

**COURT OF APPEALS
DECISION
DATED AND FILED**

NOTICE

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DECEMBER 22, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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. 98-3287

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

RAYMOND M. GREGOR, RICHARD B. MORIARTY
AND FRANCIS S. HOCHREIN,

PLAINTIFFS-RESPONDENTS,

v.

ROBERT PAUGELS, JR., INDIVIDUALLY, MARY PAUGELS,
INDIVIDUALLY, AND PAUGELS TRUCKING, INC.,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Green Lake County: RICHARD O. WRIGHT, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Robert Paugels, Jr., Mary Paugels and Paugels Trucking, Inc. (hereinafter Paugels) appeal from a judgment granting adverse

possession of a strip of their property to Raymond M. Gregor, Richard B. Moriarty and Francis S. Hochrein. We affirm.

¶2 In 1981, partners Gregor, Moriarty and Hochrein (hereinafter Gregor) purchased property to the north of and adjacent to Paugels's property. During the term of Gregor's ownership, access to Gregor's property was gained over two roads that pass over property which a 1997 survey confirmed was owned by Paugels. Upon learning of the survey results, Paugels blocked access to the roads. Gregor then sued Paugels to obtain use of the roads by adverse possession under § 893.25, STATS., claiming that use of the roads by Gregor's predecessors predated Gregor's 1981 purchase, thereby satisfying the twenty-year period of use required to support an adverse possession claim. The circuit court agreed.

¶3 Section 893.25, STATS., provides:

(1) An action for the recovery or the possession of real estate and a defense or counterclaim based on title to real estate are barred by uninterrupted adverse possession of 20 years, except as provided by s. 893.14 and 893.29. A person who, in connection with his or her predecessors in interest, is in uninterrupted adverse possession of real estate for 20 years, except as provided by s. 893.29, may commence an action to establish title under ch. 841.

(2) Real estate is possessed adversely under this section:

(a) Only if the person possessing it, in connection with his or her predecessors in interest, is in actual continued occupation under claim of title, exclusive of any other right; and

(b) Only to the extent that it is actually occupied and:

1. Protected by a substantial enclosure; or
2. Usually cultivated or improved.

¶4 Gregor had the burden of proof to 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.” *Harwick v. Black*, 217 Wis.2d 691, 699, 580 N.W.2d 354, 357 (Ct. App. 1998). The twenty-year possession period need not have accrued immediately prior to the commencement of Gregor’s adverse possession action. *See id.* at 699, 580 N.W.2d at 358. The twenty-year possession requirement can be satisfied by evidence that Gregor’s predecessors in interest, including tenants on the property, made adverse use of the roads that pass over property to which Paugels held record title. *See id.* at 701, 580 N.W.2d at 358; *see also Lindl v. Ozanne*, 85 Wis.2d 424, 428, 270 N.W.2d 249, 251 (Ct. App. 1978) (tenant’s period of possession accrues to the landlord for adverse possession purposes); *Perpignani v. Vonasek*, 139 Wis.2d 695, 724-25, 408 N.W.2d 1, 13 (1987) (adverse claimant may tack time of possession onto that of prior adverse possession to establish continuous possession for requisite statutory period).

¶5 “[W]hether the adverse claimant’s possession of the disputed land was open, continuous, notorious, hostile, and exclusive are questions of fact.” *Harwick*, 217 Wis.2d at 703, 580 N.W.2d at 359. We will uphold the circuit court’s findings of fact if they are not clearly erroneous. *See* § 805.17(2), STATS.

¶6 We turn to the evidence adduced at trial to determine whether it is sufficient to support the circuit court’s findings. Gregor’s property contained a residence until 1990, when the residence was destroyed by fire. Part of the property is farmed. The balance of the property consists of a large gravel pit that was the site of a Kramp Construction mining operation until the 1950s. Thereafter, persons entered the property to remove gravel and sand from the pit. There is an occupation line between the Paugels and Gregor properties. The occupation line is distinctive by virtue of the difference in elevation, the tree line, the remnants of a fence that existed in the 1940s and 1950s along the tree line, and

the fact that Paugels's farming operations never crossed the occupation line. Gregor and several local residents testified that they considered the occupation line to be the boundary between the Gregor and Paugels properties. The tax assessor has also used this line as a boundary line.

