COURT OF APPEALS
DECISION
DATED AND FILED

August 19, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3201

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

RAYMOND L. HARWICK AND BETTY L. HARWICK,

PLAINTIFFS-RESPONDENTS,

v.

ROBERT F. BLACK AND K. LENORE BLACK,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Lafayette County: WILLIAM D. JOHNSTON, Judge. *Affirmed.*

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

ROGGENSACK, J. Robert and Lenore Black appeal from a judgment quieting title to land owned by Raymond and Betty Harwick. The circuit court concluded that the Blacks failed to establish adverse possession of the disputed property for any twenty-year period prior to the filing of the action, and that even if they had established adverse possession for twenty years under

§ 893.25, STATS., the Harwicks had reacquired title under §§ 893.26 and 893.27, STATS. The circuit court determined that the Blacks did not establish adverse possession because occasional mowing of grass, planting flowers, and occasional parking in the disputed area were not acts sufficient to constitute visible and continuous cultivation or improvement which would have been necessary to notify the Harwicks and their predecessors of an adverse claim. The circuit court's factual findings are not clearly erroneous, and we give some weight to its legal conclusion, which is interwoven with the court's factual findings. Therefore, we affirm.

BACKGROUND

The Blacks and the Harwicks own adjoining lots in Shullsburg, Wisconsin. In 1995, the Harwicks purchased Lots 1 and 3. Lot 1 abuts the southern border of the Blacks' lot, and Lot 3 abuts the western border of the Blacks' lot. The Blacks' garage is built on part of Lot 3. In the fall of 1995, the Harwicks installed a fence blocking the Blacks' access to the land west of the garage, because they planned to use the land as a driveway. The Blacks took down the Harwicks' fence and installed a fence of their own.

In April 1996, the Harwicks brought suit against the Blacks alleging that the Blacks, by their predecessors in interest, had caused a garage to be built upon the Harwicks' property and that the Blacks had allowed their tenants to park vehicles and place other items upon the Harwicks' property. The Harwicks requested that the court determine the property line between their properties, restrain the Blacks' encroachment on the disputed property, and award money damages.

As an affirmative defense and counterclaim, the Blacks alleged that they owned the disputed property by adverse possession. The Harwicks conceded that the Blacks had adversely possessed the land on which the garage was built and the land directly east of the garage; however, the Harwicks argued that the Blacks did not adversely possess the land which extended approximately twelve feet to the west of the garage and approximately fifteen feet to the south of the garage.

At trial, the Harwicks and the Blacks presented evidence concerning their respective claims to the disputed property. The Blacks obtained their land in 1985 when it was gifted to them by Izeta Black, Robert Black's mother. Robert's parents purchased the property in 1955 from the estate of Phoebe Trestrail, whose husband had acquired it in 1914. The Harwicks obtained Lots 1 and 3 from the estate of Leta Thompson in 1995. Leta Thompson acquired the lots from the Rennicks in 1977. Lots 1 and 3 are adjacent to Lot 2, the lot on which the Harwicks' residence is built and which they purchased from Eileen Pluemer in 1990.

At trial, Leone Haffele, a neighbor of the Blacks and the Harwicks, testified that the garage has been at its present location since at least 1923, when she and her family moved in next door. She was then six years old. She lived there until 1937, but visited regularly after she moved her residence to a farm. She testified that the Trestrails mowed the grass in the area west and south of the garage and that they maintained some flowers near the garage, but she was unsure of the precise location. She also testified that she "didn't pay so much attention" to how Izeta Black and her husband mowed or maintained the property after they purchased it in 1955 because she had already moved.

Robert Black testified that he helped his mother maintain the property after his father's death in 1959. He mowed grass ten to twelve feet west of the garage and south of the garage to the flowers which ran along the southern boundary even with a lilac bush. The Blacks' daughter, Pamela Swigart, testified that her grandfather sometimes parked a car to the west of the garage in the late-1950s. She also testified that her grandmother maintained a vegetable garden southwest of the garage during the mid-1970s. In 1977, a surveyor set iron pins at the corners of the disputed area, marking the area of encroachment to identify a potential land dispute.

