**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**May 13, 2014**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2013AP2663** **Cir. Ct. No. 2012CV228**

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

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**ERIC P. NORMAN AND KEVIN D. NORMAN,**

**PLAINTIFFS-APPELLANTS,**

**V.**

**THE DECLARATION OF TRUST OF PATRICIA WARNER, PATRICIA WARNER—TRUSTEE,**

**DEFENDANT-RESPONDENT.**

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APPEAL from a judgment of the circuit court for Oneida County: MICHAEL H. BLOOM, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Eric and Kevin Norman appeal a summary judgment dismissing their complaint against the Declaration of Trust of Patricia Warner, Patricia Warner—Trustee (hereinafter, Warner). The Normans argue

there are genuine issues of material fact regarding their adverse possession claim against Warner. The circuit court concluded that, even if all factual disputes were resolved in the Normans' favor, their claim failed as a matter of law. We agree and affirm.

## BACKGROUND

¶2 The Normans and Warner own adjacent, waterfront lots in Oneida County. The Normans' lot is roughly north of Warner's lot, and both lots are bordered on the east by Mercer Lake.

¶3 Warner's lot was purchased by her grandparents sometime in the 1930s or 1940s. In about 1970, they conveyed the property to Warner's parents. Warner obtained title to the property in 2011.

¶4 Beginning at least in the 1950s, the Normans' lot was owned by Roy and Julia Jamison. The Jamisons were the uncle and aunt of Frances Norman, who is the Normans' mother. At some point, the Jamisons transferred the lot to their daughter, Cleo Wall. In 1984, Wall sold the lot to Richard and Ione Ramlow. The Ramlows sold the lot to Gerald Schilz in 1998, and in 2002, Schilz sold the lot to Frances Norman and her husband, William. Title was subsequently conveyed to the Normans in about 2004.

¶5 The Normans assert that, until 2004, they and their predecessors in title believed the southern boundary of the Normans' lot began at an iron stake on the lakeshore and then ran along the northern wall of a boathouse on Warner's property. However, a survey completed in 2004 revealed the lot line actually began at a point on the lakeshore about twenty-four feet north of the iron stake. The parties refer to the triangular-shaped piece of property between the actual lot

line and the line running along the northern wall of the Warner boathouse as the "possession area." The possession area comprises about 1,530 square feet and includes slightly over twenty-four feet of shoreline.

¶6 The Normans filed this lawsuit in 2012, asserting they had obtained title to the possession area by adverse possession, pursuant to either WIS. STAT. § 893.25[1] or the doctrine of acquiescence. The complaint alleged the Normans and their predecessors in title had been "in exclusive possession" of the possession area "under claim of title, exclusive of any other right" for over twenty years. The complaint also alleged actual, continuous occupation of the possession area for over twenty years, evidenced by activities including "cutting the grass, trimming the trees, picking up branches, removing weeds and treating the land as their own by making it a part of their front lakeside yard."

¶7 The parties subsequently submitted cross-motions for summary judgment. In support of their motion, the Normans cited the deposition testimony of their aunt, Rita Collins. Collins testified she visited the Normans' property as a child in the 1950s and 1960s when it was owned by her aunt and uncle, the Jamisons. As a child, Collins understood the property line was "somewhere less than twenty-four inches" away from the boathouse on Warner's property. She testified the Jamisons maintained their property up to the boathouse wall by cutting the weeds with a weed whacker and "picking up stuff[.]"

¶8 Collins further testified she visited the property in the 1970s when Cleo Wall owned it, and Wall maintained the property in the same way as the

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Jamisons. Collins also visited the property after Frances and William Norman purchased it in 2002. She testified Frances and William continued to maintain the property up to the boathouse wall. She further testified the Warner lot had more "native growth" than the Normans' lot, and "if you stood on the line and looked down, you would be able to tell the difference [between the two properties]."

¶9 The Normans also submitted an affidavit of Richard Ramlow, the son of the couple who owned the Normans' property from 1984 until 1998. Ramlow averred his parents maintained their property up to the boathouse wall by cutting the grass, raking pine needles, and picking up branches or sticks. He averred Warner's lot was "much more overgrown with trees, bushes and other vegetation."

