

NOTICE

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2011 IL App (5th) 110013-U

NO. 5-11-0013

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).

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SULPHUR SPRINGS BAPTIST CHURCH, an Illinois Religious Corporation,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Pope County.
	)	
v.	)	No. 07-CH-10
	)	
GLEN EUGENE ELAM and	)	
IVUS LEE ELAM,	)	Honorable
	)	Joseph M. Leberman,
Defendants-Appellees.	)	Judge, presiding.

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JUSTICE SPOMER delivered the judgment of the court.  
Justices Welch and Goldenhersh concurred in the judgment.

**ORDER**

¶ 1 *Held:* The circuit court erred by granting the defendants' motion for a judgment notwithstanding the verdict following a jury trial, with regard to disputed property in Section 27, because reasonable minds could differ on the inferences and conclusions to be drawn from conflicting testimony regarding the exclusivity of the possession.

¶ 2 The plaintiff, Sulphur Springs Baptist Church (the church), appeals the portion of the December 17, 2010, order of the circuit court of Pope County that granted the motion of the defendants, Glen Eugene Elam and Ivus Lee Elam, for a judgment notwithstanding the verdict (*n.o.v.*), following a jury trial, with regard to disputed property in Section 27.<sup>1</sup> For

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<sup>1</sup>The circuit court's order found that there was sufficient evidence to support the jury's verdict in favor of the church with regard to disputed property in Section 22, which is not subject to this appeal.

the following reasons, we find the judgment *n.o.v.* improper. Accordingly, we reverse the portion of the circuit court's order with regard to the disputed property in Section 27 and remand with directions to the circuit court to reinstate the jury verdict in favor of the church.

¶ 3

### FACTS

¶ 4 On October 9, 2007, the church filed a two-count complaint. Count I was a request to quiet title, alleging that the church 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 property and to grant the church the right to remove all fencing and other objects placed by the defendants upon the allegedly adversely possessed property.

¶ 5 A jury trial was conducted on May 18 through 21, 2010. We will limit our recitation of the testimony and evidence adduced at the trial to that which is necessary for our review of the relevant portions of the circuit court's order on appeal, and we will discuss those facts in the analysis section of this order. After the plaintiff's case in chief, the defendants' counsel made an oral motion for a directed verdict, based solely on the allegation that the plaintiff failed to prove its status as an established entity. The circuit court took the motion under advisement and the defendants' counsel proceeded with their case. On May 21, 2010, the jury returned a verdict in favor of the church on count I of the complaint, finding that the church had acquired title to all of the disputed property by adverse possession.

¶ 6 On May 28, 2010, the circuit court denied the defendants' motion for a directed verdict via docket entry on the basis of documents presented which proved that the church had existed as a formal organization since at least 1959. The same date, the circuit court entered a judgment on the verdict and entered a judgment in favor of the church on count II of the complaint, granting its request for a permanent injunction. The defendants filed a posttrial motion for a judgment *n.o.v.* on July 27, 2010. The circuit court entered an order on

December 17, 2010, granting the defendants' motion for a judgment *n.o.v.* The church filed a timely notice of appeal.

¶ 7

#### ANALYSIS

¶ 8 As a threshold matter, we find that the circuit court did not err by denying the defendants' motion for a directed verdict, which was raised solely on the basis that the church was not an established entity. The church's Exhibit 59 consists of the church constitution and bylaws, and shows that the church was established in 1914. The church's Exhibit 60 consists of minutes of church business meetings, beginning on September 27, 1959. On this basis, we affirm the circuit court's denial of the defendants' motion for a directed verdict. Accordingly, we will proceed with the issues on appeal regarding the defendants' motion for a judgment *n.o.v.*, which addressed whether the elements of adverse possession were satisfied for the requisite time period.

¶ 9 We note that the area in dispute on appeal is limited to a parcel along the southern border of the church property in Section 27, which consists of an area measuring 276 feet from east to west and 27.95 feet from north to south. The church challenges the circuit court's decision to grant the defendants' motion for a judgment *n.o.v.* with regard to this disputed area. "A \*\*\* judgment *n.o.v.* is properly entered in those limited cases where 'all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors [the] movant that no contrary verdict based on that evidence could ever stand.' " *Maple v. Gustafson*, 151 Ill. 2d 445, 453 (1992) (quoting *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510 (1967)). "In ruling on a motion for a judgment *n.o.v.*, a court does not weigh the evidence, nor is it concerned with the credibility of the witnesses; rather it may only consider the evidence, and any inferences therefrom, in the light most favorable to the party resisting the motion." *Maple*, 151 Ill. 2d at 453. "The law is well settled that a jury's verdict should not be set aside merely because different inferences and

conclusions may be drawn from conflicting testimony." *Allstate Contractors, Inc. v. Marriott Corp.*, 273 Ill. App. 3d 820, 827 (1995). "[J]udgments notwithstanding the verdict are improper where reasonable minds may differ as to inferences or conclusions to be drawn from facts presented, where the evidence demonstrates a substantial factual dispute, or where the assessment of witness credibility or the resolution of conflicting evidence is decisive to the outcome." *Hernandez v. Schitteck*, 305 Ill. App. 3d 925, 930 (1999).

