COURT OF APPEALS
DECISION
DATED AND FILED

April 22, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 98-3157-FT

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

TOWN OF DEKORRA,

PLAINTIFF-APPELLANT,

v.

DOROTHY FRANZEN,

DEFENDANT,

ROSEMARY M. MEFFERT,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Columbia County: DANIEL S. GEORGE, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Roggensack, JJ.

PER CURIAM. The Town of Dekorra appeals from a judgment ordering that title to a disputed strip of property be awarded to Rosemary Meffert

on the basis of adverse possession.[1] The Town challenges the sufficiency of the evidence to support the trial court's findings that Meffert and her predecessors in interest had substantially enclosed, cultivated and improved the parcel in question and excluded members of the public from it for a period of forty years prior to the commencement of the current litigation. We conclude that the record supports the trial court's determination. Accordingly, we affirm.

BACKGROUND

Meffert owns adjoining Lots 6 and 7 of Block 2 in the Town of Dekorra. A park owned by the Town abuts the western[2] and southern sides of Lot 6. A strip of land which extends along the southern bank of the Wisconsin River from a private resort in the west to a public landing just east of Lot 7 passes by the northern side of the park and Meffert's lots. A recorded plat designates the shoreline strip as "reserved for wharfs and public landings for the use of the proprietors." In 1995, the Town filed a declaratory judgment action seeking to quiet its title to the portion of strip of land passing by Meffert's property.[3] Meffert filed a counterclaim for title by adverse possession, and the parties tried the case to the court.

Meffert acquired Lots 6 and 7 in 1992. Lot 7 was owned by Ted Cygan from 1948 until 1992. Lot 6 was owned by William McNichols from 1948

[1] This is an expedited appeal under RULE 809.17, STATS.

[2] We do not understand there to be any dispute as to the boundaries of the lots themselves. Therefore, only general directions are used in this opinion for clarity's sake.

[3] The case below involved another parcel of land which the trial court found had been adversely possessed by Dorothy Franzen. However, the trial court's decision with respect to that property has not been appealed.

to 1958, by Warren and Mary Shaw from 1958 until 1971, and by Sam and Eva Menders from 1971 until 1992. At the time of the suit, a house and deck on Lot 6 encroached into the disputed area. Meffert also had fences, a septic system, flower beds, a screen house, and a line of planted bushes within the disputed area, and she used the pier extending into the river in front of her property. Meffert testified that there is a tennis court in the park on the other side of one of her fences, and that when balls come flying over, people ask whether they can come over and get them. She bought the property with the understanding that her lots extended to the water, and treated the land as her own.

Cygan testified that when he purchased Lot 7 in 1948, he believed that he owned all of the property between his cabin and the water's edge. He said that no one from the Town had ever claimed to him that the Town owned it, or approached him on any subject regarding the property. He said that he was the only one to dock a boat on the pier along the disputed shoreline and that he and the successive owners of Lot 6 were the only ones to mow the grass up to the water's edge in the disputed area between 1948 and 1992. Cygan said there was a line of mulberry bushes extending across the shoreline strip from the eastern side of Lot 7 to the water's edge when he bought the property and that he planted additional lilac bushes along that same line after he moved in. The bushes were too dense to see through during the summer months. He said his neighbor, Sam Mender, put up fences in the disputed area along the western edge of Lot 6 and the eastern edge of Lot 7 at some point. He said when the Shaws built a new house on the property in place of the cabin that had been there, they leveled the land all the way to the water's edge. The Shaws planted a number of bushes and pine trees in the disputed area, and trimmed them.

Cygan never saw townspeople using the disputed property while McNichol owned the property. He saw some people fishing off the shore while the Shaws owned the property, but did not know whether or not they had permission to do so. He said the Menders also planted trees and bushes in the disputed area, and Eva Menders maintained a flower garden between the house and the water's edge. Cygan believed that Menders had ejected people from the disputed area on at least one occasion. Cygan said the Town had never planted anything in the disputed area while he owned Lot 7. Cygan said he and Menders had removed trees from the disputed area when Dutch elm disease swept through the town. Cygan said that he saw people fishing off his shore from time to time, but that it was not a common thing. He did not kick them off what he considered to be his property because he did not wish to be rude.

