

Case No. A-24-794

IN THE NEBRASKA COURT OF APPEALS

ALAN KORTMEYER and CAROLYN KORTMEYER, husband and wife,
Plaintiff-Appellants,

vs.

ALYSSA HENDRIX and CAREY HENDRIX wife and husband; KACH 510,
LLC; KACH ROBERTS BLDG., LLC; KACH420M, LLC; and C&A
COMPLEX MANAGEMENT, LLC, and GLEN HAVEN SUBDIVISION
UTILITY SERVICE, LLC,
Defendant-Appellees

APPEAL FROM THE DISTRICT COURT OF
SEWARD COUNTY, NEBRASKA
HONORABLE RACHEL A. DAUGHERTY, DISTRICT COURT JUDGE

BRIEF OF APPELLANT

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STATEMENT OF THE BASIS OF JURISDICTION

This court has jurisdiction over this appeal pursuant to Neb.Rev.Stat. §§ 25-1911 and 25-1912. Appellants Alan and Carolyn

Kortmeyer, appeal from an Amended Ordered entered by the District Court of Seward County, Nebraska, on September 26, 2024. (T145-154). On October 25, 2024, Appellants timely filed their notice of appeal.

STATEMENT OF THE CASE

1. Nature of the Case

This lawsuit involves a case of adverse possession arising out of a boundary dispute between property owners Alan and Carolyn Kortmeyer (“Appellants”) and Alyssa Hendrix and Carey Hendrix wife and husband; KACH 510, LLC; KACH Roberts Bldg., LLC; KACH420m, LLC; and C&A Complex Management, LLC, and Glen Haven Subdivision Utility Service, LLC, (“Appellees”). On July 19, 2023, Appellants filed a Complaint for Quiet Title as to a strip of real property, which is approximately 7.2 feet wide, reaching the 11.4 foot mark west of the property. (T1-5). Appellant proceeded to file a Motion and Affidavit for Ex Parte Order on July 19, 2023 to prevent Appellee’s from destroying the property, which was granted on or about July 19, 2023. (T6-9; T12-14). Appellees filed an Answer and Counterclaim on September 18, 2023. (T55-67). Appellant filed an Answer to Appellee’s Counterclaim on October 27, 2024 (T68-70).

For purposes of this brief, the 7.2 feet of land west of the Appellants’ property line, between Appellant and Appellees’ properties will be refereed to as the “Disputed Property.” (“E2, p. 20).

2. Issues Tried in the Court Below

A bench trial was held on May 23, 2024. The issues tried to the court below included the following:

- a. Whether Appellant met all the elements of adverse possession.

3. How the Issues were Decided and Judgment Entered

- a. The lower court determined that Appellant did not meet their burden to support a claim of adverse possession.

4. Scope of Review

Adverse possession actions are equitable in nature. *Thornburg v. Haecker*, 243 Neb. 693, 696, 502 N.W.2d 434, 437 (1993). In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and

reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the judge heard and observed the witnesses and accepted one version of the facts rather than another. *Wanha v. Long*, 255 Neb. 849, 855, 587 N.W.2d 531, 538 (1998).

ASSIGNMENTS OF ERROR

1. This District Court erred in ruling that Appellant failed to meet their burden to support a claim of adverse possession.

PROPOSITIONS OF LAW

I.

A claim of adverse possession is equitable in nature. *Thornburg v. Haecker*, 243 Neb. 693, 696, 502 N.W.2d 434, 437 (1993).

II.

In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Wanha v. Long*, 255 Neb. 849, 855, 587 N.W.2d 531, 538 (1998).

III.

A party claiming title through adverse possession must have been in (1) actual, (2) continuous, (3) exclusive, (4) notorious, (5) adverse possession under a claim of ownership for the statutory period of 10 years. *Poulllos v. Pine Crest Homes, LLC*, 293 Neb. 115, 118, 876 N.W.2d 356, 359 (2016).

IV.

Actual occupancy or possession is always involved in any claim to land by

adverse possession. *Thomas v. Flynn*, 169 Neb. 458, 100 N.W.2d 37 (1959).

V.

