The Supreme Court of South Carolina

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N O T I C E

In the Matter of William G. Yarborough, III

Petitioner has filed a petition for reinstatement and that petition has been referred to the Committee on Character and Fitness pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules.

The Committee on Character and Fitness has now scheduled a hearing in this regard on November 28, 2012 beginning at 9:30 a.m, in the Courtroom of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

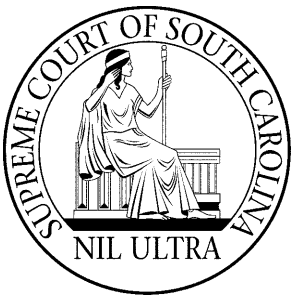
Any individual may appear before the Committee in support of, or in opposition to, the petition.

Richard B. Ness, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

October 26, 2012

[1] The date and time for the hearing are subject to change. Please contact the Office of Bar Admissions Office at the Supreme Court to confirm the scheduled time and date.



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 39
October 30, 2012
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Gene Howard Vinson, Appellant.

Appellate Case No. 2009-146227

Appeal From Union County
Lee S. Alford, Circuit Court Judge

Opinion No. 5044
Heard June 5, 2012 – Filed October 31, 2012

AFFIRMED

Heath P. Taylor, of Taylor Law Firm, LLC, of West Columbia; and Pete G. Diamaduros, of White Diamaduros & Diamaduros, of Union, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, and Senior Assistant Deputy Attorney General Salley W. Elliott, all of Columbia; and Solicitor Kevin Brackett, of York, for Respondent.

WILLIAMS, J.: On appeal, Gene Vinson ("Vinson") contends the circuit court erred in denying his motion to dismiss because the police did not have a reasonable

articulable suspicion to justify the traffic stop resulting in Vinson's arrest. We affirm.

FACTS/PROCEDURAL HISTORY

On Saturday, February 7, 2009, at approximately 3:00 a.m., Trooper C. B. Horne ("Trooper Horne") of the South Carolina Highway patrol was patrolling Highway 215 in Union County. Highway 215 is a two-lane roadway with both the northbound and southbound lane having its own yellow lane line to indicate passing is prohibited. Trooper Horne testified he was driving from Buffalo towards downtown Union, and he passed Vinson's vehicle in the opposing lane. Trooper Horne then turned around and observed Vinson's vehicle drift "back and forth" between the double yellow lines that separated the opposing lanes of traffic. Based on this observation, Trooper Horne activated his dash camera and followed Vinson for approximately two-tenths of a mile. Trooper Horne testified Vinson's vehicle never completely crossed into the opposing lane nor did it drift again into the center of the two yellow lines after Trooper Horne turned on his dash camera.

However, based on his experience, statistics, the absence of any other traffic on the road, the day of week, and the time of night, Trooper Horne stated he suspected Vinson was under the influence of alcohol. As such, Trooper Horne decided to pull Vinson over at that time because they were traveling into "a well-populated area[] [where there were] a lot of houses, a lot of hills," and further, Trooper Horne concluded it would be unfair to conduct any field sobriety tests on sloped terrain.

Trooper Horne testified that as soon as he asked for Vinson's license and registration, he noticed Vinson's eyes were bloodshot and detected an odor of alcohol emanating from Vinson's vehicle. Trooper Horne asked Vinson if he had been drinking, to which Vinson replied he had not. Trooper Horne then asked Vinson to exit his vehicle. Once Vinson exited his vehicle, Trooper Horne stated he asked Vinson again whether he had been drinking, and Vinson admitted he drank four or five beers in the past hour. Trooper Horne then asked Vinson to perform two field sobriety tests. Vinson agreed, and Trooper Horne read him his *Miranda* rights. According to Trooper Horne, Vinson failed both tests, and after Vinson stumbled numerous times while attempting to walk a straight line, he stated, "[B]e straight with me. I just failed that." In response, Trooper Horne asked Vinson whether he would like to repeat the test, which Vinson did without success. Accordingly, Trooper Horne arrested Vinson for driving under the influence.