Eva Mender testified that she believed that she and her husband owned and had paid taxes on waterfront property, and she had made that representation to Meffert. She said that when they purchased Lot 6 in 1971, there was an old fence along the west side of the property going down to within ten feet of the water, where the rocks started. She said her husband replaced and extended the fence along the western side of their property, and installed a fence near the water on the western side of Lot 7 as well, to help keep their dog in. She said that she had maintained a garden in the disputed area, and that she and her husband had installed a septic tank system in the disputed area. She had noticed townspeople fishing on the rocks in front of her property perhaps ten times in the eighteen years that she lived there, and said that they had always obtained permission from her or her husband to do so. She never saw members of the public using the pier in front of their lot, and said the Town never maintained the disputed portion of the strip in

any way. She said that nearly every weekend one or more of her ten children and their families would visit her and make use of the water and the disputed area.

Elmer Fisk, a member and former chairman of the Town Board between 1959 and 1985,[4] testified that the Town had never claimed it owned the disputed land or made any improvements to it during his tenure on the Board. During that time, the Town had mowed the lawn on the strip between the park and the water's edge, but had not mowed the grass on the strip between Lots 6 and 7 and the river. The Town had also trimmed trees and removed brush in the park area, but had not trimmed trees or removed brush from the disputed area. The Town had not installed or removed the piers in front of Lots 6 and 7, and Fisk had never seen any townspeople, aside from the owners, land or dock boats in front of those lots. The Town had placed gravel and later blacktop along the water's edge in front of the park, but never on the shoreline strip in front of Lots 6 and 7. The Town had held official gatherings in the park, but never in the disputed area. The Town had posted signs in the park designating it as a public area but had posted no such signs on the disputed land. There were no township picnic tables placed in the disputed area. Fisk said that he attended the fireworks ceremonies held on the river about fifty percent of the time, and that on those occasions he observed people watching the fireworks from the park area and a nearby resort area, but not from the disputed area. Fisk said that the Menders had erected fences down to the water's edge during his tenure on the Board, and that the Board had never told the adjoining property owners to remove them.

[4] There was an interruption in Fisk's tenure on the Board, but he testified that he was still familiar with the disputed property during that time.

The Town conceded that it had never maintained the lawn or planted anything in the disputed area. However, it presented a number of witnesses to try to show that members of the public had also made use of the land over the years, and to dispute Fisk's testimony that the Town had never asserted any ownership rights.

The trial court concluded Meffert had established adverse possession because it found Lots 6 and 7 had been both "substantially enclosed," and also "regularly maintained and 'cultivated and improved'" since the late 1940's, and because it found the Town had not notoriously re-entered the property until the 1990's, over forty years later.

DISCUSSION

Standard of Review.

An adverse possession determination presents a mixed question of fact and law, requiring findings concerning the sequence of events and a conclusion as to the legal significance of those events. ***Perpignani v. Vonasek***, 139 Wis.2d 695, 728, 408 N.W.2d 1, 14 (1987). We will not upset the trial court's findings of fact unless they are clearly erroneous. *See* § 805.17(2), STATS., *and* ***Becker v. Zoschke***, 76 Wis.2d 336, 346, 251 N.W.2d 431, 435 (1977). Nor will we weigh the evidence, resolve conflicts in the testimony, or reject reasonable inferences made by the trial court. ***In re Estate of Dejmal***, 95 Wis.2d 141, 151, 289 N.W.2d 813, 818 (1980); ***Onalaska Elec. Heating, Inc. v. Schaller***, 94 Wis.2d 493, 501, 288 N.W.2d 829, 833 (1980). Furthermore, although we do not ordinarily defer to the trial court's determination of a question of law, we will give some weight to a legal conclusion that is intertwined with the factual findings in

support of that conclusion. ***Wassenaar v. Panos***, 111 Wis.2d 518, 525, 331 N.W.2d 357, 361 (1983).