¶10 The Normans also cited the deposition testimony of Gerald Schilz, who owned the Normans' property after the Ramlows. Schilz testified the Ramlows told him the south boundary of the property ran "in a line on the side of the boathouse[.]" Schilz maintained the property up to the boathouse wall by mowing the grass, raking pine needles, and picking up branches. Schilz stated the Warner lot was not mowed as often or "taken care of as much" as his property.

¶11 The Normans also relied on the deposition testimony of their father, William Norman. William testified that, when he and his wife purchased the property in 2002, he did not have any specific knowledge about the southern property line, aside from "the way the ground was maintained." He knew Schilz had maintained the property up to the boathouse wall. William continued to maintain the property up to the boathouse wall by mowing the grass, raking pine needles, picking up sticks, and trimming trees.

¶12 William also testified to a conversation he had with Warner's father, Allen Brotton, in September or October 2003, when Warner's parents still owned the Warner lot. William stated he "went over to visit with" Allen and "asked him if he had any idea where the property line was[.]" Allen responded, "I know exactly where it is." Allen then showed William a stake on the lakeshore located "less than four feet off" the boathouse. Allen kicked the stake and told William it marked the boundary line. William testified Warner's brother, Thomas Brotton, was present during this conversation.

¶13 At his deposition, Thomas Brotton gave a similar account of a conversation between his father and William Norman in the fall of 2003. Thomas also testified no one in his family had ever maintained the possession area. In addition, he asserted the Normans and their predecessors in title had consistently raked and mowed their property, but the Warner lot was "natural vegetation" and "hadn't been raked for years."

¶14 The Normans also cited their own deposition testimony in support of their summary judgment motion. The Normans both testified that, after their parents transferred the Mercer Lake lot to them in 2004, they maintained the possession area by mowing the grass, raking pine needles, picking up sticks, and trimming trees. The Normans also testified they snowmobiled across the possession area and may have stacked building materials on it on one occasion.

¶15 Warner presented evidence disputing some of the Normans' assertions. For instance, she submitted her own affidavit, in which she averred that: (1) her father had two trees removed from the possession area in 2004; (2) her family stored boats in the possession area; (3) she regularly used the possession area when taking her canoe in and out of the boathouse; and (4) her

family maintained the possession area by picking up windfall and pine cones, raking, trimming trees, and removing weeds. Warner further averred that, from 1971 until 2011, the side yards of both her lot and the Normans' property were "maintained similarly" in a natural state. In addition, she suggested William Norman and Thomas Brotton could not have had any conversation with her father about the boundary line in September or October 2003 because her parents were in southern Wisconsin during those months. Warner also submitted evidence suggesting that her family's guest cottage, which was no longer extant, had been located in the possession area.

¶16 At a hearing on the parties' summary judgment motions, the circuit court stated there were "oodles of factual disputes[,]" but the dispositive issue was whether there was "a genuine issue of material fact." After hearing argument from both parties, the court granted Warner summary judgment. The court reasoned that, even if all the facts asserted by the Normans were assumed to be true, those facts did not establish the elements of adverse possession, either by acquiescence or under WIS. STAT. § 893.25. The Normans now appeal, arguing the circuit court erred because genuine issues of material fact preclude summary judgment.

## DISCUSSION

¶17 We independently review a grant of summary judgment, using the same methodology as the circuit court. ***Pinter v. American Family Mut. Ins. Co.***, 2000 WI 75, ¶12, 236 Wis. 2d 137, 613 N.W.2d 110. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2). Whether the undisputed

facts fulfill the legal standard for adverse possession under WIS. STAT. § 893.25 is a question of law that we review independently. ***Steuck Living Trust v. Easley***, 2010 WI App 74, ¶11, 325 Wis. 2d 455, 785 N.W.2d 631. "Our standard of review is the same regarding the doctrine of acquiescence." ***Id.***

¶18 As an initial matter, the Normans argue the circuit court failed to apply the correct summary judgment methodology. They contend the court erred because it acknowledged there were "oodles of factual disputes[,]" but it "never ruled on the issue of whether there was a genuine issue of material fact[.]"

