SUMMARY
July 13, 2023

2023COA68

No. 22CA1075, *Cronk v. Bowers* — Real Property — Corners and Boundaries Established — Boundary by Acquiescence Doctrine

In an apparent matter of first impression, a division of the court of appeals articulates and applies the boundary by acquiescence doctrine. The doctrine is not very developed or clearly articulated in Colorado; indeed, the clearest articulation of the doctrine is in an unreported federal case: *United States v. 74.33 Acres of Land*, Civ. A. No. 03-01095, 2007 WL 81897, at *6 (D. Colo. Jan. 9, 2007) (unpublished order). The division affirms the district court's judgment as it relates to ownership of the disputed property, but the division reverses the court's issuance of a permanent injunction and attorney fees and costs and remands for further findings.

COLORADO COURT OF APPEALS **2023COA68**

Court of Appeals No. 22CA1075
Washington County District Court No. 21CV30001
Honorable Stephanie M.G. Gagliano, Judge

Kenneth B. Cronk,

Plaintiff-Appellee,

v.

Douglas Bowers and Jason Bowers,

Defendants-Appellants.

JUDGMENT AFFIRMED IN PART AND REVERSED IN PART, ORDER REVERSED, AND CASE REMANDED WITH DIRECTIONS

Division IV
Opinion by JUDGE FOX
Welling and Kuhn, JJ., concur

Announced July 13, 2023

SGR, LLC, Lori C. Hulbert, Brandon T. Guinn, Denver, Colorado, for Plaintiff-Appellee

Cline Williams Wright Johnson & Oldfather, L.L.P., Russell J. Sprague, Beau B. Bump, Aaron N. Goodman, Fort Collins, Colorado, for Defendants-Appellants

¶ 1 Defendants, Douglas and Jason Bowers, appeal various aspects of the district court's judgment awarding plaintiff, Kenneth B. Cronk, a disputed piece of real property. The Bowerses also challenge the court's award of attorney fees and costs. We affirm the court's judgment as it relates to Cronk's ownership of the disputed property; however, we reverse the court's (1) issuance of a permanent injunction and (2) award of attorney fees and costs because it did not enter findings of facts or include analysis justifying either ruling.

I. Background

¶ 2 This case involves a dispute between neighboring landowners over the legal significance of a long-existing fence. Cronk owns real property at Section 6, Township 4 South, Range 54 West of the 6th P.M., in Washington County (the Section 6 Property). The Bowerses own real property at Section 1, Township 4 South, Range 55 West of the 6th P.M., in Washington County (the Section 1 Property). The Section 6 Property lies directly east of the Section 1 Property. The parcels share a mile-long border. The parties dispute ownership of a strip of land running along the border of their respective parcels (the Disputed Property).

¶ 3 Cronk and his parents (through Cronk Farms Partnership) owned and farmed the Section 6 Property from 1975 to 1983. When they began operations, a fence ran the length of the mile-long border between the two properties. The family's farming operation extended up to this fence line. Unbeknownst to them, this fence was located approximately thirty feet west of the county's section line. This placement effectively expanded the Section 6 Property thirty feet westward, creating the Disputed Property. In 1983, the Cronk Farms Partnership transferred the Section 6 Property to Cronk. Cronk continued to farm the Section 6 Property and the Disputed Property until 2017.

¶ 4 From 1975 to 2011, the Behr family owned the Section 1 Property.[1] The Behrs grazed livestock on the Section 1 Property from 1975 to 1998. Whenever livestock would break through the fence and into the Disputed Property, the Behrs or Cronk would return the livestock to the Behrs' side and repair the fence. Once during this timeframe, the Behrs paid Cronk $300 for permission to

[1] Ralph Behr and his wife owned the Section 1 Property from at least 1975 to 1998. Behr Enterprises, LLC, owned it from Ralph's death in 1998 until 2011, when it sold the Section 1 Property to the Bowerses.

graze their livestock on Cronk's side of the fence. Additionally, while Cronk sold his crop — including what he grew on the Disputed Property — the Behrs never requested payment for any portion of those sales.

¶ 5 The Bowerses purchased the Section 1 Property in 2011. Cronk continued to farm up to the fence until March 2017, when the Bowerses, without consulting Cronk, removed the northern half mile of the fence. Cronk testified that he told the Bowerses that the historic fence line was the boundary and that they could replace the original fence with a new fence in the same location.