Vinson performed a breathalyzer test at the police station, which registered Vinson's blood alcohol content as 0.14.[1]

On October 13, 2009, Vinson made a pretrial motion to dismiss his charge on the ground the traffic stop was not based upon reasonable suspicion or probable cause; thus, the traffic stop was an unreasonable seizure in violation of the Fourth Amendment. After hearing Trooper Horne's testimony, the circuit court denied Vinson's motion. In support of its decision, the circuit court ruled,

> The statute says that the vehicle shall be operated as nearly as practicable . . . within a single lane. I interpret [that] to mean if it's impossible to stay in that lane because of an obstruction on the road or the road conditions[;] . . . I don't interpret that as giving the driver freedom to reign back and forth as he deems practicable in his driving. . . . And if you're on that line then you are not within the lane; . . . I don't see where it makes any difference whether you are over the line one inch or a foot or a yard, if you've crossed the yellow line, technically it's a violation of the statute. . . . I find that under these specific circumstances that I've outlined, the officer was reasonable, that he did have reasonable, articulable suspicion, and so I would deny your motion to dismiss the case on that ground[].

Vinson was subsequently tried on November 10, 2009. He was convicted of driving under the influence, second offense. This appeal followed.

STANDARD OF REVIEW

In criminal cases, the appellate court reviews errors of law only. *State v. Banda*, 371 S.C. 245, 251, 639 S.E.2d 36, 39 (2006). As such, an appellate court is bound by the circuit court's factual findings unless they are clearly erroneous. *Id.* "The appellate court will reverse only when there is clear error." *State v. Rogers*, 368 S.C. 529, 533, 629 S.E.2d 679, 681 (Ct. App. 2006). "The same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases." *Banda*, 371 S.C. at 251, 639 S.E.2d at 39.

[1] The legal blood alcohol concentration limit in South Carolina is 0.08.

"[Thus, the appellate court's] review in Fourth Amendment search and seizure cases is limited to determining whether any evidence supports the [circuit] court's finding." *Id.* Restated, "[a]n appellate court must affirm the [circuit] court's ruling if there is *any* evidence to support the ruling." *State v. Pichardo*, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct. App. 2005) (emphasis in original).

LAW/ANALYSIS

Vinson contends the circuit court erred in finding it was lawful to stop his vehicle because Vinson's conduct did not violate section 56-5-1900 of the South Carolina Code (2006). Thus, his arrest was the result of an illegal stop and in violation of his Fourth Amendment rights. We disagree.

The Fourth Amendment to the Constitution of the United States grants citizens the right to be secure against unreasonable searches and seizures. U.S. Const. amend. IV; *see also* S.C. Const. art. I, § 10. A traffic stop constitutes a Fourth Amendment seizure; thus, the traffic stop must be reasonable under the circumstances. *See Rogers*, 368 S.C. at 533, 629 S.E.2d at 681; *see also Pichardo*, 367 S.C. at 97, 623 S.E.2d at 847 (citing *Whren v. U.S.*, 517 U.S. 806, 810 (1996)). "Reasonableness is measured in objective terms by examining the totality of circumstances." *Pichardo*, 367 S.C. at 101, 623 S.E.2d at 849. A traffic stop is not unreasonable if conducted with probable cause to believe a traffic violation has occurred, or when the officer has a reasonable suspicion the occupants are involved in criminal activity. *State v. Burgess*, 394 S.C. 407, 412, 714 S.E.2d 917, 919 (Ct. App. 2011); *see also Whren*, 517 U.S. at 810 ("As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred."). Moreover, a police officer's "subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *State v. Corley*, 383 S.C. 232, 241, 679 S.E.2d 187, 192 (Ct. App. 2009) (internal quotation marks omitted).

In denying Vinson's motion to dismiss, the circuit court found Trooper Horne had reasonable suspicion to believe Vinson violated section 56-5-1900. Section 56-5-1900 states, in pertinent part:

> Whenever any roadway has been divided into two or more clearly marked lanes for traffic the following rules in addition to all others consistent herewith shall apply . . . [a] vehicle shall be driven as nearly as practicable

> entirely within a single lane and shall not be moved from the lane until the driver has first ascertained that such movement can be made with safety.

