COURT OF APPEALS
DECISION
DATED AND FILED

June 17, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1584 **Cir. Ct. No. 2011CV239**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

MICHAEL WALTON AND ANN WALTON,

PLAINTIFFS-RESPONDENTS,

V.

JAMES WILKE, TARA WILKE, AND THE JAMES WILKE AND TARA C. WILKE TRUST DATED NOVEMBER 27, 2000, AS AMENDED,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Sheboygan County: TERENCE T. BOURKE, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 NEUBAUER, P.J. This case is about adverse possession of a portion of a lakefront neighbor's land that is occupied by a boathouse and about the establishment of the neighbors' respective riparian rights. One neighbor filed

suit claiming adverse possession of the other neighbor's land onto which the boathouse encroached. The boathouse had been there for decades. The defendant neighbor counterclaimed, seeking damages for invasion of his riparian zone and a determination of the parties' respective riparian rights. The trial court granted partial summary judgment to the neighbor claiming adverse possession. The riparian rights issue went to trial, after which the court determined how the lines determining those rights should be drawn. We conclude that the court did not err in granting summary judgment on the adverse possession claim and was within its discretion when it drew the riparian rights line. We affirm.

BACKGROUND

¶2 Michael Walton and Ann Walton (Walton) and James Wilke, Tara Wilke, and The James and Tara C. Wilke Trust dated November 27, 2000, as amended (Wilke) own adjacent lots on Crystal Lake in Sheboygan county. Wilke purchased his lot in 2006, and Walton purchased his in 2008. There is a boathouse on Walton's property that has been there since 1926 or 1927. The boathouse was built at an angle to the lot line such that a triangular portion of it extends onto Wilke's lot and down into the water. Of the triangular portion, one side is the Walton/Wilke property line, the second side is the eastern wall of the boathouse, and the third side is the water's edge, or ordinary high water mark (OHWM).[1] Because of the angle at which it was built, the front part of the boathouse and the

[1] "'Ordinary high water mark' or 'OHWM' means the point on the bank or shore up to which the presence and action of water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation or other easily recognized characteristic." WIS. ADMIN. CODE § NR 320.03(12) (May 2013); ***State v. McDonald Lumber Co.***, 18 Wis. 2d 173, 176, 118 N.W.2d 152 (1962); ***Diana Shooting Club v. Husting***, 156 Wis. 261, 272, 145 N.W. 816 (1914).

waterside door hang out into the water in front of part of Wilke's shoreline. Part of the boathouse floor is under water and is therefore on the lake bed owned by the state. Part of the boathouse floor is dry, and it is a triangular part of this dry section, described above, that encroaches on Wilke's property.[2] Walton commenced this action seeking a judgment of adverse possession regarding that portion of the boathouse that encroached on Wilke's property. Wilke counterclaimed for private nuisance, trespass, and a declaratory judgment determining the parties' riparian boundaries. The trial court granted summary judgment to Walton on the adverse possession claim and determined the parties' riparian zones based on a method proposed by Walton. The trial court indicated that it's determination of the parties' riparian rights rendered Wilke's counterclaim meritless, and therefore dismissed the counterclaim. Wilke appeals the decision on adverse possession and the determination of the riparian line.

[2] The legal description furnished by Walton is:

> Commencing at the NW corner of said Lot 70, thence S 50-02-13 W, along the northwesterly line of said Lot 70, 139.40' to a meander line, thence continuing S 50-02-13 W, 17.91; to the point of beginning, thence S 50-02-13 W, 18.47' to the O.H.W.M., thence southeasterly along the O.H.W.M., 4.26' to the southeasterly line of an existing boathouse, thence northeasterly along said southeasterly line, 17.97' to the point of beginning, being a tract of land containing 38.3 sq. ft.