¶ 6 Consistent with his farming schedule, Cronk planted wheat in late 2018 for harvest in early 2019. But, in March 2019, the Bowerses removed the southern half mile of the original fence and erected a new fence on the section line (i.e., thirty feet east of the original fence). The Bowerses also sprayed and killed Cronk's wheat crop that was planted between the original fence and the newly erected fence and replaced it with their own crop.

¶ 7 Cronk sued the Bowerses.[2] Cronk's principal contention was that he owned the Disputed Property. Cronk argued that he owned this land because he and the Behrs had acquiesced to the original fence as the legal boundary between the properties from 1975 to 2011 or, in the alternative, that he had acquired the property through adverse possession. He sought a declaration pursuant to C.R.C.P. 105(a) that he owned the Disputed Property and a permanent injunction barring the Bowerses from entering it. Based on his claimed ownership, Cronk also advanced claims for trespass, civil theft, conversion, and unlawful detention stemming from the Bowerses' destruction of his wheat crop in early 2019.

¶ 8 The district court presided over a two-day bench trial. In a written decision, the court concluded that Cronk acquired ownership to the Disputed Property through acquiescence and adverse possession. It further concluded that Cronk proved his civil theft and unlawful detention claims but failed to establish elements of his trespass and conversion claims. Finally, the court granted Cronk's request for an award of attorney fees and costs.

---

[2] Although Cronk also sued other interested parties, none are participants in this appeal.

II. Discussion

A. Boundary by Acquiescence

1. Applicable Law and Standard of Review

¶ 9 Discrepancies between a legal property line separating two properties and a physical barrier separating them are not uncommon. When the neighboring property owners mutually treat that physical barrier — and not the property line — as the boundary between the properties for over twenty years, that barrier can replace the property line as the legal boundary. *See* § 38-44-109, C.R.S. 2022 ("[B]oundaries . . . alleged to have been recognized and acquiesced in for twenty years . . . shall be permanently established.").[3]

¶ 10 This is known as the boundary by acquiescence doctrine. *See Salazar v. Terry*, 911 P.2d 1086, 1093 (Colo. 1996) (Kourlis, J., dissenting) (discussing the legal significance of, and policy behind, the doctrine); *Lee v. Konrad*, 337 P.3d 510, 518-20 (Alaska 2014) (surveying how other states apply the doctrine); *United States v.*

---

[3] The twenty year period was legislatively established in 1907. *See* Ch. 126, sec. 9, 1907 Colo. Sess. Laws 288.

74.33 Acres of Land, Civ. A. No. 03-01095, 2007 WL 81897, at *6-7 (D. Colo. Jan. 9, 2007) (unpublished order) (applying § 38-44-109).

¶ 11 To establish a boundary by acquiescence, the claimant must demonstrate by a preponderance of the evidence that (1) the adjacent owners mutually acquiesced that the physical barrier is the boundary between the two properties (2) for twenty years or more. *Kelly v. Mullin*, 159 Colo. 573, 576-77, 413 P.2d 186, 187-88 (1966); *Prieshof v. Baum*, 94 Colo. 324, 328-29, 29 P.2d 1032, 1034 (1934). Mutual acquiescence may be shown where the claimant exercised actual possession over the disputed property for twenty years or more. *Hartley v. Ruybal*, 160 Colo. 80, 84, 414 P.2d 114, 116 (1966); *cf. Schuler v. Oldervik*, 143 P.3d 1197, 1203 (Colo. App. 2006) (discussing actual possession in the context of adverse possession).

¶ 12 Mutual acquiescence is a question of fact. *See Terry v. Salazar*, 892 P.2d 391, 393 (Colo. App. 1994), *aff'd*, 911 P.2d 1086 (Colo. 1996). A district court's finding of fact will not be set aside unless it is clearly erroneous. *See* C.R.C.P. 52. "A court's factual finding is clearly erroneous when it has no record support." *See In re Parental Responsibilities Concerning S.Z.S.*, 2022 COA 105, ¶ 11.

¶ 13 The Bowerses do not argue that the court applied an incorrect legal framework; rather, they argue only that there was insufficient evidence to conclude that the parties mutually acquiesced to the original fence as the boundary. When the sufficiency of evidence is challenged following a bench trial, we must determine whether the evidence, viewed as a whole and in the light most favorable to the prevailing party, is sufficient to support the court's conclusions. *Adler v. Adler*, 167 Colo. 145, 148-51, 445 P.2d 906, 907-08 (1968); *Parr v. Triple L & J Corp.*, 107 P.3d 1104, 1106 (Colo. App. 2004). In so doing, "[w]e must also 'draw every reasonable inference from the evidence in favor of [the winning] party.'" *Averyt v. Wal-Mart Stores, Inc.*, 2013 COA 10, ¶ 18 (quoting *Harris Grp., Inc. v. Robinson*, 209 P.3d 1188, 1201 (Colo. App. 2009)).