§ 56-5-1900(a). To support its decision, the circuit court held there was no evidence or testimony that Vinson "could not have maintained his vehicle within that single lane had he chosen to do so." Because section 56-5-1900(a) requires a driver to remain within his lane "as nearly as practicable," the circuit court concluded the driver may only leave his lane "if it's impossible to stay in that lane because of an obstruction on the road or the road conditions or something of that nature." In finding Trooper Horne possessed reasonable suspicion that Vinson violated section 56-5-1900, the circuit court also noted the "totality of circumstances," including the officer's consideration of the time of day, the day of the week, the lack of other cars on the road, and Vinson's proximity to a hilly, populated area.

We concur with the circuit court's decision that Trooper Horne was justified in stopping Vinson for a perceived violation of section 56-5-1900.[2] *See State v. Butler*, 343 S.C. 198, 539 S.E.2d 414 (Ct. App. 2000) ("As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred. The police, however, may also stop and briefly detain a vehicle if they have a reasonable suspicion that the occupants are involved in criminal activity."). The plain language of section 56-5-1900 requires a driver to maintain his vehicle "entirely within a single lane" and excuses this mandate only when it is not practicable or the driver can safely change lanes. *See* § 56-5-1900(a) ("A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from the lane until the driver has first ascertained that such movement can be made with safety."). Trooper Horne testified Vinson's front tire crossed into the area between the double yellow lines that separated opposing lanes of traffic in a "no passing" zone. This action, in and of itself, is a violation of the statute.[3] Furthermore, Trooper Horne stated there

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[2] We note our decision regarding the violation of section 56-5-1900 does not entail a totality of circumstances analysis; rather, our conclusion is solely based on Vinson's violation of the plain language of the statute.

[3] Vinson highlights case law from other jurisdictions in which courts construed similar statutory language and held that minor infractions over a lane line were an insufficient basis for a stop. While we acknowledge a split of authority, we are

were no other cars on the road during that time that would have prompted Vinson's decision to cross the center line. Because it was practicable to remain within his lane of traffic, we find Trooper Horne had the requisite reasonable suspicion to pull Vinson's vehicle over for a violation of section 56-5-1900. Accordingly, the circuit court properly denied Vinson's motion to dismiss.

CONCLUSION

Based on the foregoing, the circuit court's decision is

AFFIRMED.

THOMAS and LOCKEMY, JJ., concur.

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persuaded by the line of cases in which courts have found the purpose of the "as nearly as practicable" language is to keep both drivers and pedestrians safe, not to allow motorists the option of when they will or will not abide by a lane requirement. *See U.S. v. Bassols*, 775 F. Supp. 2d 1293, 1300-01 (D.N.M. 2011) (rejecting the argument that a vehicle making contact with an lane marker is "entirely within a single lane" under a statute similar to section 56-5-1900(a), as such an interpretation could lead to the absurd result that two vehicles traveling toward each other could each be "entirely within a single lane" even though they both are partially on the same lane marker); *see also People v. Smith*, 665 N.E.2d 1215, 1218-19 (Ill. 1996); *State v. Hodge*, 771 N.E.2d 331, 338 (Ohio Ct. App. 2002); *State v. McBroom*, 39 P.3d 226, 228-29 (Or. Ct. App. 2002).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Millvale Plantation, LLC, Respondent,

v.

Carrison Family Limited Partnership and Mary H. Carrison, Appellants.

Appellate Case No. 2011-190727

Appeal From Sumter County
George C. James, Jr., Circuit Court Judge

Opinion No. 5045
Heard September 11, 2012 – Filed October 31, 2012

AFFIRMED

Robert J. Sheheen, of Savage Royall & Sheheen, of Camden, for Appellants.

W. Duvall Spruill, of Turner Padget Graham & Laney, PA, of Columbia, for Respondent.

LOCKEMY, J.: The Carrison Family Limited Partnership (the Carrison Partnership) and Mary H. Carrison (collectively Appellants) appeal the circuit court's award of a 50.72-acre tract of land to Millvale Plantation, LLC (Respondent), arguing the circuit court erred in (1) construing the deed at issue; (2) finding Appellants failed to prove their trespass to try title claim; and (3) finding Appellants failed to prove their adverse possession claim. We affirm the circuit court.