No particular act is required to establish “actual possession.” *Olson v. Fedde*, 171 Neb. 704, 107 N.W.2d 663 (1961). What is sufficient to meet the requirements of actual possession depends upon the character of the land and all of the circumstances of the case *Id.*

VI.

To prove continuous possession, the term “continuous” in the context of adverse possession means a possession for the 10-year period which is uninterrupted or stretches on without break or interruption. *Hardt v. Eskam*, 218 Neb. 81, 82, 352 N.W.2d 583, 585 (1984).

VII.

Nebraska law does not require the possession to be evidenced by persons remaining continuously upon the land and constantly from day to day performing acts of ownership. *Nye v. Fire Grp. P’ship*, 265 Neb. 438, 443, 657 N.W.2d 220, 225 (2003).

VIII.

Possession must also be exclusive, and if the occupier shared possession with the title owner, the occupier may not obtain title by adverse possession. *Dugan v. Jensen*, 244 Neb. 937, 510 N.W.2d 434 (1993).

IX.

Where the record establishes that both parties have used the property in dispute, there can be no exclusive possession on the part of one party for the purpose of establishing adverse possession. *Thornburg v. Haecker*, 243 Neb. 693, 502 N.W.2d 434 (1993).

X.

Nebraska law does not require that adverse possession be evidenced by complete enclosure and 24-hour use of the property. *Brown v. Morello*, 308 Neb. 968, 957 N.W.2d 884 (2021).

XI.

The acts of dominion over land allegedly adversely possessed must, to be effective against the true owner, be so open, notorious, and hostile as to put an ordinarily prudent person on notice of the fact that the lands are in the adverse possession of another. *Poulllos v. Pine Crest Homes, LLC*, 293 Neb. 115, 118, 876 N.W.2d 356, 359 (2016).

XII.

A claim of ownership or claim of right means “hostile” and these terms describe the same element of adverse possession. The word “hostile” when applied to the possession of an occupant of real estate holding adversely, is not to be construed as showing ill will, or that the occupant is an enemy of the person holding the legal title, but means an occupant who holds and is in possession as owner and therefore against all other claimants of the land. *Ballard v. Hansen*, 33 Neb. 861, 51 N.W.2d 295 (1892). The purpose of prescribing the manner in which an adverse holding will be manifested is to give notice to the real owner that their title or ownership is in danger so that he may, within the period of limitations, take action to protect his interest. It is the nature of the hostile possession that constitutes the warning, not the intent of the claimant when he takes possession.

XIII.

Title may be acquired by **adverse possession** though the claim of ownership was invalid and the occupant believed he was asserting legal rights only. *Erickson v. Crosby*, 100 Neb. 372, 160 N.W. 94 (1916). Permissive use of property can never ripen into title by adverse possession unless there is a nature in the nature of possession brought to the attention of the owner.

STATEMENT OF FACTS

The Appellants, Alan and Carolyn Kortmeyer purchased their property located at 923-280th Road, also known as Glen Haven Drive, Lot 28, Seward, Nebraska 68494 with a legal description of Lot 27, Block 3, Glenhaven Subdivision Replat, in the Southeast Quarter (1/4) of the

Southeast Quarter (SE1/4), of section 20, Township 10, Range 3, Seward County, Nebraska in 1990, and mistakenly believed that the land approximately 7.2 feet west of the boundary line (Disputed Property) was within their property line and utilized the Disputed Property as their own from approximately 1990 to the present. (T1-5). A 2021 survey revealed that the Disputed Property was within Lot 26's, owned by Appellees, boundary line. (12:13-21).

Appellants filed a Complaint for Quiet Title to the Disputed Property on July 19, 2023 (T1-5). Appellant proceeded to file a Motion and Affidavit for Ex Parte Order on July 19, 2023 to prevent Appellee's from destroying the property, which was granted on or about July 19, 2023. (T6-9; T12-14). Appellees filed an Answer and Counterclaim on September 18, 2023. (T55-67). Appellant filed an Answer to Appellee's Counterclaim on October 27, 2024 (T68-70). Additionally, trial revealed that the lot names and numbers changed over the years, but testimony clarified that the parties were litigating over approximately 7.2 feet on land on what was called Lot 26 on the Glenhaven Subdivision Replat (56:16-24; E7, p.32).