Adverse Possession.

A person may acquire title to land owned by a state political subdivision by taking actual possession of the land and either protecting it by a substantial enclosure or cultivating or improving it in the usual manner of an owner, for a period of forty years. Sections 330.09 and 330.10, STATS., 1947;[5] ***Petropoulos v. City of West Allis***, 148 Wis.2d 762, 767, 436 N.W.2d 880, 882 (Ct. App. 1989) (because adverse possession statutes are prospective in nature, the limitation period in effect at the time possession is first taken applies). A person claiming adverse possession must show that the disputed property was used for the requisite period of time in an "open, notorious, visible, exclusive, hostile and continuous" manner that would apprise a reasonably diligent landowner and the public that the possessor claimed the land as his or her own. ***Pierz v. Gorski***, 88 Wis.2d 131, 137, 276 N.W.2d 352, 355 (Ct. App. 1979). An adverse claimant may "tack" or add his or her time of possession to that of prior adverse possessors with whom he or she is in privity in order to establish continuous possession for the requisite statutory period. ***Perpignani***, 139 Wis.2d at 724-25, 408 N.W.2d at 13. An enclosure may be either artificial, such as a fence, or natural, such as a line of trees or bushes. ***Illinois Steel Co. v. Bilot***, 109 Wis. 418, 441, 85 N.W. 402, 406 (1901) (following remand). Furthermore, planting trees and maintaining the

[5] A slightly modified version of § 330.09, STATS., 1947, is now located at § 893.25(2), STATS., while the statute of limitations for adverse possession against state political subdivisions has been shortened to twenty years under § 893.29, STATS.

land around them may constitute possession of land by usual improvement. ***Otto v. Cornell***, 119 Wis.2d 4, 8, 349 N.W.2d 703, 706 (Ct. App. 1984).

A true title owner's notorious re-entry can defeat the continuity or exclusivity of an adverse claimant's possession if the re-entry is a substantial and material interruption for the purpose of dispossessing the adverse occupant. ***Otto***, 119 Wis.2d at 7, 349 N.W.2d at 705. However, just as "[a]cts which are consistent with sporadic trespass are insufficient to apprise a reasonably diligent owner of any adverse claim," ***Pierz***, 88 Wis.2d at 137, 276 N.W.2d at 355, a true owner's "casual" re-entry, such as raking leaves or allowing children to play on the land, is insufficient to apprise the adverse claimant that the true owner has reestablished his or her dominion over the land. ***Otto***, 119 Wis.2d at 9, 349 N.W.2d at 706. Under § 893.32, STATS.,

> No entry upon real estate is sufficient or valid as an interruption of adverse possession of the real estate unless an action is commenced against the adverse possessor within one year after the entry and before the applicable adverse possession period of limitation specified in this subchapter has run, or unless the entry in fact terminates the adverse possession and is followed by possession by the person making the entry.[6]

In other words, the re-entry must notify the adverse occupant that he is being disseized. The adverse claimant need not be belligerent to a neighbor who holds true title if the neighbor happens to step across a particular line. ***Otto***, 119 Wis.2d at 9, 349 N.W.2d at 706.

[6] The legislative committee noted that the intent of § 893.32, STATS., was to clarify the most reasonable probable interpretation of § 893.04, STATS., which was formerly located at § 330.04, STATS.

1. Substantially enclosed.

The trial court found that Lots 6 and 7 had been substantially enclosed, by a thick line of lilac bushes and other foliage which had marked a boundary along the eastern edge of Lot 7 and the eastern edge of the disputed area since at least 1948. This finding was undisputed in the testimony, and is not clearly erroneous. The trial court also found that "it was the testimony of Mr. Cygan that a fence had existed along the border between Lot 6 and the Town park prior to Shaw taking title [in 1958]." In actuality, it was Menders and Paul Shaw who testified that a fence had existed between Lot 6 and the park, prior to the Menders taking title in 1971. There was no testimony as to when the fence had first been erected. However, it is unnecessary to further consider this issue because we are persuaded that the trial court's alternate finding that the property had been usually cultivated was properly drawn from the facts of record.

