

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**September 22, 2026**

Samuel A. Christensen  
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. 2025AP1124**

**Cir. Ct. No. 2023CV93**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

---

**LAWRENCE A. CABAK,**

**PLAINTIFF-APPELLANT,**

**V.**

**ALVINE E. WINCHELL, MARY R. WINCHELL, JOEL A. WINCHELL AND  
NICOLE L. WINCHELL,**

**DEFENDANTS-RESPONDENTS.**

---

APPEAL from an order of the circuit court for Rusk County:  
ANNETTE M. BARNA, Judge. *Affirmed.*

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

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Lawrence Cabak appeals from an order of the circuit court denying his claim for a prescriptive easement over an access road on property owned by Alvine, Mary, Joel, and Nicole Winchell.<sup>1</sup> The court concluded that Cabak had failed to demonstrate adverse use that is hostile and inconsistent with the exercise of the Winchells’ possessive rights because Cabak had permission to use the access road. For the following reasons, we affirm.

### **BACKGROUND**

¶2 In 2002, Alvine and Mary purchased property in Rusk County that abutted a 42-acre parcel owned by Cabak, which he purchased in 1996.<sup>2</sup> In December 2023, Cabak filed this action for a prescriptive easement for ingress and egress over an “access road that traversed” the Winchells’ property in order to access his property. The matter proceeded to a bench trial.

¶3 At trial, Joel, who was around 30 years old at the time his parents purchased the property, testified that the access road was “[m]uddy and rutted” in 2002. Following the purchase, Joel assisted his parents in improving the access road, including by widening the road from “a 12-foot-wide trail to an 18 to 22-foot wide trail,” adding a culvert, and applying gravel. Joel also stated that he and Alvine maintained the access road by laying gravel.

¶4 Joel testified that he had a conversation with Cabak around 2003, during which they discussed whether Cabak could use the access road to reach

---

<sup>1</sup> We refer to Alvine, Mary, Joel, and Nicole, collectively, as the Winchells. We refer to them individually using their first names where appropriate.

<sup>2</sup> In 2016, Alvine and Mary’s children, Joel and Nicole, assumed ownership of their parents’ land relevant to this appeal, but Alvine and Mary retained a life estate in the property.

Cabak's property. Joel testified that Cabak would "always park[]" on the access road approximately 100 feet inside of the gate,

and I talked to him as he was walking in or walking out from hunting one day ... and I had mentioned he had parked on the road there and he had asked me permission<sup>[3]</sup> to park on the driveway and I said that would be absolutely fine. I said just park off to the side so people can get through.

Further, Joel testified that he gave Cabak permission to walk the access road to reach Cabak's property and that Joel had these "same conversations" with other neighbors about using the road.

¶5 According to Joel, he spoke to his parents about granting Cabak permission to park on the access road and access his property on foot:

My father was a little apprehensive about it because he likes his privacy. I assured him that [Cabak] was a nice guy, and it would be fine he was our neighbor, and we were being neighborly, and it would be all right and it wasn't going to disturb myself or my sister who primarily hunted there. And later on, my mother was hunting, and she had come out and she said there's a vehicle parked there on our property. And I said, yes, that's [Cabak]'s and I said I had given him permission to park it there. And I said he's accessing this land from there.

Joel stated that his father consented to Joel granting Cabak permission to use the access road for these purposes. However, Joel testified that Cabak never asked for permission to access his property by vehicle using the access road.

¶6 Alvine testified that he never had a conversation with Cabak concerning Cabak using the access road and that Alvine gave Joel permission to

---

<sup>3</sup> Joel agreed with his counsel on redirect that "maybe the word permission wasn't used, but [Cabak] wanted [Joel] to agree with how [Cabak] got to his property."

manage the property. Alvine stated that he was aware that Cabak drove on the road and that, when Alvine purchased the property, he had “assumed [Cabak] had an easement.” Consistent with his deposition testimony, Alvine testified at trial that he did not discover that Cabak did not have an easement over the access road until this lawsuit arose; however, Alvine also testified at trial that Joel informed him prior to this lawsuit that Joel had given Cabak permission to drive on the access road.

