

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 CA 1163

BLACKSTONE INVESTMENTS, LLC

VERSUS

GENE STROTHER AND NELL CURRY STROTHER

Judgment Rendered: May 6, 2011

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On Appeal from the  
21st Judicial District Court,  
In and for the Parish of Tangipahoa,  
State of Louisiana  
Trial Court No. 2008-0000325

Honorable Elizabeth P. Wolfe, Judge Presiding

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BEFORE: KUHN, PETTIGREW, AND HIGGINBOTHAM, JJ.

*J. Pettigrew, J. Concurs.*

**HIGGINBOTHAM, J.**

Plaintiff- appellant, Blackstone Investments, L.L.C. (Blackstone), the record owner of certain real property, appeals a judgment declaring that defendants-appellees, Gene Strother and his wife Nell Curry Strother (the Strothers), acquired ownership of a portion of that property by thirty-year acquisitive prescription. For the following reason, we affirm.

**FACTS AND PROCEDURAL HISTORY**

On July 12, 2007, Blackstone bought a tract of land described as Section 12, Township 4 South Range 6 East, located in Tangipahoa Parish, which contains approximately 11.982 acres. (the Traboni tract). After purchase of the property, Blackstone noticed that a barbed-wire fence encroached on the Traboni tract about twenty feet. The Strothers were record owners of the adjacent tract of land, having purchased three tracts of land on April 12, 1996, from Virginia C. Fisher, individually and as representative of the Virginia C. Fisher Family Trust. The Strothers property included Tract A, which is adjacent to the disputed tract of land that is the subject of this suit. The barbed-wire fence encompasses Tract A and the disputed tract of land. The Strothers used the area inside the barbed-wire fence for cattle. Around September 2007, an agent for Blackstone entered the property and placed survey markers and a corner post to extend the fence line to the surveyed property line. Mr. Strother removed the survey markers and corner post.

Subsequently, Blackstone filed this suit as a petitory action on January 31, 2008, claiming ownership and seeking possession of the disputed property, along with damage for trespass and the cost of restoration. The Strothers answered, claiming that they and their ancestors in title had acquired ownership of the disputed property as a result of thirty-year acquisitive prescription.

The parties stipulated to the following:

- 1) Gene and Nell Curry Strother have title to the property labeled Tract A in the April 9, 1996 survey by David Lanier.
- 2) The plaintiff, Blackstone Investments, LLC has title to the property labeled the Traboni tract in the April 9, 1996 survey by David Lanier.
- 3) The barb[ed-]wire fence around the perimeter of Tract A, which encroaches on the tract purchased by the plaintiff, has been in place, undisturbed, for over forty years.
- 4) The barb[ed-]wire fence encloses the disputed tract within the bounds of Tract A and has done so, undisturbed, for over forty years.
- 5) The April 9, 1996 survey by David Lanier is accurate in its depictions.
- 6) Gene and Nell Curry Strother are in possession of the tract of land in dispute.
- 7) Blackstone Investments, LLC has title to the tract of land in dispute.
- 8) The barb[ed-] wire fence creates a visible boundary.
- 9) The dispute tract is within visible boundary of the barb[ed-] wire fence[.]
- 10) The disputed tract is within the visible bounds of Tract A although the disputed tract is not part of Tract A.
- 11) The visible boundary has been in place for over forty years.

The parties submitted the matter to the trial court on their joint stipulations and memorandums. The trial court concluded that by tacking the possession of the Strothers' ancestors in title, the Strothers had acquired the property through thirty-year acquisitive prescription. The judgment, declaring that the Strothers were owners of the disputed tract of land, was signed on February 11, 2010.<sup>1</sup>

It is from this judgment that Blackstone appeals, designating the following assignments of error:

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<sup>1</sup> This court, *ex proprio motu*, issued a show cause order, noting that because the February 11, 2010 judgment did not describe the property, it was not a final judgment. Pursuant to that order, the parties submitted and the trial court signed an amended judgment on October 18, 2010, that described the immovable property at issue with particularity. See LSA-C.C.P. art. 1919.

1. The trial court erred in not finding that the Fisher estate renounced its acquisitive prescription of the disputed tract of land by filing [a] written act of correction in the public records indicating that they did not own the [disputed] tract.
2. The [trial] court erred in that it found that the Act of Sale from [Fisher] to Strother included the 20-foot disputed tract of land.
3. The [trial] court erred in allowing the Strothers to tack on to Fishers bad faith possession... because there was no juridical link transferring the disputed property from Fisher to Strothers.

### APPLICABLE LAW

In Louisiana, the petitory action is available for the recovery of immovable property. A.N. Yiannopoulos, Property §268, at 540, in 2 *Louisiana Civil Law Treatise* (4th ed. 2001). The petitory action is one brought by a person who claims the ownership, but who is not in possession, of immovable property, against another who is in possession or who claims the ownership thereof adversely, to obtain judgment recognizing the plaintiff's ownership. LSA-C.C.P. art. 3651.