Trial revealed that starting in 1990 Appellants mowed, maintained, and landscaped the Disputed Property, and put others on notice that Appellants owned, or acted as if they owned, the Disputed Property (133:11-23; 138: 1-8). In the early 2000s, Appellants further improved the Property and built a retaining wall and a small garden, photographs of which were offered and accepted by the Court (77:13-16; E9, p.85). The maintenance and improvement of land continued to the time of trial.

In 2018, the Appellees, Alyssa and Carey Hendrix and their companies, purchased lots surrounding the Appellants' property, including Lot 26. (29:20-22). In 2021, a survey was completed, which evidenced that the Disputed Property was actually part of Lot 26, owned by the Appellees. (12:13-21).

The disagreement of ownership over the Disputed Property revolves around the Appellants "renting" Lot 26, which was later discovered to include the Disputed Property- that is 7.2 feet of land, west of Appellants' boundary line. As mentioned during trial, Appellants purchased a trailer in the early 2000s, which sat on Lot 26, which they did not own. Rental/utility disputes regarding this use of Lot 26 led to

litigation. (E7, p.32). This previous litigation resulted in Appellants paying rent/utility payments to the property owners for the use of Lot 26, from approximately 2000 and on. (E7, p.32). However, no party to this litigation discussed the Disputed Property, or that the payments were for the Disputed Property. (E7, p.32).

In 2019, the Appellants began paying ‘rent’ to the Appellees- ‘rent’ included water and utilities for Appellants land, as well as rent for the trailer to sit on Lot 26. (20:2-8; 171:17-25; 172: 1-7). Appellee Alyssa Hendrix’s testimony contradicts itself- at one point she claimed to know where the boundary line was due to the 1977 Replat, while later testifying that she did not know where the boundary line for Lot 26 was. (166:9-16; 174:1-3; 175:16-17). Despite this, her testimony was clear that from 2019 to 2021, she did not believe the rent for Lot 26 to include the Disputed Property. (173:21-25; 174:1-25; 175:1-11).

In 2021, after the updated survey, Appellees sent a letter to Appellants stating that the Disputed Property was within Lot 26’s boundaries, and they were ‘evicting’ the Appellants. (E42, p.124). Despite this letter, Appellant continued to maintain and use the land as their own. (87:7-20).

At trial, Appellee Alyssa Hendrix admitted that from 2019 to the time of trial, neither she, nor her husband or any agent of their companies, ever maintained the Disputed Property (176:14-25; 177:1-7). In fact, Appellee Alyssa Hendrix indicated that Appellee’s did nothing to the Disputed Property, as they believed it to be the Appellant’s property. (176:14-19). Appellee Alyssa Hendrix revealed that until 2021, she did not know where the boundary line was on Lot 26 (175:16-19). Even after the 2021 survey, Appellees failed to perform any ownership duties over the Disputed Property.

It is the Appellants’ position that they met the requirements of adverse possession from 1990-2000, and therefore ‘rent’ payments to the owners of Lot 26 did not create ‘permissive’ use of the land. Additionally, trial demonstrated that the Appellants, as well as the Appellees and previous owners, believed the Disputed Property was within Appellant’s boundary line. While Appellants argue that they never agreed or understood to be renting the Disputed Property, these facts are inconsequential. As the evidence and testimony at trial demonstrated, the

Plaintiffs met all the statutory elements of adverse possession *prior* to renting Lot 25.

Trial on the issue of adverse possession was held on May 23, 2024. At the conclusion of the trial, Appellees voluntarily dismissed their counterclaim on the Conditional Use Permit. (180:8-9). The Court entered an Order on September 25, 2024, denying Appellants' Complaint for Quiet Title to the Disputed Property. (T136-143). Appellants timely filed a Notice of Appeal on October 25, 2024,

SUMMARY OF THE ARGUMENT

The decision of the District Court in this matter does not conform to the law and is not supported by the evidence at hand. Appellant actually, continuously, exclusively, notoriously, and adversely possessed the Disputed Property under a claim of ownership for a period of at least ten years.