¶7 Mary testified that she had observed Cabak walking on parts of the access road, but she had never seen him drive a vehicle on the road. Mary stated that she had also seen Cabak park his vehicle on the inside of a gate, which sat at the beginning of the access road. Mary explained that, in 2003 or 2004, Joel informed her that he had given Cabak permission to walk the access road and to park his vehicle on the inside of the gate.

¶8 Mary conceded that in her deposition testimony given prior to trial, she responded, “Not really, no,” to the question, “Do you know prior to [2022], did you, your husband, or anyone else have a conversation with Mr. Cabak about the use of this trail to access his property.” Mary also conceded that when asked at her deposition, “[D]o you know if you, or your husband, or anyone else has given [Cabak] permission to use this trail to access his property,” she answered, “I know of ... nobody that’s given [Cabak] permission.” Mary testified that she “probably misunderstood” the first deposition question because she “probably didn’t quite hear you say anybody else.” In addition, Mary stated that she “forgot that [Joel] did give [Cabak] permission to walk” the trail.

¶9 Cabak testified that upon purchasing his property in 1996, he believed that the access road was his “driveway.” Cabak testified that he had

continuously “used” the access road since purchasing the property and that he would reach his property by vehicle using the access road. Furthermore, Cabak testified that he had invited guests to drive their vehicles on the access road to reach his property. For example, Cabak recalled that he had his property logged in 2005 and that the loggers accessed his property via the access road. Cabak additionally had a farmer cultivate land on his property beginning in around 2013, and the farmer would use the access road to reach the land. Cabak testified that he had a conversation with Joel about parking by the gate, but he never asked Joel for permission to park there. In fact, Cabak testified that prior to 2023, he had never “asked anyone for permission to use” the access road. Furthermore, Cabak recalled that Alvine “added some gravel” to the access road at some point. While Cabak offered to assist with the project, he did not pay for the project, and Alvine declined his offer to help lay the gravel.

¶10 Cabak further testified that he discovered in November 2023 that he did not have legal access to his property while he was planning to place a cabin on the property. After this discovery, Cabak asked Alvine and Mary if he could use the access road, but they declined to grant him permission. Cabak stated that the sole means of accessing his property from a legal highway is via the access road.

¶11 Following written closing arguments from the parties, the circuit court issued an oral decision denying Cabak’s claim for a prescriptive easement. The court found that Cabak’s use of the access road was not adverse and hostile because the Winchells had granted him permission to use the road.

¶12 The circuit court noted that Cabak had conceded in his closing argument that “Joel gave permission to park on the Winchell property during the hunting season.” The court stated that Cabak was arguing that the Winchells

failed to “provide enough evidence to show any other permission given.” Thus, according to the court, Cabak was essentially arguing that he had established adverse and hostile use because he went beyond the permission granted by the Winchells. The court stated that Cabak’s argument was unsupported by the law. Moreover, the court found incredible Cabak’s testimony that he believed the access road was his driveway because the Winchells improved the road without Cabak’s intervention. The court concluded that if Cabak truly believed that the access road was his driveway, “there certainly should have been a conversation regarding why someone would go to such great expense by improving and maintaining” Cabak’s driveway for him.

¶13 As to the purported inconsistencies between Alvine’s and Mary’s trial testimony and their respective deposition testimony, the circuit court stated that the “wording of the questions and the context of their meaning at [the] depositions did not necessarily show contradiction particularly since the depo[sitions] showed misunderstandings in the way the questions were asked and what the wording meant.” Particularly regarding the testimony surrounding “whether or not the Winchells thought there was an easement,” the court stated that it did not believe that “the depositions are clear about the understanding of where the easement would have been at one time.”<sup>4</sup>

¶14 The circuit court later entered a written order encompassing its oral ruling. Cabak now appeals.