DISCUSSION

Adverse Possession

Summary Judgment Methodology and Standard of Review

¶3 We review a decision on summary judgment using the same methodology as the trial court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). If there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law, summary judgment shall be rendered. WIS. STAT. 802.08(2) (2013-14).[3] A factual issue will not necessarily defeat summary judgment; there must be a genuine dispute about a material fact. ***Baxter v. DNR***, 165 Wis. 2d 298, 312, 477 N.W.2d 648 (Ct. App. 1991). An issue of fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." ***Id.*** (quoting ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 248 (1986)). In an adverse possession case on summary judgment, when there are no material facts in dispute, our review of whether the facts are sufficient to establish adverse possession is de novo. *See* ***Wilcox v. Estate of Hines***, 2014 WI 60, ¶15, 355 Wis. 2d 1, 849 N.W.2d 280.

Elements of Adverse Possession

¶4 Under WIS. STAT. § 893.25, adverse possession is established if the person claiming possession of the disputed parcel, along with his or her predecessors in interest, is in actual, continued occupation of the disputed parcel for a period of twenty years, and the disputed parcel is protected by a substantial

[3] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

enclosure or is usually cultivated or improved. Adverse possession need only be shown to a reasonable certainty. ***Kruse v. Hormalus Indust., Inc.***, 130 Wis. 2d 357, 362-67, 387 N.W.2d 64 (1986).

¶5 Walton supported his motion for partial summary judgment on adverse possession with affidavits that established that the boathouse, a portion of the floor of which is above the OHWM, has been in the same position on the Walton property and encroaching on the Wilke property for at least twenty years. Walton submitted affidavits from himself and the previous owners of his property establishing that the boathouse has encroached on the Wilke property since at least 1972. Walton submitted deposition testimony from Wilke, in which Wilke did not dispute that the boathouse had been in its current location for twenty years, did not maintain that he owned any portion of the boathouse, and testified that he has not granted permission for the boathouse to stand partially on his property.

Presumption of Title and Prima Facie Case

¶6 The boathouse, by its nature, encloses the property upon which it stands; it is also an improvement. Walton's possession of the boathouse for more than twenty years created a presumption of title in Walton. *See* ***Wiese v. Swersinske***, 265 Wis. 258, 261, 61 N.W.2d 312 (1953). The subject area is well-defined as the area underneath the physical structure that is the boathouse. When a building encroaches on neighboring property, adverse possession can be had of that portion of land covered by the structure.

> The weight of authority is to the effect that one who remains in continuous, open, and exclusive possession of a building of a permanent nature, which projects over the boundary line, during the statutory period of time in which actions to recover possession of real property may be maintained, acquires title by adverse possession to that portion of the adjoining property covered by the structure,

> though the building was erected in ignorance of the location of the true boundary line, and supposedly upon land rightly owned by the builder.

Menzner v. Tracy, 247 Wis. 245, 251, 19 N.W.2d 257 (1945) (citation omitted). There is no dispute that the boathouse has been in its current location for over twenty years. Because Walton has shown that the boathouse has been in this location for twenty years, there is a presumption of title in Walton. Walton made a prima facie case for summary judgment on adverse possession.

Change in OHWM

¶7 To defeat Walton's motion, Wilke had to submit affidavits setting forth specific evidentiary facts to show that the subject area of the boathouse has not encroached on his property for at least twenty years. Wilke first argues that Walton cannot precisely describe the portion of which he seeks adverse possession because one boundary of the portion is the OHWM, which is subject to change. Wilke relies on a study prepared for Sanitary District No. 1 for the towns of Rhine and Plymouth by Dr. Neal O'Reilly. The O'Reilly report concludes that the water level in Crystal Lake has been continually declining over time and that between 1986 and 2005 it dropped between two to five feet. Further, Wilke cites a 1999 survey of the properties that did not show any encroachment on the Wilke lot. According to Wilke, the change in lake level must have meant a movement of the OHWM, changing the size of, or perhaps eliminating (if the OHWM was high enough), the encroachment onto Wilke's land. Thus, says Wilke, there is no defined portion of land subject to adverse possession.