ARGUMENT

I. THE DISTRICT COURT ERRED IN FINDING THAT APPELLANTS FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THE NECESSARY ELEMENTS TO SUPPORT A CLAIM OF ADVERSE POSSESSION

The District Court erred in ruling that the elements of adverse possession were not met by Appellants for the Disputed Property. A party claiming title through adverse possession must have been in (1) actual, (2) continuous, (3) exclusive, (4) notorious, (5) adverse possession under a claim of ownership for the statutory period of 10 years. *Poulllos v. Pine Crest Homes, LLC*, 293 Neb. 115, 118, 876 N.W.2d 356, 359 (2016).

a) Actual

Actual occupancy or possession is always involved in any claim to land by adverse possession. *Thomas v. Flynn*, 169 Neb. 458, 100 N.W.2d 37 (1959). No particular act is required to establish "actual possession." *Olson v. Fedde*, 171 Neb. 704, 107 N.W.2d 663 (1961). What is sufficient to meet the requirements of actual possession depends upon the character of the land and all of the circumstances of the case *Id.*

In the case at hand, Appellants actually possessed the land and made improvements to the Disputed Property from 1990 through the early 2000s. (138:1-3). They preserved and cared for the Disputed Property for over 10 years, by cutting grass, creating a garden bed with flowers and plants, and eventually installing a retaining wall. (138:1-7; 139:6-8).

b) Continuous

To prove continuous possession, the term “continuous” in the context of adverse possession means a possession for the 10-year period which is uninterrupted or stretches on without break or interruption. *Hardt v. Eskam*, 218 Neb. 81, 82, 352 N.W.2d 583, 585 (1984). Nebraska law does not require the possession to be evidenced by persons remaining continuously upon the land and constantly from day to day performing acts of ownership. *Nye v. Fire Grp. P’ship*, 265 Neb. 438, 443, 657 N.W.2d 220, 225 (2003).

Again, Appellants continually possessed the Disputed Property for the statutory requirement of 10 years. Testimony demonstrated that Appellants regularly used the Disputed Property as a reasonable owner would, and did so beginning in 1990, and continuing to the time of trial, without break or interruption. (87:7-25).

c) Exclusivity

Possession must also be exclusive, and if the occupier shared possession with the title owner, the occupier may not obtain title by adverse possession. *Dugan v. Jensen*, 244 Neb. 937, 510 N.W.2d 434 (1993). Where the record establishes that both parties have used the property in dispute, there can be no exclusive possession on the part of one party for the purpose of establishing adverse possession. *Thornburg v. Haecker*, 243 Neb. 693, 502 N.W.2d 434 (1993). Law does not require that adverse possession be evidenced by complete enclosure and 24-hour use of the property. *Brown v. Morello*, 308 Neb. 968, 957 N.W.2d 884 (2021).

Appellant was the sole user of the Disputed Property starting in 1990. As Appellants testified, they believed the Disputed Property was within their boundary line and treated it as a reasonable owner would. That is, excluding others from using or taking the land. Further, Appellees revealed that they had never maintained or done anything to

improve the Disputed Property, even after 2021 survey, which showed the Disputed Property to be within Appellees' boundary lines.

d) Notorious

The acts of dominion over land allegedly adversely possessed must, to be effective against the true owner, be so open, notorious, and hostile as to put an ordinarily prudent person on notice of the fact that the lands are in the adverse possession of another. *Poulllos v. Pine Crest Homes, LLC*, 293 Neb. 115, 118, 876 N.W.2d 356, 359 (2016).

In *Poulllos*, the adversely claiming party claimed the boundary to be an area for which sod was laid, underground sprinklers were buried, and that was mowed for a period of over 10 years. The Supreme Court overturned the trial court's finding that the identified property met the elements of adverse possession, stating that the element of "notorious" was not met, and "while the installation of sod and underground sprinllers were both improvements to the land, they were not conspicuous." *Id.* The Supreme Court also referred to *Wanha v. Long*, 255 Neb. 849, 587 N.W.2d 531 (1998) in stating that "although the enclosure of land renders the possession of land open and notorious, it is not the only way by which possession may be rendered open and notorious. Rather, nonenclosing improvements to land, such as erecting buildings or planting groves or trees, which show an intention to appropriate the land to some useful purpose, are sufficient." *Id.* 19, 360.