FACTS/PROCEDURAL BACKGROUND

In 1992, James L. Haynsworth Sr. (Brother) and Mary H. Carrison (Sister) acquired title to approximately six hundred acres of land (the property) in Sumter County. The property was leased by a hunting club, and Brother and Sister split the lease fees. In 1994, Brother and Sister agreed to divide the property between them, and each party executed and delivered a deed (1994 deeds) to the other party conveying their undivided one-half interest in the property.

The deed from Sister to Brother conveyed the tract of land "shown as that portion of Tract B lying to the north of SC Highway 43-109 . . ., containing a total of 291 acres, more or less . . . ." The 291 acres conveyed to Brother were comprised of four parcels, described in the deed as:

67 acres	Map 88, Lot 10	XE5-E-5
133.9 acres	Map 88, Lot 12	XE5-E-20
15.1 acres	Map 88, Lot 15	Part of XE5-E-20
75 acres	Map 88, Lot 11	XE5-E-1

The deed from Brother to Sister conveyed the tract of land "shown as being all of Tract A and that portion of Tract B lying to the south of SC Highway 43-109 containing a total of 309.7 acres, more or less . . . ." The 309.7 acres conveyed to Sister were comprised of four parcels, described in the deed as:

51 acres	Map 79, Lot 5	XE5-B-6A
144 acres	Map 79, Lot 6	XE5-B-6
92 acres	Map 89, Lot 13	XE5-F-6
22.7 acres	Map 89, Lot 12	XF4-C-1

Following the 1994 division, Brother and Sister continued to lease the property as a whole to the hunting club. In October 1995, Sister delivered a quit-claim deed to Brother deeding back fifty-one acres lying north of Highway 43-109, which had been mistakenly transferred to Sister as part of the 144-acre parcel described in the 1994 deed from Brother to Sister. The quit-claim deed stated Sister's net acreage was reduced from 309.7 acres to 258.7 acres.

In 1998, Brother conveyed the majority of his portion of the property to a family trust. In 2008, following Brother's death, the sole surviving trustee conveyed the trust property to Millvale Plantation, LLC (Respondent). In 1998, Sister

transferred the property she received in the 1994 division to the Carrison Partnership.

In 2009, Respondent brought an action to quiet title to a disputed 50.72-acre tract (disputed tract) of the property lying south of Highway 43-109. Respondent claimed ownership of the disputed tract, arguing it was part of the 133.9-acre parcel referenced in the deed from Sister to Brother. Appellants asserted counterclaims for trespass to try title and adverse possession. A non-jury trial was held in the circuit court in 2010.

Attorney Frank Robinson, who represented Respondent in connection with the 2008 conveyance of Brother's property, testified he believed the disputed tract had been properly deeded to Brother in 1994. Robinson testified he discovered a discrepancy in the language of the 1994 deed from Sister to Brother during his title examination. Although the 1994 deed stated Sister was conveying the tract of land which was part "of Tract B lying to the *north* of Highway 43-109," the disputed 50.72-acre tract was a portion of the 133.9-acre tract conveyed to Brother and was actually located *south* of SC Highway 43-109. According to Robinson, the fact that the disputed tract was south of Highway 43-109 and yet was included in the specific property description in the deed led him to request a new survey and property boundary plat. The new plat, as well as the tax maps, reflected that the disputed tract was part of the 133.9-acre tract, which was located on both sides of Highway 43-109.[1] Robinson also testified the 1995 quit-claim deed evidenced Sister's intent to convey the disputed tract to Brother in 1994. In the quit-claim deed, Sister stated she should have only received 258.7 acres in the 1994 conveyance and not 309.7 acres. Robinson testified the only way Sister could have 258.7 acres was if she did not own the 50.72-acre disputed tract. Thus, according to Robinson, the quit-claim deed affirmed his conclusion that Sister intended to convey the disputed tract to Brother.