---

<sup>4</sup> In addition to denying Cabak’s claim for a prescriptive easement, the circuit court also found that Cabak had trespassed on the Winchells’ property on one specific occasion by driving his ATV to their cabin. Therefore, the court granted the Winchells’ counterclaim for trespass as it related to that incident, and it ordered Cabak to pay \$263.50 in damages. The court denied the Winchells’ remaining counterclaims.

## DISCUSSION

¶15 The standard of review that we apply to a circuit court’s findings of fact following a bench trial is “highly deferential.” *Royster-Clark, Inc. v. Olsen’s Mill, Inc.*, 2006 WI 46, ¶11, 290 Wis. 2d 264, 714 N.W.2d 530. A circuit court’s findings of fact shall not be set aside unless they are clearly erroneous. WIS. STAT. § 805.17(2) (2023-24).<sup>5</sup> “Under the clearly erroneous standard, ‘even though the evidence would permit a contrary finding, findings of fact will be affirmed on appeal as long as the evidence would permit a reasonable person to make the same finding.’” *Royster-Clark, Inc.*, 290 Wis. 2d 264, ¶12 (citation omitted). “Moreover, we search the record not for evidence opposing the circuit court’s decision, but for evidence supporting it.” *Id.*

¶16 Additionally, “due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” WIS. STAT. § 805.17(2). This court will “not second-guess the trier of fact in its credibility determinations,” *Royster-Clark, Inc.*, 290 Wis. 2d 264, ¶26, and “where there is conflicting testimony, the trial judge is the ultimate arbiter of the credibility of the witnesses,” *Noll v. Dimiceli’s, Inc.*, 115 Wis. 2d 641, 644, 340 N.W.2d 575 (Ct. App. 1983) (citation omitted). We review conclusions of law independently. *Royster-Clark, Inc.*, 290 Wis. 2d 264, ¶13.

¶17 A prescriptive easement requires the following elements: (1) adverse use that is hostile and inconsistent with the exercise of the titleholder’s possessive rights; (2) which is visible, open, and notorious; (3) under an open claim of right;

---

<sup>5</sup> All references to the Wisconsin Statutes are to the 2023-24 version.

(4) and is continuous and uninterrupted for 20 years. **Ludke v. Egan**, 87 Wis. 2d 221, 230, 274 N.W.2d 641 (1979); *see also* WIS. STAT. § 893.28(1). “To establish a prescriptive easement the evidence must be positive and every reasonable presumption must be made in favor of the owner of the estate.” **Ludke**, 87 Wis. 2d at 232.

¶18 This appeal concerns the first element necessary to establish a prescriptive easement. “Generally, unexplained use of an easement over enclosed, improved or occupied lands for 20 years is presumed to be adverse.”<sup>6</sup> **County of Langlade v. Kaster**, 202 Wis. 2d 448, 454, 550 N.W.2d 722 (Ct. App. 1996) (citation omitted). “However, the presumption may be rebutted by proof that the use was under license, indulgence or special contract inconsistent with a claim of right.” **Ludke**, 87 Wis. 2d at 231. “Hostile intent does not exist if the use is pursuant to the permission of the true owner.” **County of Langlade**, 202 Wis. 2d at 457.

¶19 Cabak contends that the circuit court erroneously found that he had permission to use the access road. According to Cabak, the evidence from the trial demonstrates that “at most, permission was given for Cabak to park his vehicle on” the access road “by the gate, but no testimony was provided that permission

---

<sup>6</sup> The parties appear to agree that the circuit court correctly determined that the access road was not “unenclosed,” and, therefore, the presumption of permissive use did not apply. *See* WIS. STAT. § 893.28(3) (stating that “[t]he mere use of a way over unenclosed land is presumed to be permissive and not adverse”). Therefore, we accept the parties’ apparent agreement that the presumption of permissive use does not apply without further discussion.