Brown v. Morello, 308 Neb. 968 (2021) concerned a 20-foot parcel of land that was indistinguishable from the adverse possessor's yard, in which the adverse possessor maintained, mowed, gardened, and built a retaining wall on for the statutory period. The Nebraska Supreme Court ruled that Brown had met the necessary burden of proof and had quiet title to the disputed property.

In *Poulllos*, the Nebraska Appellate Court ruled that the notorious element needs to include more than "general acts of maintenance." *Id.* Unlike *Poulllos*, Kortmeyers greater action than general maintenance of the Disputed Property from 1990 to 2024, when the trial occurred. In *Poulllos*, there were no visible improvements to the disputed land that indicated a claim of ownership, such as planting trees or a garden. *Id.*

Here, the Appellants used the land so often and to such a purpose to put a reasonable owner on notice.

Similarly to *Brown*, the Appellants were under the belief, until 2021, that the Disputed Property was within their boundary line, and treated the property as their own. All of the usual incidents of ownership were undertaken- the Appellants maintained the approximately 7 feet of Disputed Property by mowing, gardening, weeding, and eventually building a retaining wall. While the evidence is murky, Appellant Carolyn Kortmeyer's testimony indicates that Appellants began building the retaining wall in 2003.

Appellee Alyssa Hendrix testified that prior to 2021, they did not convey, in any way, that the Disputed Property was included in their land survey. (174: 20-22). Further, Appellee Alyssa Hendrix testified that she believed the Disputed Property to be the Appellant's, specifically stating "I don't- - I'm not allowed to their property because they're separate from us." (176:18-19).

Appellant urges the Court to apply the same rationale as in *Brown* and find that Appellant met the burden of proof in proving adverse possession.

e) Adverse

A claim of ownership or claim of right means "hostile" and these terms describe the same element of adverse possession. The word "hostile" when applied to the possession of an occupant of real estate holding adversely, is not to be construed as showing ill will, or that the occupant is an enemy of the person holding the legal title, but means an occupant who holds and is in possession as owner and therefore against all other claimants of the land. *Ballard v. Hansen*, 33 Neb. 861, 51 N.W.2d 295 (1892). The purpose of prescribing the manner in which an adverse holding will be manifested is to give notice to the real owner that their title or ownership is in danger so that he may, within the period of limitations, take action to protect his interest. It is the nature of the hostile possession that constitutes the warning, not the intent of the claimant when he takes possession. *Id.*

Title may be acquired by **adverse possession** though the claim of ownership was invalid and the occupant believed he was asserting legal

rights only. *Erickson v. Crosby*, 100 Neb. 372, 160 N.W. 94 (1916).

Permissive use of property can never ripen into title by adverse possession unless there is a nature in the nature of possession brought to the attention of the owner.

Even though the Appellants mistakenly believed the Disputed Property was within their boundary line, this does not stop a successful claim of adverse possession. Appellant Carolyn Kortmeyer testified that between 1990 to 2003, they not only mowed and maintained the land, but also installed a front garden area that was maintained, with a retaining wall being built in 2003-2004. (141:7-15). These actions clearly show that the Appellants used the land as their own, against the true owner, and did more than merely ‘maintaining’ the land.

Both Appellants and Appellees testified that neither thought the rental payments for Lot 26 included the Disputed Property, as both parties believed the land was owned by the Appellants. (143:24-25; 144:2-10). The same is true regarding the ‘rental’ payments to the previous owners, which began in the mid-2000s. (143:24-25; 144:1-2).

CONCLUSION

For all the foregoing reasons, Appellant respectfully requests this Court to reverse the lower court’s decision. Appellants have satisfied all necessary elements of adverse possession of the Disputed Property. They have shown that they actually, continuously, exclusively, notoriously, and adversely possessed the Disputed Property under a claim of ownership for a period of at least 10 years, beginning in 1990.

I hereby certify that this brief complies with the word count and typeface requirements of Neb. Ct. R. App. P. § 2-103. This brief contains 3,909 words, excluding this certificate. This brief was created using Word Microsoft 365.

Respectfully submitted,

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Certificate of Service

I hereby certify that on Wednesday, February 26, 2025 I provided a true and correct copy of this *Brief of Appellants Kortmeyer* to the following:

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