¶7 Gregor testified that use of the roads has been continuous and open for more than twenty years, citing use by Kramp Construction since the 1940s to access the gravel pit and by Kramp and others since 1952 to remove sand from the property. The roads were also used by persons residing in the house and working the farming area of the Gregor property. Joseph Keller, a lifelong area resident, testified that the road existed when he lived in the immediate area (1908 to 1951) and that there had been regular use of the gravel pit through the years. There were tenants in the Gregor rental residence almost continuously until it burned in 1990. A former resident of the rental residence testified that she used the roads from her childhood until her 1952 marriage. Another community member testified that the roads existed since 1940 and that he used the roads daily.

¶8 A longtime community resident and current owner of the adjacent property, William Schubert, testified that the roads have been present since the 1940s, that he and others used the roads to access the Gregor property, including the gravel pit area, and that no former owner of the Paugels property had ever asserted a claim to the roads. Schubert has been farming part of Gregor's land and uses the roads for access. Since Gregor purchased the property in 1981, gravel has been hauled out of the pit on a regular basis by local contractors. Gregor and a contractor who hauled gravel out of the pit maintained the roads and plowed them as necessary. Prior to 1997, Paugels never complained about the use of the roads except when one of the contractor's drivers crossed over the occupation line.

After that incident, Paugels blocked the roads and claimed users of the roads were trespassing.

¶9 In light of this evidence, the court made the following findings. Access to Gregor's property was obtained over two roads that a 1997 survey revealed passed over part of Paugels's property. One of the roads serviced a residence on Gregor's property from approximately 1943 through 1990 when the residence was destroyed by fire. Thereafter the road was used to gain access to a crop field. A second road crossed Paugels's property, branched off from the first road and gave access to a gravel pit located on Gregor's property. Use of the gravel pit road began in the early 1980s and became more regular and frequent from 1990 to 1997.

¶10 The court found that the testimony from past and present community members and neighbors established that the roads were used by Gregor and Gregor's predecessors from 1943 to 1997. The testimony also established a clear and long-standing line of demarcation, or occupation line, between the Gregor and Paugels properties. The existence of the occupation line was bolstered by the fact that Paugels cultivated his property up to the line, by the presence of a tree line along the occupation line and by the existence of a difference in elevation between the Gregor and Paugels properties at the occupation line.

¶11 Based on these findings of fact, which are supported in the record and therefore are not clearly erroneous, the court concluded that Gregor met his burden of proving adverse possession under § 893.25, STATS., that the occupation line dividing the Gregor and Paugels properties had been in existence for more than twenty continuous years (from 1943 to 1997) and that Gregor and his predecessors had adversely used the roads which passed over part of Paugels's

property. The court concluded that possession by Gregor and his predecessors of Paugels's property to the occupation line and use of the roads on Paugels's property had been open and notorious, were notice to all that Gregor intended to possess and have exclusive use of the property, and were hostile to Paugels (i.e., not consensual). We conclude that the court applied the proper law to the facts.

¶12 Paugels argues that there was insufficient evidence that the roads were “protected by a substantial enclosure” or “usually cultivated or improved” as required by § 893.25, STATS. Cases interpreting these statutory provisions do not treat this language as literally as Paugels. Rather, all that is required is that the use by the adverse claimant be that to which the property would be put by the true owner. See *Burkhardt v. Smith*, 17 Wis.2d 132, 138, 115 N.W.2d 2d 540, 544 (1962). The use and maintenance of the roads by Gregor and his predecessors are sufficient to satisfy this requirement.

By the Court.—Judgment affirmed.

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

