NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 2244

GERALD AND SANDRA DUPLANTIS, et al.

VERSUS

CHARLES FRANCIS BERGERON and LYNN TUCKER BERGERON

Judgment Rendered: OCT - 5 2011

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On Appeal from the 32nd Judicial District Court
for the Parish of Terrebonne
State of Louisiana
Docket No. 147039, Division "E"

Honorable Randall L. Bethancourt, Presiding

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BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.

Parro, J. concurs in the result.

HUGHES, J.

This is an appeal of a judgment that resolved a boundary dispute in favor of the plaintiffs on the basis of thirty-years' acquisitive prescription. For the reasons that follow, we reverse the judgment in favor of the plaintiffs and render judgment in favor of the defendants, setting the boundary according to the survey of the court-appointed surveyor, Kenneth L. Rembert.

FACTS AND PROCEDURAL HISTORY

Plaintiffs, owners of several lots in the Helen Park Estates and Augustin Rodrigue Subdivisions, filed a boundary action against the defendants, Charles and Lynn Bergeron, the owners of the contiguous property to the north of the plaintiffs' properties, seeking to have the court judicially fix the boundary between plaintiffs' lots and defendants' property.

In response, the Bergerons filed a reconventional demand against the plaintiffs, alleging that they had possessed the disputed land for more than one year prior to the plaintiffs' action and that the filing of the lawsuit and a plat prepared by David A. Waitz Engineering and Surveying, Inc. (Waitz) amounted to an interruption of their possession.[1] The Bergerons pled the right to possess by virtue of quiet possession without interruption for more than one year prior to the disturbance. The Bergerons

[1] Louisiana Code of Civil Procedure Article 3655provides that a person may invoke a possessory action when he is in possession of immovable property and his possession thereof has been disturbed. See LSA-C.C.P. art. 3655. In order to maintain the possessory action, the requirements are that the filer had possession of the property at the time of the disturbance, that the filer had possession quietly and without interruption for more than a year immediately prior to the disturbance, the disturbance was one in fact or law, and that the action was instituted within one year of the disturbance. LSA-C.C.P. art. 3658. While title and ownership are not issues in possessory actions, because this is a boundary dispute, the boundary articles make clear that title prescriptions may be pled herein. **Ledoux v. Waterbury**, 292 So.2d 485, 487 (La. 1974).

also requested that the court appoint a surveyor, pursuant to LSA-C.C.P. art. 3692,[2] to fix and mark the boundary.

By a consent judgment, the court appointed Kenneth L. Rembert to conduct a survey of the land and mark the disputed line. Based on seventy-two hours of research and thirty-six hours of field work, Mr. Rembert concluded that the "original line" for the northern boundary of the subdivision as set by the earlier survey of Adloe Orr & Associates (Orr), was in error.[3] This error was perpetuated by the "revised" survey of Helen Park Estates conducted by Edward C. McGee (McGee) in 1965 and the survey conducted by Mr. Waitz in 2005. The trial court nevertheless determined that, although the Bergerons' title includes the area contested by the parties herein, the plaintiffs had proven ownership by acquisitive prescription of thirty years, and therefore set the northern boundary line of the subdivision according to the original "incorrect" Orr survey.[4]

LAW AND ANALYSIS

The following Civil Code articles are applicable to boundary actions in general:

> **Art. 792. Fixing of boundary according to ownership or possession**
>
> The court shall fix the boundary according to the ownership of the parties; if neither party proves ownership, the boundary shall be fixed according to limits established by possession.
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> **Art. 793. Determination of ownership according to titles**

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[2] **LSA-C.C.P. art. 3692. Appointment of surveyor by court; duties of surveyor**

> The court may appoint a surveyor to inspect the lands and to make plans in accordance with the prevailing standards and practices of his profession indicating the respective contentions of the parties.

[3] Plaintiffs, Joseph and Cathy Pitre and Alvin J. and Barbara Champagne, own property in the Augustin Rodrigue Subdivision. Neither the Pitres nor the Champagnes appeared at the trial to testify. Mr. Rembert, however, testified that the correct boundary line for Augustin Rodrigue Subdivision would be a continuation of the Helen Park Estates line.

[4] The trial court found, and plaintiffs concede in brief, that the Orr survey was incorrect.

When both parties rely on titles only, the boundary shall be fixed according to the titles. When the parties trace their titles to a common author preference shall be given to the more ancient title.