The Blacks' son, Timothy, lived on the property from 1983 to 1984, and then the property was rented to Deb Patrow. Timothy mowed the grass to the west and south of the garage and parked his vehicle on the west side of the garage. Deb Patrow testified that during the twelve years she lived in the Blacks' house, she mowed the lawn in the disputed area, had a garden south of the garage and parked a camper to the west of the garage.

Eileen Pluemer lived in the residence on Lot 2 from 1979 to 1990. Her testimony conflicted with some of the testimony offered by the Blacks. She testified that Leta Thompson (Harwicks' predecessor in interest) had school kids mow the area around the garage. Pluemer testified that with Leta Thompson's permission, she occasionally drove through the area west of the garage to get to her house and that the Blacks occasionally parked a vehicle or boat on the side of the garage, but otherwise did not occupy the area around the garage.

The Harwicks' son, Kevin, testified that starting in 1992, he cut the grass for Leta Thompson on Lots 1 and 3, including the disputed land west and south of the garage. Since 1990, he and his friends played football, baseball and

softball on Lot 3, using the garage as a backstop. Betty Harwick testified that Patrow parked a camper to the west of the garage only occasionally since 1990.

The circuit court concluded that the Blacks failed to prove facts sufficient to establish adverse possession of the land west and south of the garage for the twenty-year period immediately prior to the action. The Blacks appealed. We reversed the judgment and remanded with directions that the circuit court determine whether the Blacks, or their predecessors in title, adversely possessed the disputed property for *any* twenty-year period prior to the filing of the action. On remand, the circuit court concluded that the Blacks failed to establish adverse possession for any twenty-year period, and that even if they had established adverse possession for twenty years under § 893.25, STATS., the Harwicks had reacquired title under §§ 893.26 and 893.27, STATS. This appeal followed.

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. *See* ***Perpignani v. Vonasek***, 139 Wis.2d 695, 728, 408 N.W.2d 1, 14 (1987). We will not upset the circuit court's findings of fact unless they are clearly erroneous. *See* § 805.17(2), STATS.; *see also* ***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 circuit court. *See* ***Johnson v. Merta***, 95 Wis.2d 141, 151, 289 N.W.2d 813, 818 (1980); *see also* ***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 circuit court's conclusion of law, we

will give some weight to a legal conclusion that is intertwined with the factual findings in support of that conclusion. *See* ***Wassenaar v. Panos***, 111 Wis.2d 518, 525, 331 N.W.2d 357, 361 (1983).

Adverse Possession.

Under § 893.25, STATS., an action to quiet title in real estate is barred by uninterrupted adverse possession of twenty years duration. Adverse possession requires actual possession of the land and either protecting it by substantial enclosure or cultivation or improvement in the usual manner of an owner. *See* Section 893.25(2). 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. *See* ***Pierz v. Gorski***, 88 Wis.2d 131, 137, 276 N.W.2d 352, 355 (Ct. App. 1979). The sole test of whether adverse possession has been achieved is the "physical character of the possession." ***Allie v. Russo***, 88 Wis.2d 334, 343, 276 N.W.2d 730, 735 (1979).

Adverse possession for any twenty year period is sufficient to establish title in the adverse possessor. *See* ***Harwick v. Black***, 217 Wis.2d 691, 701, 580 N.W.2d 354, 358 (Ct. App. 1998). In addition, 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. *See* ***Perpignani***, 139 Wis.2d at 724-25, 408 N.W.2d at 13. However, 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. *See* ***Otto v. Cornell***, 119 Wis.2d 4, 7, 349 N.W.2d 703, 705 (Ct. App. 1984).