¶8 We are not convinced that the subject area is not well-defined enough for adverse possession because the OHWM may have moved over the years or may have been so high that water covered up the entire subject area. As

stated above, Wilke relies on a report concluding that the lake level dropped two to five feet between 1986 and 2005. This is a measure of the level of Crystal Lake as a whole. This tells us nothing about the OHWM at the Walton and Wilke lots. Wilke also suggests that perhaps there was no encroachment at all for a portion of the twenty-year span. He points to a 1999 survey that did not show the encroaching boathouse. However, Wilke's own expert testified that a property survey "is not required to show encroachments or structures." Similarly, Wilke points to testimony by the Schulers, who owned the property prior to Walton, that they were not aware of an encroachment. However, the Schulers did not seek to establish specifically the location of the boathouse vis-à-vis the property line. In any event, the parties submitted two surveys, both showing the boathouse encroaching on the Wilke property, which Wilke does not argue are inaccurate. Both Walton's and Wilke's surveyors agree that the subject area is defined as a triangular portion of land on which the boathouse sits, with the third side of the triangle encroaching on Wilke's land as the OHWM. Additionally, the Wisconsin Department of Natural Resources (DNR) set flags on the subject property to show the OHWM. The surveys establish the OHWM as the lower boundary of the subject area, and Wilke has not raised a genuine issue of material fact regarding that boundary. Wilke has produced no evidence showing that the OHWM was higher during the twenty-year period, much less showing it was so high as to completely cover the subject area.

¶9 The party claiming adverse possession is not required to provide a surveyed description of the area adversely possessed. ***Droege v. Daymaker Cranberries, Inc.***, 88 Wis. 2d 140, 146, 276 N.W.2d 356 (Ct. App. 1979). Furthermore, it is long-standing common law that describing a portion of land "to the waters of" or to the shore of a body of water is sufficiently accurate to convey

title to the land. *See, e.g.*, ***Doemel v. Jantz***, 180 Wis. 225, 235, 193 N.W. 393 (1923) (noting that the Wisconsin Supreme Court has variously used "water's edge," "natural shore," "water line," "ordinary low-water mark," and "ordinary high-water mark" to denote boundary of riparian owner's property); ***Lampman v. Van Alstyne***, 94 Wis. 417, 430, 69 N.W. 171 (1896) (river sufficiently definite as northern boundary of land described in deed); 78 AM. JUR. 2D *Waters* § 47 (2013) (noting that the ownership of land abutting navigable water extends to the high-water mark on the shore). The very nature of property that abuts water is that the water's edge will vary. The court's definition of the subject portion includes an edge defined by the OHWM. If this edge has risen and fallen with the lake over the last twenty years, this is not enough to destroy an adverse possession claim. Walton's evidence provided a reasonably certain basis for the trial court to determine the boundary of the subject area. In contrast, Wilke's evidence is all speculative. There is no genuine dispute of material fact as to the OHWM boundary of the subject area.[4]

¶10 Wilke also argues that the location of the property line between the Walton and Wilke lots is a fact question that must go to trial. Wilke's expert testified that the location of the property line in his 2012 survey was "extremely similar" to that in Walton's expert's survey. Indeed, in this section of his brief, Wilke does not cite any evidentiary fact to show that the property line is in question and needs to be determined at trial.

[4] The parties do not argue this as a case involving reliction, and we do not address it as such. *See, e.g.*, ***Perpignani v. Vonasek***, 139 Wis. 2d 695, 408 N.W.2d 1 (1987).

¶11 Finally, Wilke argues that the boathouse was illegal and that this illegality defeats summary judgment. In October 2010, the DNR wrote Walton to advise him that the Walton/Wilke property line passes through the boathouse, that under DNR rules for boathouses he may repair the boathouse as long as the value of the repairs does not exceed fifty percent of the assessed value of the boathouse, and that the DNR could not authorize any invasion into a neighbor's exclusive riparian zone. The DNR wrote Walton again in December 2011, indicating that repairs had been made without a permit and that if Walton did not take down at least part of the repairs the DNR would "take enforcement action." According to Wilke, this makes the boathouse illegal, and an "illegal boathouse cannot be the foundation for an adverse possession claim."