Art. 794. Determination of ownership according to prescription

When a party proves acquisitive prescription, the boundary shall be fixed according to limits established by prescription rather than titles. If a party and his ancestors in title possessed for thirty years without interruption, within visible bounds, more land than their title called for, the boundary shall be fixed along these bounds.

The evidence adduced at trial indicates that the property contested herein is held, under title, by both plaintiffs and defendants. The Bergerons submitted into evidence their chain of title dating back to 1906, when, according to the conveyance synopsis submitted into evidence at the trial without objection, Abraham Blum sold the property now owned by the Bergerons to Augustus A. Coxon. Thereafter, in 1917 the property was sold by Mr. Coxon to Judge Charlton Beattie Tucker and Mathilde Thibodaux Tucker. The Tuckers then, in 1948, sold the property to Lorna Thibodaux Brown and Tom Brown. In 1951 the property was sold to Norma Thibodaux Dunbar by the Browns, and thereafter by Norma Thibodaux Dunbar and her sons, Thomas Dunbar, Alan Paul Dunbar, and Patrick Dunbar, to the Bergerons in 1994. According to that title, the legal description of the Bergeron property is as follows:

> A certain tract of land situated in the Parish of Terrebonne, State of Louisiana, in Section 86, Township 15 South, Range 16 East, and more particulary described as per plat prepared by George Bergeron, Jr., and Son, Inc., C.E., dated February 04, 1994, said plat being entitled "Survey of 4.70 Acres belonging to Norma Thibodaux Dunbar, et al, located in Section 86, T15S, R16E, Terrebonne Parish, Louisiana" and described as follows: commencing at the northeast corner of Lot 14 of Helen Park Estates Subdivision. Said point being the point of beginning. Thence North 22 25'00" West a distance of 152.00' to a point; thence South 67 35'00" West a distance of 260.00' to a point; thence South 22 25'00" East a distance of 152.00' to a point; said point being the northeast corner of Lot Eighteen (18) of Helen Park Estates Subdivision. Thence South 67 35'00" West a distance of 1,016.22' to point on the water's edge of Dry Bayou; thence Northerly

> along the water's edge for a distance of 207.61' to a point; thence North 67 42'35" East a distance of 1,225.32' to a point; thence South 22 25'00" East, a distance of 192.42' to a point; thence South 67 35'00" West a distance of 20.00' to the "Point of Beginning"; Said property consisting of 4.70 acres. Together with all buildings and improvements thereon and all rights, ways, privileges and servitudes thereunto belonging or in anywise appertaining.

The plaintiffs' titles derive from and are subsequent to the establishment of Helen Park Estates Subdivision according to Mr. Orr's survey dated June 12, 1958, and are described therein as lots having a depth of 120 feet. The court-appointed surveyor, Mr. Rembert, after review of numerous records from the Terrebonne Parish Clerk of Court, title information, and lengthy field surveys, concluded in his *proces verbal* that:

> ...the location of the northern property line of Helen Park Estates Subdivision as staked by the original survey made in 1958 "criss-crosses" the position of the northern property line of Lot 22 as shown on the Terrebonne Project LA-12 map. They were supposed to coincide and the position of Lot 22 of the Terrebonne Parish LA-12 map should govern, as that was what Helen Park Estates Subdivision was to be carved from[.]

The original Orr survey indicates that the subdivision was to be located in the portion of land designated as Lot 22, or "carved from" Lot 22, of the Terrebonne Project-LA-12 Map. Therefore, the northern line of Lot 22 and Helen Park Estates should be the same or "coincide," as described by Mr. Rembert. He therefore recommended that the northern boundary lines of the plaintiffs' lots be set to coincide with the Bergerons' title, which borders Lot 22 to the north. Stated differently, plaintiffs' property depths should be adjusted down from 120 feet in order to coincide with the bearing of the northern line of the original Lot 22.

Clearly, the evidence establishes that the Bergerons hold the more ancient and better title. However, Article 794 requires us to consider whether the plaintiffs have proven possession of the disputed portion of the property for a period of time sufficient for acquisitive prescription to apply.

Acquisitive prescription is a means by which property is acquired through possession over a fixed period of time. Louisiana Civil Code article 794 allows a party to acquire more land than is called for in his title, if the party possesses that land for thirty years without interruption and within visible bounds. Additionally, LSA-C.C. art. 3473 allows ownership of immovables to be acquired by the prescription of only ten years, provided that the four requisites listed in LSA-C.C. art. 3475 are met. The requisites are: possession of ten years, good faith, just title, and a thing susceptible of acquisition by prescription. LSA-C.C. art. 3475.