The Harwicks argue that even if the Blacks established adverse possession of the disputed property under § 893.25, STATS., the Harwicks and their predecessors in interest reacquired title by adverse possession founded on a recorded written instrument and the payment of taxes. *See* §§ 893.26 and 893.27, STATS. Before determining whether the Harwicks dispossessed the Blacks by substantial and material re-entry, we must determine whether the Blacks and their predecessors adversely possessed the disputed property by substantially enclosing or usually cultivating or improving it for the requisite period of time. Because our review of the record reveals no evidence of any continuing, substantial enclosure, either artificial, such as a fence, or natural, such as a row of trees,[1] *see* ***Illinois Steel Co. v. Bilot***, 109 Wis. 418, 441, 85 N.W. 402, 406 (1901), until 1995 when Robert Black tore down the Harwicks' fence and installed a fence of his own, the adverse possession, if any, must arise because the land has been "usually cultivated or improved."

Property which is usually cultivated or improved has been put to the exclusive use of the occupant as the true owner might use such land in the usual course of events. *See* ***Burkhardt v. Smith***, 17 Wis.2d 132, 138, 115 N.W.2d 540, 544 (1962). While "[a]dverse possession without inclosure need not be characterized by a physical, constant, visible occupancy or improved by improvements of every square foot of the land," the possession must be

[1] Although Pamela Swigart testified that there was a fence on the south side of the garage, her testimony did not establish exactly where the fence was located, how long it was there, and whether the Blacks or their predecessors ever maintained it as a boundary for the disputed property.

sufficiently visible and regular to give notice of exclusion to the true owner. ***Id.*** at 137-38, 115 N.W.2d at 543-44. Accordingly, acts which are consistent with sporadic trespass are insufficient to apprise a reasonably diligent owner of any adverse claim. *See* ***Pierz***, 88 Wis.2d at 137, 276 N.W.2d at 355. However, planting trees and mowing the lawn may establish adverse possession in some circumstances. *See* ***Otto***, 119 Wis.2d at 8, 349 N.W.2d at 706 (planting trees along lot boundary and maintaining land around trees constituted possession of land by usual improvement). Furthermore, considering the type and character of the area, what might be required for adverse possession of rural, seasonal or lake property is not necessarily applicable to a city lot. *See* ***Burkhardt***, 17 Wis.2d at 139, 115 N.W.2d at 544 (removing brush and putting in lawn sufficient to constitute adverse possession of lake cottage property); *see also* ***Pierz***, 88 Wis.2d at 137, 276 N.W.2d at 355 (improvements sufficient to apprise true owners of adverse possession of wild lands must substantially change the character of the land).

The Blacks and their predecessors allegedly mowed the lawn, planted flowers, and occasionally parked vehicles in the disputed area. Occasionally parking on the disputed property was merely sporadic trespass, not a continuous activity, and was, therefore, insufficient to apprise the Harwicks and their predecessors of an adverse claim. In regard to maintaining the lawn and flowers, the testimony conflicted in regard to how long a period of time this occurred and over what area it occurred. The circuit court found it was not sufficiently visible cultivation or improvement to give notice of exclusion to the Harwicks and their predecessors. These findings are not clearly erroneous. Therefore, we conclude that the circuit court did not err when it determined that

the Blacks and their predecessors did not substantially enclose or usually cultivate or improve the area south and west of the garage for the requisite time period.[2]

CONCLUSION

The circuit court properly concluded that the Blacks did not establish adverse possession because occasional mowing of grass, planting flowers and occasional parking in the disputed area were not acts sufficient to constitute visible cultivation or improvement which would have been necessary to give notice of exclusion to the Harwicks and their predecessors. Accordingly, we affirm.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[2] Because we conclude, as the circuit court did, that the Blacks did not adversely possess the disputed area for any twenty-year period, we do not reach the question of whether the Harwicks dispossessed the Blacks under §§ 893.26 and 893.27, STATS.