¶ 14 If we conclude that the district court did not clearly err in its factual finding of acquiescence, then sufficient evidence necessarily supports the factual finding. *See Fifth Third Bank v. Jones*, 168 P.3d 1, 3 (Colo. App. 2007) ("If there is sufficient substantial and competent evidence to support a verdict, and the verdict is not against the clear weight of the evidence, the findings of the trial court are binding on this court.").

2. Analysis

¶ 15 The district court found that Cronk and the Behrs mutually acquiesced to the original fence as the boundary between the properties from 1975 to 2011. The court's finding was informed by its determination that Cronk exercised actual possession over the property during that timeframe. Based on our review of the record, we conclude that there is sufficient evidence to support the court's finding that the parties mutually acquiesced to the original fence as the boundary. *See Parr*, 107 P.3d at 1106.

¶ 16 To begin, there is record support for the court's finding that Cronk and the Behrs mutually treated the original fence as the boundary line for over twenty years. The Behrs paid Cronk $300 for permission to graze their livestock on his side of the fence. This underscores the parties' mutual understanding that Cronk owned the land east of the historic fence and was therefore entitled to profit from it by granting and charging for such access. Similarly, the Behrs never challenged Cronk's exclusive right to farm or use the Disputed Property. This shows that the Behrs did not believe they owned the Disputed Property. Finally, the court found that Cronk credibly testified that he always believed the fence was the

boundary line. This evidence, viewed in the light most favorable to Cronk, is sufficient to support the conclusion that Cronk and the Behrs mutually acquiesced to the original fence as the boundary line for over twenty years. *Terry*, 892 P.2d at 393; *Prieshof*, 94 Colo. at 328, 29 P.2d at 1034.

¶ 17 The record also supports the court's ancillary finding that Cronk exercised actual possession over the Disputed Property. Foremost, Cronk and his family exclusively farmed the Disputed Property for over forty years. Consistent with that exclusive use, Cronk prohibited others from using the property — as evidenced by his barring of the Behrs' livestock from prolonged grazing on the property without his permission. Again viewed in the light most favorable to Cronk, this evidence is sufficient to support the finding that Cronk exercised actual possession over the Disputed Property for more than twenty years. *Hartley*, 160 Colo. at 84, 414 P.2d at 116; *Niles v. Churchill*, 29 Colo. App. 283, 285-87, 482 P.2d 994, 994-95 (1971).

¶ 18 The Bowerses assert there is insufficient evidence that the Behrs mutually acquiesced to the fence being the boundary. While there was no testimony from the Behrs affirmatively establishing

such acquiescence, their acquiescence may be inferred from their conduct. There is sufficient evidence to support a reasonable inference that the Behrs acquiesced to the fence as the boundary. *See Parr*, 107 P.3d at 1106; *Averyt*, ¶ 18.

¶ 19 The Bowerses also claim the court failed to fully consider countervailing evidence. In particular, the Bowerses point to the fact that (1) Cronk allowed other landowners (including the Behrs) to occasionally drive cars and livestock across the Disputed Property from 1975 to 2011; (2) the Behrs entered into a mineral lease agreement in 2010 that included the Disputed Property; and (3) Cronk's testimony suggests that he knew section lines — and not fences — always governed. While presented as a sufficiency of evidence claim, the Bowerses essentially assert that the court's factual finding as to mutual acquiescence was clearly erroneous.

¶ 20 None of these arguments demonstrates clear error. The first simply points to conflicting evidence about who controlled the Disputed Property — evidence that we are not at liberty to re-

weigh.[4] *See* C.R.C.P. 52; *LR Smith Invs., LLC v. Butler*, 2014 COA 170, ¶ 25. The second is irrelevant since the Behrs acquiesced to the fence as the boundary for more than twenty years *before* the lease was executed in 2010. *See* § 38-44-109. And the third simply attacks the court's determination that Cronk credibly testified that the fence was the boundary. We cannot disturb such credibility determinations. *See In re Estate of Owens*, 2017 COA 53, ¶ 22 ("[A] trial court's 'determination of' a testifying witness' 'credibility [is] entirely within the purview of the trial court as the finder of fact and is binding upon' an appellate court." (quoting *People v. Fordyce*, 705 P.2d 8, 9 (Colo. App. 1985))).