Whether a party has possessed property for purposes of acquisitive prescription is a factual determination by the trial court and will not be disturbed on appeal unless it is clearly wrong. **Phillips v. Fisher**, 93-928 (La. App. 3 Cir. 3/2/94), 634 So.2d 1305, 1307, writ denied, 94-0813 (La. 5/6/94), 637 So.2d 1056.

One who possesses a part of an immovable by virtue of a title is deemed to have constructive possession within the limits of his title. LSA-C.C. art. 3426. Therefore plaintiffs must only show that they, or their ancestors in title, possessed a part of the land for some period in order to avail themselves of the benefit of constructive possession over all of the land within the limits of their title. And while the limits of plaintiffs' title, as set forth in the Orr survey, are incorrect, "[t]he whole concept of good faith acquisitive prescription connotes that the chain of title is defective in some way." **Pitre v. Tenneco Oil Company**, 385 So.2d 840, 847 (La. App. 1 Cir.), writ denied, 395 So.2d 698 (La. 1980).

The possession required is corporeal possession by one who intends to possess as owner. LSA-C.C. art. 3424. What constitutes corporeal possession is a question of fact, and each case rests upon its own individual circumstances. **Clifton v. Liner**, 552 So.2d 407, 412 (La. App. 1 Cir. 1989). One who has corporeal possession continues in possession until he transfers it or abandons it, or until another expels him from it, or until he allows the land to be usurped and held

for a year without doing any act of possession or without interfering with the usurper's possession. **Clifton v. Liner**, 552 So.2d at 412.

Therefore, if the plaintiffs prove that they, or their ancestors in title, took corporeal possession over a part of the land, we must presume that they have continued in constructive possession over all the land included in their titles. However, we note that "constructive possession of a part of a tract of land by reason of possession of the whole under color of title, cannot prevail over the adverse possession, whether the latter's possession be civil or corporeal, of the other party under a better or earlier title." **Case v. Jeanerette Lumber & Shingle Co.**, 79 So.2d 650, 653 (La. App. 1 Cir. 1955); **Buras v. United Gas Pipe Line Company**, 239 La. 721, 127 So.2d 271, 275 (La. App. 4 Cir. 1961). Thus, in this case, the plaintiffs must prove actual corporeal possession of the property in dispute in order to defeat the Bergerons' possession under a better and earlier title.

The jurisprudence holds that:

> ...The nature of corporeal possession sufficient to form the basis of prescription of 10 years depends on the character of the land. What constitutes possession in any case is a question of fact, and each case depends upon its own facts. The corporeal possession necessary to support the plea of prescription must include such external signs of possession as to indicate clearly that the possessor holds control and dominion over the property.

Jacobs v. Southern Advance Bag & Paper Company, Inc., 228 La. 462, 472-473, 82 So.2d 765, 768 (1955) (Citations omitted).

Patrol activities and surveys, or other "isolated acts of a transitory nature" are not sufficient to establish corporeal possession. See **Pitre v. Tenneco Oil Company**, 385 So.2d at 848. Trapping or hunting and casual grants of permission to others to trap or hunt are not acts that amount to corporeal possession. See **Buras v. United Gas Pipe Line Company**, 127 So.2d at 275. On the other hand, digging canals, placing "posted" signs, and performing reclamation projects have been held to be acts of corporeal possession, **Charpentier v. Louisiana Land and Exploration**

Company, 415 So.2d 452, 454 (La. App. 1 Cir. 1982), as well as occupying the land, trapping, raising cattle, raising family, building a camp, and burning the marsh every year. **Liner v. Louisiana Land and Exploration Company**, 319 So.2d 766 (La. 1975).

Under these principles of law and jurisprudence, we look to the facts of this case.

Dr. Frank Taulli, who died prior to trial, was the predecessor in title of the lands now owned by the testifying plaintiffs.[5] Dr. Taulli purchased several lots in Helen Park Estates on August 23, 1961, from his uncle, Joseph Taulli.

The Bergerons purchased their 4.70 acres in 1994 and hired Leonard Chauvin to perform a survey.[6] In January of 1995, based on the Chauvin survey, the Bergerons erected a chain-link fence along the southern boundary of their property. Mr. Chauvin had set this boundary line further south than the surveys of Orr and McGee.