¶19 We conclude the circuit court's methodology was proper. The mere existence of factual disputes does not preclude summary judgment, unless the disputed facts are material. ***Kauer v. DOT***, 2010 WI App 139, ¶7, 329 Wis. 2d 713, 793 N.W.2d 99. Here, the circuit court did not explicitly rule that there were no disputes of material fact. However, that ruling is implicit in the court's conclusion that, even accepting the Normans' version of the facts as true, their claims nevertheless failed as a matter of law. Our supreme court has used the same methodology when reviewing summary judgment decisions. *See* ***Hagen v. City of Milwaukee Employes' Ret. Sys. Annuity & Pension Bd.***, 2003 WI 56, ¶11, 262 Wis. 2d 113, 663 N.W.2d 268 (affirming grant of summary judgment despite factual disputes because "[e]ven accepting [the plaintiff's] version of the facts to be true … summary judgment dismissing the case is required as a matter of law"); *see also* ***Andrews Constr., Inc. v. Town of Levis***, 2006 WI App 180, ¶16 n.5, 296 Wis. 2d 89, 722 N.W.2d 389 (same). We therefore reject the Normans' argument that the circuit court erred by failing to apply the proper summary judgment methodology. Moreover, we agree with the circuit court that, even accepting the facts asserted by the Normans as true, those facts did not meet

the legal standards for adverse possession, either by acquiescence or under WIS. STAT. § 893.25.

## I. Adverse possession by acquiescence

¶20 The Normans first assert that genuine issues of material fact exist regarding their claim for adverse possession under the doctrine of acquiescence.

> The doctrine of acquiescence is "a supplement to the older ... rule of adverse possession which held that adverse intent was the first prerequisite of adverse possession.... The harsh result of this rule soon became apparent ... and courts began to hold that land could be acquired by adverse possession ... if the true owner acquiesced in such possession for a period of twenty years." ***Buza v. Wojtalewicz***, 48 Wis. 2d 557, 562-63, 180 N.W.2d 556 (1970). The doctrine thus ameliorates the rule of adverse possession by allowing mutual acquiescence to substitute for adverse intent.

***Chandelle Enters., LLC, v. XLNT Dairy Farm, Inc.***, 2005 WI App 110, ¶8, 282 Wis. 2d 806, 699 N.W.2d 241. The Normans assert the evidence is disputed as to whether the parties and their predecessors in title acquiesced in a boundary line located at or near the north wall of the Warner boathouse. They also argue the circuit court misapplied the doctrine of acquiescence when it held that the doctrine "requires some sort of fence or fence equivalent which has been relied upon by both parties."

¶21 We conclude the circuit court properly granted Warner summary judgment on the Normans' acquiescence claim, albeit for a different reason. *See* ***Mercado v. GE Money Bank***, 2009 WI App 73, ¶2, 318 Wis. 2d 216, 768 N.W.2d 53 (appellate court may affirm on different grounds). Citing ***Chandelle Enterprises***, 282 Wis. 2d 806, ¶16, Warner argues the doctrine of acquiescence is inapplicable when the legal descriptions in the parties' deeds are unambiguous.

Warner contends the legal descriptions in this case are unambiguous, so the doctrine of acquiescence does not apply. The Normans do not respond to this argument, and we therefore deem it conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments deemed conceded). As a result, even accepting the facts asserted by the Normans as true, their acquiescence claim fails as a matter of law because the doctrine of acquiescence is inapplicable.

## II. Adverse possession under WIS. STAT. § 893.25

¶22 The Normans next argue genuine issues of material fact preclude summary judgment on their claim for adverse possession under WIS. STAT. § 893.25. Section 893.25 permits a person to acquire title to real property by showing that he or she adversely possessed the property for an uninterrupted period of twenty years. WIS. STAT. § 893.25(1). To establish adverse possession under § 893.25, a party must show: (1) "actual continued occupation under claim of title, exclusive of any other right;" and (2) that the property was either "[p]rotected by a substantial enclosure" or "[u]sually cultivated or improved." WIS. STAT. § 893.25(2). In other words, the party must show that the 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 (Ct. App. 1979). The party seeking to claim title by adverse possession bears the burden to prove these elements by clear and positive evidence. ***Steuck Living Trust***, 325 Wis. 2d 455, ¶15.

¶23 Here, even if we accept all the facts asserted by the Normans as true, the Normans cannot meet their burden to establish adverse possession under WIS. STAT. § 893.25. Specifically, they cannot establish that the possession area was either protected by a substantial enclosure or usually cultivated or improved for the requisite twenty-year period.