¶ 21 Viewing the evidence in the light most favorable to Cronk, we conclude that Cronk satisfied the requirements of section 38-44-109. Accordingly, the court's C.R.C.P. 105(a) declaration that the original fence replaced the section line as the boundary and that Cronk therefore owns the Disputed Property was not erroneous.

---

[4] In any event, section 38-44-109, C.R.S. 2022, does not require *exclusive* actual possession, as in the adverse possession context. *See Welsch v. Smith*, 113 P.3d 1284, 1288 (Colo. App. 2005). Instead, it only contemplates actual possession. *See Hartley v. Ruybal*, 160 Colo. 80, 84, 414 P.2d 114, 116 (1966).

B. Adverse Possession

¶ 22 The Bowerses also attack the court's adverse possession ruling. They assert that (1) that the court failed to apply a clear and convincing standard, § 38-41-101(3)(a), C.R.S. 2022; and (2) there was insufficient evidence to support the court's findings on certain elements of Cronk's adverse possession claim. *See Beaver Creek Ranch, L.P. v. Gordman Leverich Ltd. Liab. Ltd. P'ship*, 226 P.3d 1155, 1160-61 (Colo. App. 2009) (adverse possession elements).

¶ 23 But even if we assume, without deciding, that the court erred in these respects, any error was harmless. The result of the court's adverse possession ruling is that Cronk acquired ownership of the Disputed Property. So too, the result of the court's boundary by acquiescence ruling is that Cronk acquired ownership of the Disputed Property. Because we affirm the district court's judgment that Cronk acquired ownership of the Disputed Property by acquiescence, whether he also did so through adverse possession is immaterial. *See* C.R.C.P. 61 (harmless error); *Laura A. Newman, LLC v. Roberts*, 2016 CO 9, ¶ 24 (discussing harmless error in the civil context).

C. Unlawful Detention

¶ 24 Based on his claimed ownership in the Disputed Property, Cronk also alleged that the Bowerses wrongfully detained the property by entering it, removing his crop, and replacing that crop with their own. He advanced this claim under section 13-40-103, C.R.S. 2022 (forcible detention), and section 13-40-104, C.R.S. 2022 (unlawful detention). The court concluded that Cronk proved the Bowerses committed unlawful detention of his property pursuant to section 13-40-104(1)(a).

¶ 25 The Bowerses now claim that the court erred by failing to enter findings that they detained the property "forcibly." This argument is misplaced. Section 13-40-104 does not require proof that the accused entered the property with force. *See Northrup v. Nicklas*, 115 Colo. 207, 213, 171 P.2d 417, 420 (1946) ("Neither a strong hand, nor a multitude of people, nor force in any sense, is necessary to complete a cause of action in unlawful detention."). Accordingly, the court did not err by concluding that Cronk prevailed on his unlawful detention claim without finding that the Bowerses entered the property forcibly.

D. Permanent Injunction

¶ 26 The Bowerses next claim that the court erred by issuing a permanent injunction prohibiting them from entering the Disputed Property because, in their view, there is no factual basis that Cronk faced a danger of real, immediate, and irreparable injury. *See Joseph v. Equity Edge, LLC*, 192 P.3d 573, 576 (Colo. App. 2008). We agree that the district court's findings are inadequate to support the injunctive relief it ordered.[5]

¶ 27 To obtain a permanent injunction, the claimant must "prove four elements: (1) he or she has achieved actual success on the merits; (2) irreparable harm will result unless the injunction is issued; (3) the threatened injury outweighs the harm that the injunction may cause to the opposing party; and (4) the injunction,

---

[5] Cronk claims that the Bowerses did not preserve this issue because they did not make specific arguments as to why each of the permanent injunction elements was not satisfied. *See Joseph v. Equity Edge, LLC*, 192 P.3d 573, 576-77 (Colo. App. 2008). But in their motion to dismiss, the Bowerses explicitly claimed that there were insufficient factual allegations to support the issuance of a permanent injunction. Because this assertion brought the issue to the attention of the district court and provided it with an opportunity to rule on it, the issue is preserved. *See Dill v. Rembrandt Grp., Inc.*, 2020 COA 69, ¶ 24.

if issued, will not adversely affect the public interest." *Rinker v. Colina-Lee*, 2019 COA 45, ¶ 64.