2. Cultivation.

There is ample testimony in the record to support the trial court's finding that the successive owners of Lots 6 and 7 cultivated and maintained the disputed area from 1948 to 1995. Cygan testified that the lawn in front of both Lots 6 and 7 already extended to within a few feet of the water when he bought his property in 1948, and that he and his neighbors, McNichols, the Shaws and the Menders, all maintained the lawn in the disputed area by sowing additional grass seed, mowing the grass, removing brush, and planting and trimming trees throughout the entire time that he owned his property. In addition, Cygan testified that the Shaws had built the house that extended into the disputed area and leveled the land in front of their house all the way to the water's edge, after they purchased Lot 6 in 1958. Menders testified that she and her husband had installed

a septic system and flower beds in the disputed area after they took possession of Lot 6 in 1971. All of the successive owners made exclusive use of the piers along the river in front of their property. Such actions represented the usual and customary use for such land, and were sufficiently "open, notorious, visible, exclusive, hostile and continuous" to apprise a reasonable title holder of an adverse claim of possession.

3. Re-entry.

The Town claimed it took action sufficient to disrupt the continuity or exclusivity of the lot owners' possession of the disputed land. However, the Town admitted it did nothing to maintain the lawn, and that it never asked the lot owners to remove their fences, trees, or no trespassing signs. It claimed that it removed diseased elm trees on one occasion and that members of the public made continuous use of the shoreline over the years.

However, the Town's assertions were disputed by other testimony. Cygan and Menders testified that the lot owners themselves had removed the trees. Similarly, there was a wide disparity in the testimony as to the frequency of the public's use of the shoreline for fishing and observing events such as fireworks displays and boat races. Therefore, the trial court's conclusions that the public's use of the land was casual and sporadic and that the Town failed to interrupt the lot owners' possession of the disputed area by a substantial and material re-entry appear to be intertwined with factual findings supported by the lot owners' testimony.

The next problem with the Town's theory is that, even if we were to accept the testimony of its witnesses that members of the public continuously fished along the shoreline in front of Lots 6 and 7 throughout the years in question,

there was little if any evidence that anyone other than the adjoining property owners ever used the land above the water line. This is significant for several reasons. Since adverse possession creates title only in those lands actually possessed, it follows that a title owner's simultaneous possession or re-entry is also effective only as to that land which is actually possessed. Therefore, public use of the shore would do nothing to interrupt adverse possession of the cultivated land above the ordinary high water mark. Moreover, title to all navigable water up to the ordinary high water mark is held in trust for the people of the state and cannot be ceded. *See* § 281.01(18), STATS. (defining waters of the state); § 281.31(2)(d), STATS. (defining navigable waters); ***Illinois Steel Co. v. Bilot***, 109 Wis. 418, 426, 84 N.W. 855, 856 (1901). While Riparian land owners may acquire certain qualified rights sufficient to build piers, etc., they may not impede the public's navigational use of the river. *See* ***id.*** *and* ***Gianoli v. Pfleiderer***, 209 Wis.2d 509, 535, 563 N.W.2d 562, 572 (Ct. App. 1997). Land below the high water mark is therefore not subject to the same adverse possession analysis as land above the high water mark.

The final problem with the Town's position is that none of the activities it claims interrupted the lot owners' adverse possession terminated their use of the disputed area, and the Town did not commence its action to reassert its rights until the forty year period had elapsed. Thus, the Town has failed to comply with the statutory requirements for re-entering property which is being adversely possessed. *See* § 330.04, STATS. (in effect when adverse possession began until 1965); § 893.04, STATS. (in effect from 1965 to 1979); *and* § 893.32, STATS. (in effect from 1979 onward). We therefore cannot conclude that the trial court erred by awarding Meffert title to the disputed strip of land.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.