*A. Substantial enclosure*

¶24 "The purpose of the substantial enclosure requirement is to alert a reasonable person to the possibility of a border dispute." ***Steuck Living Trust***, 325 Wis. 2d 455, ¶26. The enclosure may be "artificial in part and natural in part if the circumstances are such as to clearly indicate that the inclosure, partly artificial and partly natural, marks the boundaries of the adverse occupancy." ***Illinois Steel Co. v. Bilot***, 109 Wis. 418, 441, 85 N.W. 402 (1901). The enclosure need not actually prevent others from entering the disputed property, but it must be "of a substantial character in the sense of being appropriate and effective to reasonably fit the premises for some use to which they are adapted." ***Id.*** at 446.

¶25 The Normans argue there is a genuine dispute of material fact regarding whether the possession area was protected by a substantial enclosure. They observe several witnesses testified that the Normans' property was consistently maintained up to the boathouse wall, and there was a clear line between the two properties because Warner's lot was more overgrown. They argue this "obvious demarcation of the property line," in combination with the north wall of the boathouse, is sufficient to constitute a substantial enclosure.

¶26 We disagree. First, the boathouse is on Warner's property and was constructed by Warner's predecessors in title. The Normans do not explain how a structure indisputably constructed by Warner's predecessors in title on their own

property can constitute a substantial enclosure giving Warner and her predecessors in title notice of a possible border dispute. *See* ***Steuck Living Trust***, 325 Wis. 2d 455, ¶¶26, 30 (rejecting assertion that 200-foot drainage ditch constituted a substantial enclosure, in part because there was no evidence the ditch was dug without the titleholder's permission and "nothing in the nature and function of the ditch itself ... would reasonably suggest it was dug by a non-titleholder claiming land on the other side").

¶27 Second, accepting as true the Normans' allegation that the difference in the way the two properties were maintained created a clear line between them, we do not believe this type of line constitutes a substantial enclosure for purposes of WIS. STAT. § 893.25. The Normans do not cite any authority for the proposition that a visible difference in the way two properties are maintained, without more, can constitute a substantial enclosure sufficient to give notice of a border dispute.[2]

[2] In ***Illinois Steel Co. v. Bilot***, 109 Wis. 418, 446, 85 N.W. 402 (1901), our supreme court cited ***Worthley v. Burbanks***, 45 N.E. 779 (1897), for the proposition that "a line marked by cutting away the brush … may be sufficient *under the circumstances* to indicate, as a matter of fact, the boundaries of the adverse claim[.]" (Emphasis added.) However, the circumstances in ***Worthley*** are distinguishable from the circumstances of this case.

In ***Worthley***, 45 N.E. at 780, the claimant asserted adverse possession over a parcel of rural land that was characterized by "barren sand ridges and hills, interspersed with a few sloughs." The evidence showed that one of the claimant's predecessors in title had removed all valuable timber from the property. ***Id.*** A subsequent predecessor in title "caused said land to be surveyed, and chopped and grubbed the brush out along the line thereof all the way around said tract, and caused stakes to be driven at the corners, and some places along the line[.]" ***Id.*** He also "grubbed and cleared" a half-acre parcel on the property and enclosed it with a brush fence. ***Id.*** Later, he planted and harvested cranberries. ***Id.*** The evidence further showed the claimant and her predecessors in title visited the property several times each year and openly claimed to own it. ***Id.*** at 780-81.

(continued)

This court has refused to find a substantial enclosure in a case where the claimant placed several stakes with attached flags along a disputed border. *See* ***Droege v. Daymaker Cranberries, Inc.***, 88 Wis. 2d 140, 145, 276 N.W.2d 356 (Ct. App. 1979). The enclosure asserted here is even less substantial than that in ***Droege***. Thus, even accepting the Normans' version of the facts as true, we conclude the Normans cannot meet their burden to prove the existence of a substantial enclosure.

*B. Usually cultivated or improved*

¶28 The facts asserted by the Normans are also insufficient to establish that the Normans and their predecessors in title usually cultivated or improved the possession area. "'Usually improved' means to put to the exclusive use of the occupant as the true owner might use such land in the usual course of events." ***Burkhardt v. Smith***, 17 Wis. 2d 132, 138, 115 N.W.2d 540 (1962). In other words, "if the cultivation or improvement in relation to the nature of the use in the area indicates the boundaries of the adverse claim and is usual under the circumstances, such use is sufficient and considered actual occupancy under the statute." ***Id.***

¶29 A number of cases illustrate the type of use sufficient to constitute usual cultivation or improvement under WIS. STAT. § 893.25. For instance, in

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The Indiana Supreme Court held that these acts fulfilled the legal standard for adverse possession under Indiana law. ***Id.*** at 781. Notably, the Indiana test did not require the claimant to show the presence of a substantial enclosure. ***Id.*** at 782. Thus, ***Worthley*** did not hold that a line marked by the removal of brush constituted a substantial enclosure. Moreover, ***Worthley*** did not hold that the act of removing brush along a line, without more, was sufficient to establish adverse possession. Instead, ***Worthley*** held that, given the character of the land, the acts done by the claimant and her predecessors in title were sufficient to alert others to their claim of ownership. ***Id.*** at 783.