¶ 10 "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 v. Alberts*, 278 Ill. App. 3d 1028, 1036 (1996) (quoting *Joiner v. Janssen*, 85 Ill. 2d 74, 81 (1981)). 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." *Hermes v. Fischer*, 226 Ill. App. 3d 820, 825 (1992) (citing *Schwartz v. Piper*, 4 Ill. 2d 488, 493 (1954)). "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*, 4 Ill. 2d at 493; *Joiner*, 85 Ill. 2d at 83). In granting the defendants' motion for a judgment *n.o.v.*, the circuit court found: (1) that the church failed to meet its burden, by clear and convincing evidence, regarding the exclusive possession of the property, (2) that the church failed to show that it held the

property under a claim of title inconsistent with that of the true owner, and (3) that the church failed to meet its burden to show the location of the boundary of the property claimed to be adversely possessed.

¶ 11

### I. *Exclusive Possession*

¶ 12 We begin by addressing the circuit court's finding that there was insufficient evidence for the jury to find that the church met the element of exclusive possession. "[B]ecause exclusivity requires that the claimant possess the property independent of a like right in others, the rightful owner must be altogether deprived of possession." *Illinois District of American Turners, Inc. v. Rieger*, 329 Ill. App. 3d 1063, 1073 (2002). In this case, the church filed its complaint on October 9, 2007. Accordingly, in order to meet this element of adverse possession, the church must have been in exclusive possession of the disputed area at least since October 9, 1987, and we must examine the evidence presented on this element.

¶ 13 John Kunath, a witness for the church, testified that the church was in exclusive possession of the entire area outlined on the church's Exhibit 15 from 1959 through 2007, with the exception of one year when Wayne Elam, the father of the defendants, plowed and planted potatoes on "the lower part" and the following year when he plowed and planted corn on the same area. It cannot be determined from Kunath's testimony where exactly "the lower part" is and whether "the lower part" planted by Wayne Elam included the disputed area. Furthermore, Kunath testified that he was unsure when the planting took place, but he testified that it was probably after Wayne Elam moved back to the farm after living up north. Defendant Ivus Elam testified that his father moved back to the farm in the early 1970s. Testimony showed that Wayne Elam died in 1989.

¶ 14 Defendant Glen Elam later testified that his father planted at various times in "the bottom field." The exhibits in the record show that "the bottom field" is located along the western border of the church property, which is not included in the area in dispute on appeal.

Accordingly, a reasonable jury could have concluded, clearly and unequivocally, either that Wayne Elam planted on the disputed property prior to 1987 or that he planted outside of the disputed area, rendering the church's possession exclusive. A judgment *n.o.v.* was improper with regard to exclusive possession of the disputed area because reasonable minds could differ regarding inferences and conclusions that could be drawn from the testimony. See *Hernandez*, 305 Ill. App. 3d at 930.

¶ 15 A judgment *n.o.v.* was also improper concerning the exclusive possession of the disputed area because there was conflicting testimony on this element, which required credibility determinations to resolve. John Kunath testified that only the church and its members used the disputed area from 1959 to 2007. Kunath also testified that it was the church which maintained and mowed the property, all the way to the old fence line. Both defendants testified that when the old fence was in place, neither they nor their families used any of the land north of the fence. In contrast, defendant Ivus Elam testified that the old fence was taken down and the old roadway was filled in before his father died, after which Ivus allegedly mowed "at times," north of where the old fence had been when he was bush-hogging, and he allegedly mowed to the centerline of the old roadway. Likewise, defendant Glen Elam testified that his family used some of the property north of the old fence, but not until after the fence was removed. He also testified that he mowed to the centerline of the old roadway, after the fence was removed and the roadway filled in, beginning sometime in the 1980s.