Ownership of immovable property may be acquired by the prescription of thirty years without the need of just title or possession in good faith. LSA-C.C. art. 3486. Ownership of immovable property under record title may be eclipsed and superseded by ownership acquired under prescriptive title. Under the general codal provisions on acquisitive prescription, a possessor lacking good faith and/or just title may acquire prescriptive title to land by corporeally possessing a tract for thirty years with the intent to possess as owner. Such possession confers prescriptive title upon the possessor only when it is continuous, uninterrupted, peaceable, public and unequivocal, and confers title only to such immovable property as is actually corporeally possessed. See LSA-C.C. arts. 3424, 3476, 3486, 3488; See also **Falcone v. Springview Country Club, Inc.**, 96-0794, 0795, and 0796 (La. App. 1st Cir. 3/27/97), 691 So.2d 314, 316; **Brown v. Wood**, 451 So.2d 569, 572 (La. App. 2nd Cir.), writ denied, 452 So.2d 1176 (La.1984).

Corporeal possession is the exercise of physical acts of use, detention, or enjoyment over a thing. LSA-C.C. art. 3425.

Actual possession, for purposes of acquisitive prescription without title, must either be inch-by-inch possession or possession within enclosures. An enclosure is any natural or artificial boundary. **George M. Murrell Planting & Mfg. Co. v. Dennis**, 06-1341 (La. App. 1st Cir. 9/21/07), 970 So.2d 1075, 1080. The party who does not hold title to the disputed tract has the burden of proving actual possession within enclosures sufficient to establish the limits of possession with certainty, by either natural or artificial marks, giving notice to the world of the extent of possession exercised. **Id.**

Possession can be transferred by universal title or by particular title. LSA-C.C. art. 3441. When possession is so transferred, 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. Under these provisions, privity of contract or estate is an essential prerequisite to tacking of possession. **Secret Cove, L.L.C. v. Thomas**, 02-2498 (La. App. 1st Cir. 11/7/03), 862 So.2d 1010, 1015, writ denied, 04-0447 (La. 4/2/04), 869 So.2d 889; **Brown**, 451 So.2d at 573. Therefore, under the general tacking provisions of Articles 3441 and 3442, tacking is only allowed with respect to property that is included and described in the juridical link between the possessor's ancestor in title and the possessor himself. **Brown**, 451 So.2d at 573-574.

Alternatively, under LSA-C.C. art. 794, dealing with boundary actions, a title holder may acquire more land than his title calls for by possessing property beyond his title for thirty years without interruption and within visible bounds. The difference is that under Article 794, one may utilize tacking to prescribe beyond title on adjacent property **to the extent of visible boundaries**, whereas the general

prescriptive articles allow tacking in order to prescribe **to the extent of title**. **Id.**; **Secret Cove**, 862 So.2d at 1015-1016. Under Article 794, the privity of title between the possessor and his ancestor in title, need not extend to the property to which the possessor asserts prescriptive title; under this article, the juridical link, or written instrument that passes to the possessor from his ancestor in title need not encompass or include the particular property to which the possessor claims prescriptive title. **Secret Cove**, 862 So.2d at 1016.

The fact that Article 794 envisions that tacking requires *some* juridical link or privity of title between the possessor and his ancestor is clear. That statute affords prescriptive title only in instances where there has been thirty years of possession by the possessor “and his ancestors **in title**.” LSA-C.C. art. 794, **Brown**, 451 So.2d at 574. (Emphasis added).

Whether a party has possessed property for purposes of thirty-year acquisitive prescription is a factual determination by the trial court and will not be disturbed on appeal unless it is clearly wrong. **Secret Cove**, 862 So.2d at 1016. However, the questions presented here for our determination are purely *legal* ones, rather than factual ones, as the pertinent facts are undisputed. In a case involving no dispute regarding material facts -- only the determination of a legal issue -- a reviewing court must apply the *de novo* standard of review, under which the trial court’s legal conclusions are not entitled to deference. **TCC Contractors, Inc. v. Hosp. Serv. Dist. No. 3**, 10-0685 (La. App. 1st Cir. 12/8/10), 52 So.3d 1103, 1108.

Renunciation of acquisitive prescription of immovables must be express and in writing. See LSA-C.C. art. 3450. A renunciation of accrued prescription to be effective must be unequivocal and takes place only when the intent to renounce is clear, direct and absolute. **McPherson v. Roy**, 390 So.2d 543, 551 (La. App. 3rd Cir. 1980) writ denied, 396 So.2d 910 (La. 1981).