***Burkhardt***, the defendant built a cottage that extended onto a neighboring lot. ***Id.*** at 135. The defendant also "spaded up the entire [lot] which was covered with weeds, raked it, and seeded it with bluegrass." ***Id.*** He removed dead trees, bramble, wild bushes, and stumps from the lot, and he planted trees in the lot's northeast corner and along its northern boundary. ***Id.*** at 135-36. "He built a fence partly along the lawn on the north and on the east." ***Id.*** at 136. He constructed a terrace, a fireplace, a rock garden, and a flower bed on the lot, and he installed a clothesline and swings for his children. ***Id.*** For a time, he also had two cabins and a fishing shack on the lot. ***Id.*** Based on this evidence, the supreme court affirmed the circuit court's finding that the defendant usually cultivated and improved the lot. ***Id.*** at 140. The court reasoned the defendant's acts "would indicate to any stranger that [the lot] was usually being used as an owner would use such land in that lake-resort area and thus proclaimed he asserted exclusive ownership." ***Id.*** at 137.

¶30 The supreme court similarly affirmed the circuit court's finding that the defendant's acts constituted usual cultivation or improvement in ***Laabs v. Bolger***, 25 Wis. 2d 17, 23-24, 130 N.W.2d 270 (1964). There, the defendant applied fertilizer and planted grass in a disputed area between two lake lots. ***Id.*** at 18, 20-21. He also planted trees along what he asserted was the boundary line, and he consistently mowed the grass up to that line. ***Id.*** at 21.

¶31 In ***Leciejewski v. Sedlak***, 116 Wis. 2d 629, 636-37, 342 N.W.2d 734 (1984), the defendants built a shed and horse barn on a disputed lakefront property, converted the barn to a cabin, constructed a fence and boathouse, planted trees, and cleared trees and weeds. Again, the supreme court affirmed the circuit court's finding that these acts constituted usual cultivation or improvement. ***Id.***

¶32 In ***O'Kon v. Laude***, 2004 WI App 200, ¶¶16-17, 276 Wis. 2d 666, 688 N.W.2d 747, plaintiffs asserting an adverse possession claim submitted evidence that they mowed grass, planted raspberries, piled debris, and maintained a garden on a disputed strip of property between two city lots. We concluded this evidence was sufficient to raise a genuine issue of material fact as to usual cultivation or improvement, particularly in light of the defendant's failure to submit any contrary evidence. ***Id.***, ¶¶18, 20.

¶33 The activities the Normans undertook in the possession area are less significant than those described in the cases cited above. Accepting the facts asserted by the Normans as true, the evidence shows the Normans and their predecessors in title cut weeds, mowed grass, raked pine needles, removed branches and sticks, and trimmed trees in the possession area. Beginning sometime after 2002, the Normans snowmobiled over the possession area. They may also have stacked building materials in the possession area on one occasion. The Normans did not, however, build any structures, plant any trees or gardens, or consistently store any property in the possession area. Although mowing grass, in combination with other activities, may be evidence of usual cultivation or improvement, *see, e.g.*, ***id.***, ¶¶16-18, the Normans do not cite any case holding that mowing, cutting weeds, and raking, without more, is a sufficient basis for an adverse possession claim.

¶34 We therefore conclude, as a matter of law, that the Normans' use of the possession area did not constitute usual cultivation or improvement under WIS. STAT. § 893.25. The Normans' use was insufficient to raise a red flag of warning that they were asserting a claim for exclusive ownership of the property. *See* ***Burkhardt***, 17 Wis. 2d at 138-39. Accordingly, the circuit court properly

concluded that, even accepting the facts asserted by the Normans as true, Warner was entitled to summary judgment on the Normans' adverse possession claim.

*By the Court.*—Judgment affirmed.

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