James Carr, an employee of the Sumter County Tax Assessor's office, testified the Tax Assessor's office had assessed taxes from 1994 to 2008 to Brother as the owner of the disputed tract. Carr explained he noticed the reference to Highway 43-109 in the 1994 deed and took it into consideration, but ultimately his decision to assess taxes to Brother for the disputed tract was based on the specific property descriptions in the 1994 deed referencing the tax maps. According to Robinson, Brother paid the taxes on the disputed property. Additionally, Sister testified she intended to transfer *all* of her property to the Carrison Partnership in 1998.

[1] Appellants do not dispute this finding.

However, Carr explained the disputed tract was not included in the 1998 deed conveying Sister's property.

James LaFrage, Jr., a forester who managed the property prior to and following the 1994 division, testified timber was cut from Brother's and Sister's tracts in 1999 and from 2004 to 2005. According to LaFrage, it was possible loggers were cutting timber on the north and south sides of Highway 43-109 at the same time. LaFrage testified Brother and Sister would have each received checks from the same timber company, and he believed Brother would have known Sister was getting paid for cutting on the disputed tract based on the settlement sheets attached to the timber company checks. The timber deeds in evidence failed to identify ownership of the disputed tract. Additionally, LaFrage testified he had never seen the 1994 deeds, the 1995 quit-claim deed, or the tax maps.

Sister testified she owned the disputed tract. She acknowledged she and Brother never had any disagreement about the ownership or use of the disputed tract. Furthermore, Sister testified she never told Brother not to come onto the disputed tract. According to Sister, she was not aware Brother was paying taxes on the disputed tract, and she believed she was receiving the tax bill as part of several others that arrived yearly.

Following trial, the circuit court issued an order in February 2011 finding the 1994 deeds were not ambiguous and determining Sister intended to convey the disputed tract to Brother. Additionally, the circuit court found Appellants' counterclaims for trespass to try title and adverse possession failed for lack of evidentiary support. Subsequently, the circuit court denied Appellants' motion to reconsider. This appeal followed.

STANDARD OF REVIEW

An action to quiet title to property is an action in equity. *Jones v. Leagan*, 384 S.C. 1, 10, 681 S.E.2d 6, 11 (Ct. App. 2009). "In an equitable action tried without a jury, the appellate court can correct errors of law and may find facts in accordance with its own view of the preponderance of the evidence." *Church v. McGee*, 391 S.C. 334, 342, 705 S.E.2d 481, 485 (Ct. App. 2011). "Our equitable standard of review does not require this court to ignore the findings of the trial judge who heard the witnesses." *Id.* at 343, 705 S.E.2d at 485. "Decisions relative to the veracity and credibility of witnesses can best be made by the trial judge who heard the witnesses and observed their demeanor." *Id.* at 343, 705 S.E.2d at 485-86.

Here, Appellants have asserted counterclaims of trespass to try title and adverse possession. Adverse possession and trespass to try title claims are actions at law. *See Frazier v. Smallseed*, 384 S.C. 56, 61, 682 S.E.2d 8, 11 (Ct. App. 2009) (holding an adverse possession claim is an action at law); *Knox v. Bogan*, 322 S.C. 64, 66, 472 S.E.2d 43, 45 (Ct. App. 1996) (holding an action in trespass to try title is an action at law). In actions at law tried by a judge without a jury, the findings of fact of the judge will not be disturbed on appeal unless found to be without evidence which reasonably supports them. *Townes Assocs. Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976).

LAW/ANALYSIS

I. 1994 Deed

Appellants argue the circuit court erred in finding the 1994 deed from Sister to Brother conveyed the disputed tract to Brother. We disagree.

"In construing a deed, the intention of the grantor must be ascertained and effectuated, unless that intention contravenes some well settled rule of law or public policy." *K & A Acquisition Grp., LLC v. Island Pointe, LLC*, 383 S.C. 563, 682 S.E.2d 252, 262 (2009) (internal quotation marks omitted). "In determining the grantor's intent, the deed must be construed as a whole and effect given to every part if it can be done consistently with the law." *Id.* "The intention of the grantor must be found within the four corners of the deed." *Id.*

Appellants argue that because a plat of the disputed tract was not in existence at the time of the conveyance, the circuit court, in construing the 1994 deed, should have determined title to the disputed tract by referring to Highway 43-109. Appellants maintain Highway 43-109 was the "ultimate dividing line" in the division of the property, and Sister was to receive all of the property south of the highway and Brother was to receive all of the property north of the highway. Appellants argue the tax map references in the 1994 deed should not prevail over the description of Highway 43-109 as the dividing line because the tax map references are merely references to tax map numbers and do not contain boundary descriptions.