## DISCUSSION OF FACTS AND APPLICATION OF LAW

The parties stipulated that Blackstone had title to the disputed tract of land, but that the Strothers were in possession of the disputed tract. On June 7, 1949, a credit deed was filed that conveyed to Mr. Phillip Costanza and Ms. Lucy Ruffino Costanza property adjacent to the disputed tract of land that is the subject of this suit. On April 1, 1981, the Costanzas sold the property by cash deed to Olan Fisher, Virginia Fisher, and Laura Costanza. After the death of Olan Fisher, Ms. Virginia Fisher was awarded the tract in question through a judgment of possession signed April 16, 1990. In 1995, the property was passed to Virginia C. Fisher Family Trust by Virginia Costanza Fisher. On April 12, 1996, an Act of Cash Sale conveyed what was labeled as Tracts A, B, and C to the Strothers from Virginia C. Fisher, individually and as trustee of the Virginia C. Fisher Family Trust, and Laura Costanza. Tract A in this cash sale is adjacent to the disputed tract of land.

In 1996, Mr. David Lanier surveyed the section of property in Tangipahoa Parish that included the Traboni Tract, Tract A, and the disputed tract. As a result of the survey, Ms. Virginia Fisher filed in the conveyance records an "Act of Correction of Act of Donation to Trust." This Act stated that the property donated to the Virginia Fisher trust was erroneously described in the Act of Donation. The correct description of the property was given in the Act of Correction. The parties agreed that the description of the property in the Act of Correction did not include the disputed tract of land. Blackstone contends that the trial court failed to recognize this Act of Correction as renouncing the acquisitive prescription that had run in the Fishers favor.

As previously outlined, LSA-C.C. art. 3450 provides with respect to immovables, renunciation of acquisitive prescription must be express and in writing. To be effective, a renunciation of accrued prescription must be

unequivocal and takes place only when the intent to renounce is clear, direct, and absolute and made manifest either by words or actions of the party in whose favor prescription has run. **McPherson**, 390 So.2d at 551. This matter was submitted to the trial court based solely on the stipulations of the parties. Therefore, there was no evidence presented regarding the intent of the Fisher Trust in filing the Act of Correction. The Act of Correction states that the Act of Cash deed dated on November 26, 1963, erroneously described the property and it contains the accurate legal description of the property. The word renunciation is not within this Act of Correction. This is not a clear, unequivocal, and absolute renunciation of the prescription that had run in the favor of the Fisher Trust. Thus, we conclude that the trial court did not err in finding that the act of correction was not a renunciation of the prescription that had run in favor of the Fishers. Blackstone's first assignment of error is without merit.

Blackstone argues that the trial court erred in finding that the Act of Sale from the Fisher trust to the Strothers included the disputed tract of land and in allowing the Strothers to tack on the bad faith possession of their ancestor in title because there was no juridical link transferring the disputed property.

The parties stipulated that the barbed-wire fence encroaching on the Traboni tract owned by Blackstone has been there undisturbed for over forty years. There was no dispute that the Strothers and their ancestors in title (the Costanzas, Fishers, and the Fisher Family Trust) corporeally possessed the property within the enclosure of the barbed-wire fence for at least forty years and this possession was continuous, uninterrupted, peaceable, public, and unequivocal during that time.

The Strothers purchased the property in 1996; therefore, they must rely on tacking possession of their ancestors in title to acquire the disputed tract through thirty-year acquisitive prescription. The Strothers do not dispute Blackstone's



second assignment of error that the Act of Cash Sale did not include the disputed tract of land. However, the Strothers can rely on boundary tacking within the visible bounds of the barbed-wire fence in accordance Article 794.

In order for the Strothers to tack on the possession of their ancestors in title they must prove some juridical link or some privity in contract. See LSA-C.C. art. 794. For boundary tacking under Article 794, however, a juridical link is not required for the area in dispute, but does require a juridical link with respect to the adjacent property to tack possession of a prior possessor within visible bounds. The Act of Cash Sale between the Virginia Fisher Family Trust and the Strothers conveyed the land adjacent (tract A) to the disputed tract of land to the Strothers. The barbed-wire fence encompassed tract A and the disputed tract. The Act of Cash Sale between the Fisher Trust and the Strothers conveying tract A to the Strothers is the juridical link that is necessary for the Strothers to tack on the possession of their ancestor in title and prescribe *beyond title* on to the adjacent property to the extent of the barbed-wire fence. Thus, Blackstone's third assignment of error is without merit.

### CONCLUSION

The Strothers acquired the disputed tract by acquisitive prescription as they and their ancestors in title had possessed the property as owners for thirty years without interruption within the visible bounds formed by the barbed-wire fence. Therefore, the judgment of the trial court is affirmed. All costs associated with this appeal are cast against plaintiff-appellant, Blackstone Investments, L.L.C.

**AFFIRMED.**