¶12 First, 2011 Wis. Act 167, § 27 created an exception to the statute referenced in the DNR letter for boathouses in existence on December 16, 1979. *See* WIS. STAT. § 30.121(3c). Second, in the case upon which Wilke relies, ***Zeisler Corp. v. Page***, 24 Wis. 2d 190, 128 N.W.2d 414 (1964), adverse possession was not proved; the supreme court affirmed the trial court's conclusion that the use of the property "was neither precise, continuous, nor significant." ***Id.*** at 197-98. Finally, any dispute between the DNR and Walton about the extent of repairs to the boathouse is irrelevant to the elements of adverse possession. The DNR communications do not in any way change the established location and encroachment of the boathouse on Wilke's property. The partial summary judgment in favor of Walton on adverse possession was appropriate.

Determination of Line of Riparian Rights

¶13 After the trial court decided the adverse possession claim on partial summary judgment, there was a two-day trial to the court regarding the riparian

rights line between the Walton and Wilke properties. The court adopted an alternative proposed by Walton, labeled "Extended Lot Line Method from Outside Wall Line." Wilke appeals this decision.

Standard of Review

¶14 The trial court's determination of parties' respective riparian rights is a matter of discretion, and, therefore, we review the decision to see if the trial court failed "to exhibit a reasoned, illuminative mental process with which to logically connect its decision, findings and conclusions."[5] ***Manlick v. Loppnow***, 2011 WI App 132, ¶23, 337 Wis. 2d 92, 804 N.W.2d 712 (citation omitted).

Determination of Riparian Rights

¶15 Lakefront property owners are entitled to access to the water from their shoreline to reach navigable water and to use the lake for swimming. ***Nosek v. Stryker***, 103 Wis. 2d 633, 640, 309 N.W.2d 868 (Ct. App. 1981). The lakefront property owner's riparian rights extend from his or her shoreline to the line of navigability, which separates the owner's riparian area from navigable waters. ***Manlick***, 337 Wis. 2d 92, ¶13. Wisconsin law recognizes various methods for determining where riparian boundaries lie between neighboring lakefront property owners. *See* ***Nosek***, 103 Wis. 2d at 635-37 (explaining three methods recognized

[5] Wilke has a separate section in his brief entitled "Standard of Review," placed between his Statement of Facts and his Argument. *See* WIS. STAT. RULE 809.19(1). In this section, Wilke indicates that the standard of review of the riparian line determination is de novo with respect to (1) construction and interpretation of WIS. ADMIN. CODE § NR 326.07 (Apr. 2005) as to the proper definition of "proportionality" and (2) whether the facts fulfill a particular legal standard. In his Argument section, Wilke states that the "standard of review on the issue of riparian lines is erroneous exercise of discretion." The correct standard is erroneous exercise of discretion. We note, however, that it is an erroneous exercise of discretion if the court misapplies the law. ***Sullivan v. Waukesha Cnty.***, 218 Wis. 2d 458, 470, 578 N.W.2d 596 (1998).

by caselaw); WIS. ADMIN. CODE § NR 326.07 (Apr. 2005) (defining three methods of apportionment of riparian rights). "There is no set rule in Wisconsin for establishing the extension of boundaries into a lake between contiguous shoreline properties." ***Borsellino v. Kole***, 168 Wis. 2d 611, 616, 484 N.W.2d 564 (Ct. App. 1992).

> But the dominant rule is that each must have his due proportion of the line bounding navigability and a course of access to it from the shore exclusive of every other owner, and that all rules for apportionment or division are subject to such modification as may be necessary to accomplish substantially this result.

Thomas v. Ashland, Siskiwit & Iron River Logging Ry. Co., 122 Wis. 519, 524, 100 N.W. 993 (1904), *quoted in* ***Manlick***, 337 Wis. 2d 92, ¶16; ***Nosek***, 103 Wis. 2d at 639; WIS. ADMIN. CODE § 326.07. Thus, ultimately, the question is one of fairness, *see* ***Borsellino***, 168 Wis. 2d at 618, and which method is equitable in a particular case is a decision within the discretion of the trial court, ***Manlick***, 337 Wis. 2d 92, ¶¶16, 19. A trial court properly exercises its discretion when it "set[s] forth a discussion of factors relied upon in reaching a conclusion." ***Id.***, ¶23.