Respondent argues the tax map references were the primary method of expressing the intent of the parties, and should prevail over the general description referencing Highway 43-109. Respondent maintains the recitations of acreage in the 1994

deed, as well as the 1995 quit-claim deed, were specific and clearly expressed Sister's intent.

Construing the 1994 deed as a whole, we find Sister intended to convey the disputed tract to Brother. While the general description in the deed states Brother was to receive the property lying north of Highway 43-109, the more specific property description in the deed provides Brother was to receive four tracts totaling 291 acres. One of these tracts, identified by tax map reference as a 133.9-acre tract, included the disputed tract lying south of Highway 43-109. We find the precise recitation of acreage and reference to the tax maps in the 1994 deed is controlling and accurately reflects Sister's intent to convey the disputed tract to Brother. *See Lake View Acres Dev. Co. v. Tindal*, 306 S.C. 477, 480, 412 S.E.2d 457, 459 (Ct. App. 1991) (holding that if a general description of the property to be conveyed in the deed is followed by a clause summing up the intention of the parties as to the property conveyed, "such clause has a controlling effect on all prior phrases used in the description."). Although Sister maintains the tax map references should not prevail, we find the parties' decision to include tax map references in their deeds is significant and reflects their intent to convey the specific acreages described therein.

Furthermore, the 1995 quit-claim deed reflects Sister's intent to convey the disputed tract to Brother. In the quit-claim deed, Sister conveyed fifty-one acres north of Highway 43-109 back to Brother after it had been mistakenly conveyed to her in the 1994 deed from Brother to Sister. The quit-claim deed stated Sister's net acreage was reduced from 309.7 acres to 258.7 acres. If Sister owned the disputed tract, her total acreage would include the 50.72 acre tract, and thus, it would be greater than 258.7 acres. However, the quit-claim deed reiterated that Sister owned only the 258.7 acres she was originally conveyed in the 1994 deed from Brother to Sister.

Accordingly, the preponderance of the evidence in the record supports a finding that Sister conveyed the disputed tract to Brother in the 1994 deed.

II. Trespass to Try Title and Adverse Possession

Appellants argue the circuit court erred in finding they failed to prove their trespass to try title and adverse possession claims. We disagree.

In a trespass to try title action, the defendant in actual possession of the disputed property is regarded as the rightful owner of the property until the plaintiff proves

perfect title, and a mere prima facie showing of paper title by the plaintiff is not enough. *Cummings v. Varn*, 307 S.C. 37, 41, 413 S.E.2d 829, 831-32 (1992). "There are four ways in which a plaintiff in an action of trespass to try title may acquire title to land sufficient to oust a defendant claiming the same land." *Id.* at 40, 413 S.E.2d at 831. "First, the plaintiff may show a grant from the state to someone, and then by successive deeds to him." *Id.* "Second, the plaintiff may trace his title to a common source from whom both he and the defendant claim through separate chains of title." *Id.* at 40-41, 413 S.E.2d at 831. "Third, a plaintiff may show that he and those under whom he claims have been in actual, hostile, exclusive, and continuous possession of the land adversely to the defendant for twenty years." *Id.* at 41, 413 S.E.2d at 831. "Once that fact is established, the law presumes whatever is necessary to give the plaintiff good title." *Id.* "Fourth, the plaintiff can show he alone or with those from whom he has inherited have been in actual, hostile, exclusive, and continuous possession of the land adversely to the defendant for ten years." *Id.*; *see also* S.C. Code Ann. §§ 15-67-210 to -270 (2005).