¶ 28 The court did not enter findings explaining how Cronk satisfied the above factors. *Id.* This omission was error. *See* C.R.C.P. 65(d) ("Every order granting an injunction . . . shall set forth the reasons for its issuance . . . ."); *Joseph*, 192 P.3d at 577 (reversing an injunction and remanding for further findings because the court did not make the necessary factual findings).

¶ 29 Cronk asserts that an injunction is a necessary corollary to his acquisition of the property. He claims that he is therefore *entitled* to an injunction pursuant to C.R.C.P. 65(f). This argument fails. First, that Cronk owns the Disputed Property does not necessarily mean he is entitled to a permanent injunction prohibiting the Bowerses from entering it. By this logic, anyone who owns real property is entitled to a permanent injunction to keep others out. To the contrary, just like any real property owner, Cronk must satisfy the four elements required to obtain a permanent injunction. *Rinker*, ¶ 64. Second, even if an injunction were mandatory under C.R.C.P. 65(f) like he claims, the court still needed to explain the basis for issuing that injunction under C.R.C.P. 65(d).

¶ 30 Accordingly, we reverse the issuance of the injunction and remand for the district court to make findings on this issue based on the existing record.

E. Attorney Fees and Costs

¶ 31 Cronk requested attorney fees and costs of $94,793.85. He argued that, because he prevailed on his unlawful detention and civil theft claims, he was entitled to recover reasonable attorney fees. *See* § 13-40-123, C.R.S. 2022 (unlawful detention); § 18-4-405, C.R.S. 2022 (civil theft). After the parties briefed the issue, the court granted Cronk's request in full without entering findings of fact or accompanying analysis.

¶ 32 A district court may award only reasonable attorney fees. *See* Colo. RPC 1.5(a); *Tallitsch v. Child Support Servs., Inc.*, 926 P.2d 143, 147 (Colo. App. 1996). To determine what constitutes a reasonable fee, a court uses a well-established analytical framework. *See Tisch v. Tisch*, 2019 COA 41, ¶ 84 (outlining this framework).

¶ 33 We review a district court's determination of reasonable attorney fees for an abuse of discretion. *Carruthers v. Carrier Access Corp.*, 251 P.3d 1199, 1211 (Colo. App. 2010). Of course,

the court "must make sufficient findings to permit meaningful appellate review." *Id.* (quoting *Yaekle v. Andrews*, 169 P.3d 196, 201 (Colo. App. 2007)).

¶ 34 The district court did not make sufficient findings. In fact, the court did not enter any factual findings or include any analysis explaining why the award of $94,793.85 was reasonable. Such an award cannot stand. *See id.* at 1211-12 (vacating an award of attorney fees and remanding for further proceedings because the district court did not enter findings of fact or perform any of the analysis underlying its award, and collecting cases on this point).

¶ 35 Cronk baldly contends that the Bowerses waived their right to challenge the reasonableness of the award because they did not adequately challenge the underlying bases of the award on appeal — i.e., the civil theft and unlawful detention rulings. We reject this contention. The validity of the civil theft and unlawful detention rulings has nothing to do with the reasonableness of the award that stemmed from those rulings. *See* Colo. RPC 1.5(a); *Tisch*, ¶¶ 83-84.

¶ 36 Lastly, because Cronk prevailed on his unlawful detention claim in this appeal, he is entitled to reasonable appellate attorney fees pursuant to section 13-40-123. *See Zeke Coffee, Inc. v.*

Pappas-Alstad P'ship, 2015 COA 104, ¶ 56; *see also Integra Fin., Inc. v. Grynberg Petroleum Co.*, 74 P.3d 347, 348-49 (Colo. App. 2002) (concluding that reasonable attorney fees must be awarded under section 13-40-123 "for work attributable to the claims relating to possession"). Given our disposition regarding the court's award of trial-related fees, and because the district court is better positioned to address the necessary factual determinations related to Cronk's appellate attorney fee request, we exercise our discretion under C.A.R. 39.1 and direct the court on remand to award Cronk his reasonable appellate attorney fees incurred for issues on which he prevailed on appeal. *Zeke Coffee*, ¶ 56.

III. Disposition

¶ 37 The district court's judgment is affirmed as it relates to Cronk's ownership of the Disputed Property. However, the court's issuance of a permanent injunction and award of attorney fees and costs are reversed. We therefore remand the case for (1) findings on whether, on the existing record, a permanent injunction is warranted; and (2) a determination of Cronk's reasonable attorney fees and costs incurred at trial and on appeal.

JUDGE WELLING and JUDGE KUHN concur.