¶16 The trial court selected a method proposed by Walton, labelled the "Extended Lot Line Method from Outside Wall Line," which sets the riparian rights line as "from the point where the boathouse meets the ordinary high water mark, along the foundation, or concrete footing of the boathouse on its eastern side, and then extending into the lake on a straight line." In other words, the line extends out from the wall of the boathouse into the lake.

¶17 Wilke argues that by selecting the "Extended Lot Line Method from Outside Wall Line" the trial court did not give Wilke his fair share of the lake between the shoreline and the line of navigability. Wilke points to WIS. ADMIN.

CODE § NR 326.07, which sets forth three alternative methods of apportionment, then authorizes "[a]ny other method … that is compatible with the general rule adopted in sub. (1)," which is the requirement of due proportion from ***Thomas***, 122 Wis. at 524, quoted above. Wilke goes on to calculate that he has forty-six percent of the parties' combined shoreline and only twenty percent of the total line of navigation. These calculations, argues Wilke, show that he does not have his due proportion of lake access.

¶18 We reject Wilke's arguments due to the well-reasoned and thorough explanation the trial court gave for its decision, which was well-grounded in law. We first want to note that Wilke's mathematical interpretation of "due proportion" is not necessarily what ***Thomas*** and the many cases that cite it mean. First, it is impossible for Wilke to measure his riparian rights to calculate percentages as he has because the trial court has only defined Wilke's riparian rights line on the Walton side of his lot and not the other side. Second, such a mathematical interpretation of "due proportion" would not take into account a curvy shoreline, which could afford an owner more shore, and thus more of the line of navigability, even though the lot size is essentially the same. We read "due proportion" to mean that portion that is due to each lakefront owner. This does not necessarily imply mathematical exactitude. Rather, it is "due" in the sense of "adequate," *see* WEBSTER'S THIRD NEW INT'L DICTIONARY 699 (1993), and "proportion" in the sense of "proper or equal share," ***id.*** at 1819. Each lakefront owner gets his or her fair share in order to be able to use the lake and get out to navigable waters.

¶19 The trial court gave a detailed and well-reasoned explanation for its choice of the "Extended Lot Line Method from Outside Wall Line." First, it rejected the straight extension of onshore property line method, as the new property line, after adverse possession of the boathouse, "angles along the side of

the boathouse." Second, it rejected the coterminous method, noting from photographic evidence that the lots in the area are narrow and that "using the coterminous method … would create a sharp angle that would be potentially disruptive to existing riparian zones around lots 69 and 70." The court then went on to discuss the prominence of the boathouse as a feature of the Walton property, "not just because it is designated as an historical landmark," but also as a place used over the years by the occupants of the Walton property. Wilke would have been aware of it when he purchased his property. The court concluded that it "would be unfair to draw a riparian line which makes the boathouse vulnerable" by going through the boathouse. Based on Walton's stronger argument for exclusivity in the area directly in front of the boathouse, the court rejected Wilke's proposed line, which wrapped around the boathouse. The court noted that owners of the lot have used the area directly in front of the boathouse and have stored boats in the boathouse. "It is difficult to imagine how the owners of lot 69 could remove a boat from their boathouse if they did not have riparian rights to the portion of the lake in front of their own boathouse."

¶20 Regarding the adoption of the "Extended Lot Line Method from Outside Wall Line," the trial court said:

> The court believes this is an appropriate resolution. The line suggested by Walton is not as drastic as a coterminous line, and allows Wilke swimming access to Crystal Lake from the west side of his pier. Wilke may not be able to put a boat lift on the west side of the pier, but the court notes that he does have a boat on the east side of his pier …. Another benefit to this riparian line is that it closely approximates an extension of the current lot line. Future owners … should be able to easily discern what the riparian line is between the two lots.

¶21 The riparian line determined by the trial court is an equitable solution as to the apportionment of riparian rights given the adverse possession of

the boathouse. Each party has his due proportion of rights to the use of the lake and access to navigable waters. The court's decision was based on the facts before it. There was no erroneous exercise of discretion. We affirm.

By the Court.—Order affirmed.

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