In addition, the Winchells do not dispute Cabak’s assertion that he used the access road, which constituted improved or occupied land, for at least 20 years. *See County of Langlade v. Kaster*, 202 Wis. 2d 448, 454, 550 N.W.2d 722 (Ct. App. 1996). Therefore, we assume without deciding that the presumption of adverse use applies here.

was given regarding any use of” the road. He further argues that even if we conclude that the circuit court’s finding that he “received permission to park” on the access road was not clearly erroneous, his “decades-long, unqualified use of the Access Road demonstrates adverse use under Wisconsin law.”

¶20 We conclude that the evidence presented at the bench trial supports the circuit court’s findings of fact, including that Joel gave Cabak permission to park on the access road and to use the road to access his property.<sup>7</sup> To begin, Cabak erroneously states that Joel testified that “he never gave Cabak permission to walk ... down the Access Road.” Contrary to Cabak’s assertion, Joel testified that after the Winchells improved the access road, Cabak began walking to his property using the road. The Winchells’ counsel then asked whether Cabak had Joel’s “permission to do that,” to which Joel responded, “Yes.”

¶21 Moreover, Joel testified that he later told Alvine and Mary that he had given Cabak permission to park near the gate. While Joel later clarified that the word “permission” may not have been used during his 2003 conversation with Cabak, Joel agreed with counsel that Cabak was seeking for Joel “to agree with how he got to his property.”<sup>8</sup> Joel’s testimony was corroborated by Mary, who

---

<sup>7</sup> Cabak does not contend that Joel did not have the authority to grant Cabak permission to use the access road. Nor does Cabak appear to renew his argument from the circuit court that any permission Joel granted to Cabak to use the access road was limited to the hunting season. To the extent Cabak intended to renew that argument, we deem it undeveloped and do not address it further. See *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

<sup>8</sup> We note that Cabak cites no authority for the proposition that the word “permission” must be used by a true owner to avoid adverse use or hostile intent. Conversely, the Winchells cite *State v. A.G.*, 2023 WI 61, ¶29, 408 Wis. 2d 413, 992 N.W.2d 75, to support their argument that use of the word “permission” was not needed because Wisconsin courts strongly disfavor “magic words,” meaning “a party’s request to prioritize form over substance.” Cabak does not respond to this argument, and we deem it conceded. See *Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (noting that unrefuted arguments may be deemed conceded).

stated that Joel “gave [Cabak] permission to park his vehicle by the gate, the main gate. And then ... my son gave him permission to walk it.” In addition, Alvine testified that Joel informed him that Joel had given Cabak permission to drive on the access road.

¶22 The Winchells’ testimony, which the circuit court credited, contradicts Cabak’s suggestion that the Winchells were being friendly or neighborly with Cabak rather than granting him permission to use the access road. See *Shepard v. Gilbert*, 212 Wis. 1, 11, 249 N.W. 54 (1933) (holding that “neither friendship nor close social relations of the owner and initial user can be effective to rebut the presumption [of adverse use]” and that “[s]uch evidence may indicate acquiescence, but it plainly falls short of proving a permission”).

¶23 To support his position that he was never granted permission to use the access road other than for parking, Cabak relies almost exclusively on his testimony from the bench trial. These arguments ignore our standard of review. The Winchells’ testimony was in direct conflict with Cabak’s testimony regarding his conversation with Joel, and we will not reweigh the circuit court’s credibility determinations. See *Noll*, 115 Wis. 2d at 644. The court’s findings were also logical. Cabak’s position that he was given permission only to park inside of the gate on the access road but that he was not given permission to use the road to access his property makes little sense. Cabak claimed that the access road was the only way to access his property from a legal highway. If Cabak needed permission to enter the gate and park on the access road, the court could reasonably infer that Cabak needed permission to reach his property using the road.

¶24 Even so, Cabak argues that Alvine’s and Mary’s testimony was, as a matter of law, incredible, and he argues that the “circuit court’s credibility findings” were “internally inconsistent.” (Formatting altered.) Cabak asserts that Alvine and Mary testified at their respective depositions that no individual ever granted Cabak permission to use the access road, but then, when they testified at trial, each stated that Joel had granted Cabak permission to use the road.