¶ 16 Because there is conflicting testimony and the resolution involves a determination of the credibility of witnesses, the judgment *n.o.v.* was improper. See *Allstate Contractors, Inc.*, 273 Ill. App. 3d at 827 (jury verdict should not be set aside because different inferences and conclusions may be drawn from conflicting testimony). See also *Maple*, 151 Ill. 2d at 453 (circuit court not concerned with credibility of witnesses in the context of a judgment *n.o.v.*).

It was for the jury to determine which witnesses were credible on the exclusive possession element.

¶ 17           II. *Claim of Title Inconsistent With That of the True Owner*

¶ 18   Having found that there is sufficient evidence on the element of exclusive possession to support the jury's verdict, we turn to the circuit court's finding that there was insufficient evidence that the church's possession was under claim of title inconsistent with that of the true owner. "Using and controlling property as owner is the ordinary mode of asserting a claim of title inconsistent with that of the true owner." *Peters v. Greenmount Cemetery Ass'n*, 259 Ill. App. 3d 566, 570 (1994). The record reveals that a school previously existed on the church property. Evidence showed that the church purchased the school building after a school consolidation occurred in Pope County in 1959, and began using it as a church. In its order granting a judgment *n.o.v.*, the circuit court emphasized that it was not established whether children playing on the disputed property during the relevant time period were attending the school or the church, thereby implying that it was questioning the continuity of the church's use of the property. However, our review of the testimony reveals that witnesses did testify that children played on the disputed area "when they attended church or church activities."

¶ 19   In addition to children playing, testimony regarding additional uses showed that the church also mowed and maintained the disputed area since 1959, that the church conducted activities on the disputed area such as "Game Day" for the children, and that the church had wiener roasts on the disputed area. Even assuming, *arguendo*, that the children playing was the sole use revealed by the witnesses, Illinois law holds that adverse possession of successive property holders may be tacked in determining whether the element of continuity has been met. See *O'Connell v. Chicago Park District*, 376 Ill. 550, 559 (1941). Moreover, a jury instruction on tacking was given, with no objection. Accordingly, it is irrelevant

whether children playing on the disputed property were from the church or the previous school. For these reasons, in looking at the evidence in a light most favorable to the church, a judgment *n.o.v.* was improper with regard to the element of a claim of title inconsistent with that of the true owner because a reasonable jury could have concluded, clearly and unequivocally, that this element was satisfied.

¶ 20

### III. *Location of the Property Boundaries*

¶ 21 Finally, the circuit court found that the church failed to meet its burden to show the location of the boundary of the disputed area. The circuit court further found that John Kunath's testimony was inconsistent because he "testified that the south boundary of the claimed property was a fence that was ran parallel to and south of the north line of Section 27" but Kunath also testified that "the fence ran along the bank of the 'old abandoned roadway.' " The circuit court aptly noted, as demonstrated in the church's Exhibit 14, "*the portion* of the 'old abandoned roadway' that lies south of the old church building and south of the current church building is entirely in Section 22." (Emphasis added.) However, it is apparent that the circuit court misconstrued Kunath's testimony.

¶ 22 Kunath testified that an old fence running east and west marked the south boundary of the church property. The fence is no longer standing, but Kunath adequately described the location of the old fence line. He testified that there are two large stones still in existence, which have marked the boundaries of the cemetery for over 100 years, and that the old fence was in line with the stone markers. Kunath drew a line representing the old fence on the church's Exhibit 15, an aerial photograph. The line that Kunath drew to depict the fence runs east and west and is in direct line with the stone markers of the cemetery, which are visible in the photograph. When compared to the church's Exhibit 13, an official survey, it is clear that the old fence line in the disputed area is well within Section 27. This testimony regarding the location of the fence was undisputed. The circuit court misconstrued



Kunath's testimony to mean that the old fence ran along the banks of the old roadway in its entirety. In reality, Kunath testified that the old roadway ran very close to the church, turned in a southwesterly direction, and *then* ran parallel to the fence. Although testimony established that the old roadway curved, testimony also established that the old fence continued straight across. Accordingly, in looking at the evidence in a light most favorable to the church, a judgment *n.o.v.* was improper with regard to the location of the boundary lines because a reasonable jury could have concluded, clearly and unequivocally, that the evidence established the same.

¶ 23

#### CONCLUSION

¶ 24 When all of the evidence is considered in a light most favorable to the church, it does not so overwhelmingly favor the defendants that the jury's verdict in favor of the church could never stand. Accordingly, the circuit court erred by granting the defendants' motion for a judgment *n.o.v.* with regard to the disputed property in Section 27. We reverse that portion of the order and remand with directions to the circuit court to reinstate the jury verdict in favor of the church.

¶ 25 Reversed and remanded with directions.