COURT OF APPEALS
DECISION
DATED AND FILED

November 10, 2015

Diane M. Fremgen
Clerk of Court of Appeals

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* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP2893 **Cir. Ct. No. 2010CV2401**

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

RONALD J. RUDNICK,

PLAINTIFF-RESPONDENT,

V.

GARY B. RUDNICK AND LAURIE J. RUDNICK,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Outagamie County: MITCHELL J. METROPULOS, Judge. *Reversed and cause remanded for further proceedings*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Gary and Laurie Rudnick appeal an order granting an adverse possession claim in favor of Ronald Rudnick following a jury verdict. We conclude the evidence presented at trial failed to meet the legal standards for

adverse possession as a matter of law, and therefore reverse and remand for further proceedings.

BACKGROUND

¶2 Gary and Ronald are brothers. In approximately 1976, Ronald purchased their parents' farm house and one acre of land. Gary entered into a rental agreement with their parents for the surrounding family farm property and subsequently purchased the farm property. Gary's property surrounded Ronald's parcel on three sides, with a county road abutting on the remaining side. Farm buildings existed on Gary's property, including a barn and other farm structures.

¶3 In 1996, Ronald razed the barn after obtaining Gary's permission. Ronald constructed a 24' x 24' pole shed for two horses at roughly that same location, also with Gary's permission. A water well located on Gary's property serviced the farm house, as well as the barn until it was razed.

¶4 In 2010, Ronald blacktopped an existing driveway hugging the brothers' property lines at the south of Ronald's land, which driveway Gary also used to access the farm fields. Ronald installed four inches of blacktop instead of the customary two inches so Gary could drive his farm equipment on it. Ronald asked Gary to refrain from utilizing the blacktop driveway for a large manure tanker because of a concern the vehicle's weight would damage the driveway. Gary refused, and the brothers thereafter had a falling out. Gary eventually built

his own gravel driveway adjacent to the blacktop driveway.[1] Additional facts will be addressed further in this opinion.

¶5 On November 29, 2010, Ronald commenced an action against Gary and Laurie for adverse possession and unjust enrichment. Ronald asserted a right to disputed property constituting approximately one-half acre. Gary counter-claimed for unjust enrichment.

¶6 Following the conclusion of the evidentiary portion of the one-day trial, Gary's attorney, during the jury instruction conference, requested dismissal of the adverse possession claim. The court denied the request. The jury was given the pattern jury instruction for adverse possession not founded on a written instrument and returned a verdict granting Ronald adverse possession to the disputed property. Gary moved for judgment notwithstanding the verdict, which was denied. Gary subsequently filed a Motion to Change Answer and Verdict. The court denied that motion as well, and Gary now appeals.

DISCUSSION

¶7 WISCONSIN STAT. § 893.25[2] codifies the common law elements for adverse possession, which in this case require "hostile, open and notorious, exclusive and continuous" physical possession for a period of twenty years.[3] *See*

[1] In 2012, Ronald commissioned a survey that revealed one and one-half feet of Ronald's original driveway was located on Gary's property.

[2] References to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[3] This differs from the establishment of a prescriptive easement. *See, e.g.*, ***Mushel v. Town of Molitor***, 123 Wis. 2d 136, 144-45, 365 N.W.2d 622 (Ct. App. 1985).

Steuck Living Trust v. Easley, 2010 WI App 74, ¶14, 325 Wis. 2d 455, 785 N.W.2d 631. Further, only the premises actually occupied may be adversely possessed, and the land must either be "[p]rotected by a substantial enclosure," or "[u]sually cultivated or improved" in the usual manner of an owner for the requisite period. *See* WIS. STAT. §§ 893.25(2)(b)1. and 2.

¶8 The party seeking to claim title by adverse possession bears the burden of proving the elements by clear and convincing evidence. ***Steuck***, 325 Wis. 2d 455, ¶15. The evidence must be strictly construed against the claimant and all reasonable presumptions must be made in favor of the true owner. ***Id.*** The fact of possession and its real adverse character must be sufficiently open and obvious as to "apprise the true owner … in the exercise of reasonable diligence of the intention to usurp the possession of that which in law is his [or her] own." ***Id.***, ¶14 (citation omitted). Adverse possession may not be established by inference. *See* ***Zeisler Corp. v. Page***, 24 Wis. 2d 190, 198, 128 N.W.2d 414 (1964). Moreover, permissive use defeats a claim for adverse possession. *See* ***Ludke v. Egan***, 87 Wis. 2d 221, 230, 274 N.W.2d 641 (1979).

¶9 Adverse possession issues are usually mixed questions of fact and law. *See* ***Perpignani v. Vonasek***, 139 Wis. 2d 695, 728, 408 N.W.2d 1 (1987). In reviewing a jury verdict, this court will view the evidence in the light most favorable to the verdict and will affirm unless the jury, properly applying the law, could not have reasonably concluded that the adverse possessor met their burden of proof. *See* ***Pierz v. Gorski***, 88 Wis. 2d 131, 136, 276 N.W.2d 352 (Ct. App. 1979). We review de novo whether the legal standards for adverse possession are fulfilled. *See* ***Steuck***, 325 Wis. 2d 455, ¶11.

¶10 Here, resolving any conflicts in the evidence to favor the verdict, we hold the evidence presented at trial was insufficient to meet the legal standards of adverse possession as a matter of law. The totality of the trial record does not establish by clear and convincing evidence that Ronald possessed any or all of the disputed property for the requisite twenty-year period. Any possession was also pursuant to permission until 2010 and thus not hostile. In addition, Ronald has plainly failed to establish exclusive and continuous use. In short, nothing apprised Gary that Ronald intended to usurp the possession of any portion of Gary's property and claim it as his own, such that Gary risked losing it through adverse possession.

