erected a new fence on the surveyed property line. The Buddes tore it out immediately.

¶ 12 The Schlechtes' son, Michael Schlechte, testified that he visited the Schlechte property nearly every weekend when he was a young child. He is very familiar with the property in the vicinity of the drainage ditch and he remembers that when he was a child there was a fence on the east side of the ditch. He would often jump the ditch for play and the fence was on the other side. The fence was still there in 1977 to 1979. He believed the ditch was on Schlechte property and the fence was to the east of the ditch.

¶ 13 Warren's wife, Lois Schlechte, grew up on the Schlechte property and remembers the drainage ditch and the fence to the east side of it. The fence was built before the ditch and had been there as long as she could remember.

¶ 14 Cathy Norris, the Schlechtes' daughter, visited the Schlechte property as a child every weekend and often spent summers there with her grandparents. She remembers the drainage ditch on the farthest side of the pasture. There was a fence on the east side of

the ditch. The fence was far enough to the east of the ditch that when the children jumped the ditch in play, they did not run into the fence. The fence was still there even after the Buddes started farming the land. She specifically remembers that it was there in 1986, and for several years thereafter.

¶ 15 Darrell Budde and his son farmed the Schlechte property from 2000 to 2010. His testimony was conflicting with respect to the ditch and the fence.

¶ 16 Lawrence Budde testified that when he started farming the Budde property in 1958, there was a drainage ditch on the west side of his property. There was never a fence on the east side of the drainage ditch. Lawrence farmed right up to within 30 inches of the ditch. Lawrence always maintained the ditch. No one had ever complained to Lawrence about his being on their land when he farmed right up to the ditch. Lawrence did not remove any fence along the west side of his property, east of the drainage ditch. He did remove fence posts put in after the survey had been completed. He believed the property was his and the posts interfered with his activities. He had always considered the centerline of the ditch to be the boundary line between the properties. He testified that to the extent he occupied the Schlechte property he did so on behalf of the Schlechtes, for whom he farmed the land as a tenant.

¶ 17 Fred Grogh testified that he spread fertilizer on the Budde property beginning in the late 1980s and for 20 years or more. He always used the ditch as the boundary line and does not remember a fence along the east side of the ditch. Grogh was not related to the parties and had no interest in the outcome of the case.

¶ 18 Vera Budde testified that her earliest memory of the ditch was 1956, when she

married Lawrence Budde. She worked the Budde farm ground and would work within 12 to 18 inches of the ditch. She never saw a fence on the east side of that ditch. The Schlechtes never made any claim to ground to the east of the ditch.

¶ 19 Allen Budde is the son of Lawrence and Vera Budde. He had been working the Budde farm ground and maintaining the drainage ditch for 40 years. No one other than the Budde family ever maintained the ditch. Allen testified that he never saw a fence to the east of the drainage ditch. Over the preceding 40 years he had never even found an old fence post on the east side of the ditch. He farmed up to about 30 inches from the ditch. He always considered the middle of the ditch to be the boundary line between the two properties.

¶ 20 Jerald Boerngen testified that he lived in the vicinity of the Budde property and passed by the area of the ditch several times a week. He had been doing so since 1973 and had never seen a fence to the east of that ditch.

¶ 21 In its order finding that the Buddes had not established ownership of the disputed parcel by adverse possession, the circuit court pointed out that the Buddes have the burden of proof, that all presumptions are to be made in favor of the Schlechtes, and that proof must be made by clear and unequivocal evidence and not by implication or inference. *Morris v. Humphrey*, 146 Ill. App. 3d 612, 615 (1986). The court further pointed out that use of vacant and unoccupied land is presumed to be permissive and not adverse and such use cannot ripen into prescriptive right, whatever length of time such use is enjoyed. *Nitterauer v. Pulley*, 401 Ill. 494 (1948). The court found as a matter of fact that the old fence to the east of the drainage ditch had existed, although the court did

not state when or for how long. The court concluded that, applying the law to the evidence adduced at trial, the Buddes had failed to prove clearly and unequivocally the elements required to establish title by adverse possession. The Buddes appeal.

¶ 22 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, (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 unequivocal evidence. *Joiner*, 85 Ill. 2d at 81. 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. *Joiner*, 85 Ill. 2d at 81.

¶ 23 We will not disturb the circuit court's findings unless they are against the manifest weight of the evidence. *Knauf v. Ryan*, 338 Ill. App. 3d 265, 269 (2003). A finding is against the manifest weight of the evidence only when the opposite conclusion is apparent or when findings appear to be unreasonable, arbitrary, or not based on evidence. *Kunkel v. P.K. Dependable Construction, LLC*, 387 Ill. App. 3d 1153, 1157 (2009). As the trier of fact, the trial judge was in a superior position to judge the credibility of the witnesses and determine the weight to be given their testimony. *Kunkel*, 387 Ill. App. 3d at 1158. When contradictory testimony that could support conflicting conclusions is given at a bench trial, an appellate court will not disturb the trial court's factual findings based on that testimony unless a contrary finding is clearly apparent. *Kunkel*, 387 Ill.

App. 3d at 1158.

¶ 24 The Buddes argue that the circuit court's finding that the fence existed is contrary to the manifest weight of the evidence. We cannot agree. The testimony regarding the existence of this fence is contradictory. Warren Schlechte testified that the fence was present on the property, and marked the common boundary, until 1998. Cathy Norris testified that she remembered the fence being there as late as 1986 and for several years thereafter. Both surveys found that the boundary line was indeed east of the ditch, lending credibility to the Schlechtes' testimony that the fence existed before the ditch was dug.

¶ 25 The Buddes argue that the testimony of these witnesses is not reliable and that the testimony of their own witnesses is more reliable. As we have stated, the trial judge was in a superior position to judge the credibility of the witnesses and determine the weight to be given their testimony, and when contradictory testimony that could support conflicting conclusions is given at a bench trial, an appellate court will not disturb the trial court's factual findings based on that testimony unless a contrary finding is clearly apparent. *Kunkel v. P.K. Dependable Construction, LLC*, 387 Ill. App. 3d 1153, 1157-58 (2009). In this case, a finding contrary to that of the trial court is not clearly apparent. Furthermore, 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. *Joiner v. Janssen*, 85 Ill. 2d 74, 81 (1981).

¶ 26 Based on the circuit court's finding that the fence existed, the court's finding that the Buddes have not established exclusive possession of the disputed property for a

continuous 20-year period and have not, therefore, adversely possessed the land is not contrary to the manifest weight of the evidence.

¶ 27 For the foregoing reasons the judgment of the circuit court of Clay County is hereby affirmed.

¶ 28 Affirmed.