In 2004, Dr. Taulli sold two lots to Teddy P. Dupre and one lot to Shane M. Duplantis. In 2005, Gerald and Sandra Duplantis also purchased one lot from Dr. Taulli and hired Mr. Waitz to conduct a survey. The Waitz survey indicated that the Bergerons' chain-link fence encroached onto their property by up to several feet in some areas. It was the Waitz survey that prompted this action, filed in December of 2005.

Only two of the plaintiffs appeared at the trial of this matter to offer testimony, Peggy Dupre and Gerald Duplantis. Because they did not purchase their property until 2004 and 2005, respectively, in order to prove either thirty

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[5] The plaintiffs in this action are Gerald and Sandra Duplantis, Shane and Jacquelyn Duplantis, Teddy and Peggy Dupre, Dr. Frank Taulli, Joseph and Cathy Pitre, and Alvin J. and Barbara Champagne. Only Peggy Dupre and Gerald Duplantis appeared at trial to testify about the acquisition of their property. While Gerald Duplantis testified that his son and daughter-in-law, Shane and Jacquelyn Duplantis, bought their property from Dr. Taulli in 2004, no additional evidence was offered to prove from whom and when the remaining plaintiffs acquired their property.

[6] At the time Mr. Chauvin performed this survey he was employed by George Bergeron, Jr. and Son, Inc.

years' or ten years' possession, they must "tack" on to the possession of their common ancestor in title, Dr. Frank Taulli. Possession is transferable by universal title or by particular title. LSA-C.C. art. 3441. The possession of the transferor is tacked to that of the transferee if there has been no interruption of possession. LSA-C.C. art. 3442. Although Dr. Taulli died prior to the trial, his testimony had previously been taken by deposition and was admitted into evidence at the trial without objection.

According to Dr. Taulli, he bought nine lots in Helen Park Estates from his uncle, Joseph Taulli, in 1961. He testified that he did not commission a survey of his own, but accepted the Helen Park Estates Subdivision plat done by Mr. Orr. He stated that at the time he purchased the lots, he was not aware of any markers enclosing the property and that he "never did look for any." The property was wooded; he never developed or inhabited it and, at the time he purchased it, "[t]here was no fence there." Regarding whether he was ever actually physically on the property, he merely stated that his "last trip out there" was after he sold the lots to the plaintiffs. Dr. Taulli provided no testimony as to any physical acts he performed on the property. In fact, Dr. Taulli provided no clear testimony that he ever actually set foot on the property. Under the law and jurisprudence cited above, this testimony fails to establish acts sufficient to prove corporeal possession.

Moreover, although plaintiffs, in their pre-trial memorandum, stated that they "will all testify that they have actually possessed the properties involved either by cutting grass on the lots, or because other boundaries were in place for many years up to which they possessed," no testimony was offered to that effect.

At the time of the trial, Peggy Dupre had lived for 29 years across the street from the lot she bought from Dr. Taulli in 2004. She testified that "as long as I can remember...nobody has ever gone and fool[ed] with the property across the street"

and that it was wooded and undeveloped. Although she purchased the lot in 2004, cleared the property, and built a house, she testified that she did not know where the northern boundary should have been. She did not dispute the placement of the Bergerons' fence, which had already been built, and in fact made no inquiry whatsoever as to the location of her rear boundary.

Likewise, Mr. Duplantis testified that neither he nor his wife knew the location of the rear boundary of their property and had only purchased their property in 2005. He offered no testimony regarding what acts he did on the property or to what bounds. None of the other plaintiffs testified.

In their pre-trial memorandum, plaintiffs alluded to an old barbed-wire fence that they seem to allege served as a boundary to their properties that would form the basis of their plea of acquisitive prescription. The record, however, evidences that none of the plaintiffs testified about the fence. The only testimony offered regarding the fence was from Charles Tucker, Lynn Bergeron, and Leonard Chauvin.

Mr. Chauvin stated that "[t]here was an old fence along this Bergeron line all of the way – along this line, in the woods. It had been there for many, many years. I – I was familiar with that fence." Regarding where he placed the boundary line after completing his survey, he stated that "it [his boundary line] was consistent with things that I had known my entire life." However, later in his testimony, he stated that he believed the old fence ran just north of his boundary setting.

Ms. Bergeron testified that when she and her husband acquired the property, only remnants of the old fence remained. Charles Tucker, Ms. Bergeron's father, who was 77 years of age at the time of the trial, testified that he recalled the old barbed-wire fence, that it ran all the way to the "dry bayou," and that he presumed the fence was built by his father, since it had existed for at least sixty years prior to

the date of the trial. He stated that he had no way of knowing if the fence erected by his daughter was in the same place as the old fence.