¶11 Ronald testified he "groomed" the disputed property for forty years, but merely proving he used the property did not fulfill his burden of proof. Only property that is actually occupied is subject to adverse possession. *See* ***Steuck***, 325 Wis. 2d 455, ¶13. The proof must evidence sufficient detail so the court can set new boundaries. *See* ***Bettack v. Conachen***, 235 Wis. 559, 565-66, 294 N.W. 57 (1940).

¶12 Certainly, Ronald did not adversely possess the property upon which the pole shed now sits. Ronald constructed the pole shed after the barn was razed in 1996. Gary asserted control over his property in 2010, before any twenty-year statutory period could have been met. Moreover, Ronald acknowledged that he tore down the barn and replaced it with the pole shed only after seeking and obtaining his brother's permission, as he knew both buildings were located on Gary's property.

¶13 Ronald pastured two horses on two acres of Gary's land, but the description of the two acres is unclear in the record. Moreover, Ronald testified he

maintained the horses on the property only from 1998 to 2010, so again the requisite twenty-year duration was unsatisfied. Furthermore, the use of the pasture was with Gary's permission, so to the extent any portion of the two acres could be assumed to be part of the one-half acre currently in dispute, it was not possessed with hostility.

¶14 Ronald also failed to demonstrate by clear and convincing evidence that he used the water well exclusively for the required time period. In addition to Ronald's house, the well served the barn until it was razed fourteen years before Ronald's lawsuit was commenced. At best, the record shows Ronald testified that Gary had no need for water on Gary's portion of the farm "[s]ince [Gary] purchased the surrounding farmland[.]" Ronald also testified the barn "was already vacant when Gary bought the farm …." However, Gary's land contract was dated January 1993, and his warranty deed was dated in 1999. Therefore, even assuming Ronald's testimony established that Gary did not use the well since he purchased the farm property, the twenty-year requirement was again not satisfied. In addition, Ronald's brief to this court concedes "both parties had agreements with their parents as to the use of the well and driveway."

¶15 It is undisputed Gary used the driveway to access his fields and further testified that he would not have purchased the farm without it. Gary continued to use the driveway even after Ronald installed the blacktop driveway in the fall of 2010, over the exact location of the old gravel driveway. Ronald testified the brothers' dispute began when Ronald refused to allow Gary to enter the driveway with his large manure tanker.

¶16 Notably, Ronald concedes Gary used the disputed area seasonally to reach his fields and to move dirt. However, Ronald insists Gary's "reentry" was

"casual." Ronald relies on ***Frank C. Schilling Co. v. Detry***, 203 Wis. 109, 115, 233 N.W. 635 (1930), in support of this argument. ***Schilling*** has never been cited as precedent, but it is inapposite in any event. The ***Schilling*** court stated that if an owner of land be "disseized thereof by another, so as to start a period of adverse possession in favor of the latter," a casual reentry would not dispossess an adverse claimant. However, the present case did not involve a "disseizing" to start a period of adverse possession. Indeed, Ronald's blacktopping the driveway to twice the normal thickness to accommodate Gary's farm equipment demonstrated the non-exclusive use.

¶17 We also note Ronald provides no citation to the record in support of his assertions regarding casual use, and we will not search the record to support Ronald's argument. *See* ***Haley v. State***, 207 Wis. 2d 193, 198-99, 240 N.W. 829 (1932). But more importantly, it is clear that activities "which are seasonal in character … having regard for the location and adaptability of the land to such use" may satisfy adverse possession. *See* ***Burkhardt v. Smith***, 17 Wis. 2d 132, 139, 115 N.W.2d 540 (1962). We see no reason "reentry" for seasonal farm activities over the course of many years does not similarly defeat a claim for adverse possession.

¶18 Ronald also testified he planted trees, grass, and raspberry plants, but he never testified when these events occurred or how long they continued. The present record cannot support a finding of the requisite "usual cultivation or improvement" by an adverse possessor. *See* WIS. STAT. § 893.25(2)(b). Ronald testified he placed a burn barrel, dog kennel, and compost area in the disputed area, but no testimony established how much of the disputed area this occupied. In addition, nothing established how much area the lawn covered or how long it existed. Ronald described at trial a photograph his wife took "when [the dispute]

was first starting to escalate." Ronald testified "you can see it was lawn forever …." It is unclear from the testimony whether "forever" was referring to time or space. Either way, an imprecise term such as "forever" does not establish by clear and convincing evidence either a definite time period, or a definite expanse of property.

¶19 Much of the testimony at trial centered on the various aggravations the brothers foisted upon each other since 2010. For purposes of proving a claim of adverse possession, this evidence was extraneous and irrelevant. Numerous surveys, photographs, and maps were admitted into evidence, but nothing even arguably established how much of the disputed area was occupied exclusively, continuously, notoriously and adversely for the requisite time period. Such a period of time necessarily needed to exist prior to when Gary clearly reasserted control over his property in 2010.

¶20 Ronald insists he was "not required to show and account for utilizing every square inch of land, in detail, in order to adversely possess it." This argument begs the question, as that was not the failure at issue in Ronald's proof. As regards the requirements of adverse possession, Ronald described an area in dispute and little more. Fundamentally, he did not satisfy his burden of proving the elements by clear and convincing evidence.

¶21 In all, the trial evidence failed to establish the legal standards for adverse possession as a matter of law. Accordingly, we reverse the circuit court's judgment. Because the jury answered the special verdict question regarding adverse possession in the affirmative, it did not reach unjust enrichment, and we remand for further proceedings in that regard.

By the Court.—Order reversed and cause remanded for further proceedings.

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