¶25 Here, the circuit court, acting as the trier of fact, acknowledged the potential discrepancies, finding that the “wording of the questions and the context of their meaning at [the] depositions did not necessarily show contradiction particularly since the depo[sitions] showed misunderstandings in the way the questions were asked and what the wording meant.” This court cannot say that “no finder of fact could believe” Alvine’s and Mary’s bench trial testimony under these circumstances. See **Ruiz v. State**, 75 Wis. 2d 230, 235, 249 N.W.2d 277 (1977) (citation omitted). Inconsistencies in a witness’s testimony do not render his or her testimony incredible as a matter of law. **Id.** at 232 (“Even though there be glaring discrepancies in the testimony of a witness at trial, or between his trial testimony and his previous statements, that fact in itself does not result in concluding as a matter of law that the witness is wholly incredible.”). Rather, “[i]nconsistencies and contradictions in a witness’[s] testimony” are for the trier of fact “to consider in judging credibility[,] and the relative credibility of the witnesses is a decision” for the trier of fact. **Kohlhoff v. State**, 85 Wis. 2d 148, 154, 270 N.W.2d 63 (1978). Cabak has failed to demonstrate that the court’s interpretation of the testimony was clearly erroneous or that Alvine and Mary were incredible as a matter of law.

¶26 Similarly, we reject Cabak’s argument that his “unequivocal conduct” of driving the access road to reach his property and “inviting others” to

do the same “is the exact hostile behavior Wisconsin Courts have ruled establish[es] a prescriptive easement.” See **Lindokken v. Paulson**, 224 Wis. 470, 475, 272 N.W. 453 (1937) (“[A] use permissive in the beginning can be changed into one which is hostile and adverse only by the most unequivocal conduct on the part of the user.”). Alvine testified that Joel informed him that Joel had given Cabak permission to drive on the access road to reach his property. While this contradicted Joel’s testimony in some respects, the fact remains that there was some evidence that Cabak had permission to drive on the road.

¶27 In addition, as the Winchells argue on appeal, the evidence presented at the bench trial was unclear as to “whether Cabak regularly drove on the trail prior to the time that the Winchells improved it, which would be within the 20-year limit necessary to establish a prescriptive easement, or whether his use of the trail for driving was often enough to be obvious to the Winchells.” Cabak does not respond to the Winchells’ summary of the testimony provided, and we therefore deem the Winchells’ argument conceded. See **Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.**, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶28 To the extent that Cabak is referring to his testimony that a farmer and loggers used the access road to reach his property, we note that both Alvine and Joel testified that they gave the farmer permission to use the access road to reach the farming land. Moreover, the circuit court found the Winchells more credible than Cabak, and, accordingly, it was free to assign little weight to Cabak’s testimony. Indeed, the court appeared skeptical of Cabak’s testimony. In particular, the court found that Cabak’s claim that he believed he owned the access

road was contradicted by the fact that he did not inquire about its true ownership after the Winchells began improving the road.<sup>9</sup>

¶29 To summarize, the Winchells rebutted the presumption of adverse use, see *County of Langlade*, 202 Wis. 2d at 454, by demonstrating that Cabak had used the access road pursuant to their permission. The circuit court’s factual findings are not clearly erroneous, and the testimony the court relied upon was not incredible as a matter of law.

*By the Court.*—Order affirmed.

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

---

<sup>9</sup> Cabak asserts that the circuit court erred by relying on the maintenance of the access road when deciding whether he proved the elements of a prescriptive easement because “[p]ossession, or an intention to possess as one’s own, is not a prerequisite to the creation of an easement.” We agree with the Winchells, however, that Cabak misconstrues the court’s reference to maintenance. What the court actually did was point out that Cabak’s lack of involvement in maintaining the access road led it to question Cabak’s testimony regarding his belief that the road was his driveway.