Thus, while there is testimony as to the existence of an old barbed-wire fence, no one could provide any evidence of the location of that fence. Without such evidence, the plaintiffs cannot rely on that fence to be a boundary up to which they possessed. In fact, at the time the plaintiffs purchased their properties, that fence had already been replaced by the chain-link fence of the Bergerons.

Because we find that Dr. Taulli's testimony does not provide support for the plaintiffs' plea of acquisitive prescription, they cannot tack onto the years that he owned the property. Without doing so, the plaintiffs are unable to continue his possession. We must conclude that the evidence is insufficient to prove that either Dr. Taulli or the plaintiffs took corporeal possession of their properties until well after the Bergerons established corporeal possession, under their title, with the chain-link fence, in 1995.

We conclude that the Bergerons are the owners under a better title than that of the plaintiffs. We also find that the Bergerons have shown sufficient acts, dating as far back as at least the 1950's, that establish actual corporeal possession. At the trial, Lynn Bergeron testified that she was born in the area, but moved with her immediate family when she was two years of age. However, some family remained in the area and lived on the property. She and her family visited them on occasion and during those visits she played inside and outside of their home, which was located on the property.

During Mr. Tucker's testimony, photographs were admitted into evidence that depict the old barbed-wire fence. It is clear from the photographs of "the old family home" that the fence ran in close proximity to the old house and that the Bergerons' ancestors in title maintained the property up to that fence. One of the

photographs also depicts Lynn Bergeron as a young child on the property not far from the fence, corroborating her earlier testimony.

Moreover, the testimony of Kenneth Rembert and Leonard Chauvin, both accepted by the trial court as experts in the field of land surveying, corroborates that the Bergerons' title includes all of the land enclosed by their fence. And while the Chauvin survey differs minimally from the Rembert survey, Chauvin deferred to the more extensively researched survey of Rembert. As such, because the chain-link fence was built in January of 1995, clearly enclosing the disputed property, and the plaintiffs' suit was not filed until December of 2005, the Bergerons have also proven ownership of the disputed land by ten years' acquisitive prescription through possession under their superior title. Accordingly, even if we assume, for the sake of argument, that the plaintiffs acquired ownership of the disputed land by acquisitive prescription of thirty years before the Bergerons purchased their property, the acts of corporeal possession in good faith by the Bergerons under their just title for over ten years constitutes the basis for claiming ownership of the disputed land by acquisitive prescription. See LSA-C.C. arts. 3473 and 3475. Consequently, the boundary must be fixed according to the ownership established by the Bergerons.[7] We must conclude that the trial court thus erred and reverse its judgment.

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[7] The Bergerons alleged five assignments of error:

1. That the trial court erred in failing to adhere to LSA-R.S. 50:3, 50:125, and 154;
2. That the trial court erred in finding that the plaintiffs proved acquisitive prescription;
3. That the trial court erred in rendering judgment in favor of those plaintiffs who were not present at the trial;
4. That the trial court erred in dismissing the Bergerons' Third Party Demand; and
5. That the trial court erred in assessing them with one-half the costs.

Because assignments of error 2, 3, 4, and 5 all hinge on a determination of whether the trial court erred in finding that the plaintiffs proved acquisitive prescription, we discussed this issue first. Based on our conclusion that the boundary line should be set according to the just title of the Bergerons, the remaining assignment of error is rendered moot.

CONCLUSION

The judgment of the district court is reversed and judgment is rendered in favor of defendants/plaintiffs-in-reconvention/appellants, Charles and Lynn Bergeron, and against the plaintiffs/defendants-in-reconvention/appellees, Gerald and Sandra Duplantis, Shane and Jacquelyn Duplantis, Teddy and Peggy Dupre, the succession representative and/or heirs of Dr. Frank Taulli, Joseph and Cathy Pitre, and Alvin J. and Barbara Champagne, setting the southern boundary of the property owned by the Bergerons according to the findings of the court-appointed surveyor, Kenneth Rembert, consistent with their title as set forth herein. All costs of the trial court and the appeal, including the cost of the court-appointed surveyor in the amount of $9,062.75, are to be assessed against the plaintiffs/defendants-in-reconvention/appellees, Gerald and Sandra Duplantis, Shane and Jacquelyn Duplantis, Teddy and Peggy Dupre, the succession representative and/or heirs of Dr. Frank Taulli, Joseph and Cathy Pitre, and Alvin J. and Barbara Champagne.

REVERSED AND RENDERED.