"In order to establish a claim of adverse possession, the claimant must prove by clear and convincing evidence his possession of the subject property was continuous, hostile, actual, open, notorious, and exclusive for the statutory period." *McDaniel v. Kendrick*, 386 S.C. 437, 442, 688 S.E.2d 852, 855 (Ct. App. 2009).

Here, Appellants contend Sister has been in actual, hostile, exclusive, and continuous possession of the disputed tract for ten years. Appellants maintain Respondent failed to offer any evidence that Brother, or his successor trustee, exercised any dominion or control over the disputed tract. Respondent argues no evidence was presented Sister went onto the disputed tract after the 1994 division. Additionally, Respondent contends no evidence was presented Sister ever excluded Brother from the disputed tract or paid taxes on the disputed tract.

We find the evidence in the record supports the circuit court's finding that Appellants failed to prove their trespass to try title and adverse possession claims. First, we note that although Sister contends Brother failed to offer any evidence he exercised dominion and control over the disputed tract, Sister bears the burden of proving she has met the requirements for trespass to try title and adverse possession. *See Watson v. Suggs*, 313 S.C. 291, 294, 437 S.E.2d 172, 173 (Ct. App. 1993) (holding that "[i]n an action of trespass to try title, the defendant in actual possession of the disputed property is regarded as the rightful owner of the property until the plaintiff proves perfect title"); *Getsinger v. Midlands Orthopaedic Profit Sharing Plan*, 327 S.C. 424, 428, 489 S.E.2d 223, 225 (Ct.

App. 1997) (holding the burden of proof of adverse possession is on the party relying thereon).

"If a claimant asserts title by adverse possession and his or her occupancy is not under color of title, the claimant must show either fencing or other improvements covering most of the subject land or some other continuous use and exercise of dominion." *Frazier v. Smallseed*, 384 S.C. 56, 63, 682 S.E.2d 8, 12 (Ct. App. 2009). "While the legal owner need not have actual knowledge the claimant is claiming property adversely, the hostile possession should be so notorious that the legal owner by ordinary diligence should have known of it." *Jones v. Leagan*, 384 S.C. 1, 13-14, 681 S.E.2d 6, 13 (Ct. App. 2009).

Here, the evidence in the record does not support a finding that Sister ever exercised dominion and control over the disputed tract. No evidence was presented Sister went onto the disputed tract or told Brother not to come onto the disputed tract. Furthermore, no evidence was presented Sister performed any act resulting in physical changes to the disputed tract that would have put Brother on notice that his property was being possessed by another. Sister did not fence the disputed tract, construct any structures on the tract, or post "no trespassing" signs.

We also note activities that do not involve the creation of permanent structures on the land can be sufficiently open and notorious as to put the legal owner on notice that his land is being adversely possessed. *See Miller v. Leaird*, 307 S.C. 56, 62, 413 S.E.2d 841, 844 (1992) (holding evidence supported Special Referee's finding of adverse possession when respondent paid the mortgages on the property, paid taxes on the property, and marked the boundary lines of the disputed property, and cut and sold timber on the tract in question for the statutory period). Here, however, no evidence was presented Sister paid a mortgage or property taxes on the disputed tract. In fact, Brother paid the property taxes on the disputed tract from 1994-2008. Furthermore, although Sister argues her sale of the timber from the disputed tract evidences her control over the tract, we are not persuaded that the sale of timber establishes Sister acquired the tract by adverse possession. The record reflects cutting on the disputed tract occurred only twice between 1994 and 2008 and did not occur throughout the entire statutory period. Additionally, according to LaFrage, the cuttings on Brother's and Sister's properties occurred at roughly the same time, and Brother and Sister both received checks from the same timber company. No evidence was presented Brother was aware he was not receiving checks for the cuttings from the disputed tract.

Based on the foregoing, we find Appellants failed to prove Sister was in continuous, hostile, actual, open, notorious, and exclusive possession of the disputed tract for ten years. Accordingly, the circuit court did not err in finding Appellants failed to prove their trespass to try title and adverse possession claims.

CONCLUSION

Based on the foregoing, the circuit court's order is

AFFIRMED.

SHORT and KONDUROS, JJ., concur.