COURT OF APPEALS
DECISION
DATED AND FILED

February 5, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2013AP1935
2014AP69

Cir. Ct. No. 2011CV424

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

EMILY K. NEUMANN,

PLAINTIFF-APPELLANT,

V.

MICHAEL LUETHE AND CYNTHIA LUETHE,

DEFENDANTS-RESPONDENTS.

APPEALS from a judgment and an order of the circuit court for Monroe County: TODD L. ZIEGLER, Judge. *Affirmed*.

Before Blanchard, P.J., Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. Emily Neumann appeals a judgment of the circuit court dismissing her adverse possession claim, and an order denying her motion

for a new trial. For the reasons set forth below, we affirm the judgment and the order of the circuit court.

BACKGROUND

¶2 This appeal arises from a dispute over ownership of a .17-acre sliver of real estate located in Monroe County, referred to in the record and in the parties' briefs as Outlot 1. Outlot 1 lies between farmland owned by Neumann to the west and farmland owned by Michael and Cynthia Luethe to the east. From 1965 until 1977, the Neumann and Luethe farms were separated by a fence that the parties refer to as the "1977 Fence." Another landmark relevant to this case is a monument, referred to as the Harrison Monument, that was placed in 1989 to mark the intersection of sections 29, 30, 31, and 32 of T16N-R2W in the Town of Ridgeville.

¶3 Neumann initiated this action in the circuit court, claiming adverse possession and possession by title of Outlot 1, and also alleging that the Luethes trespassed on her property. The circuit court held a bench trial, at which the parties disagreed as to the location of the correct property line between the Neumann and Luethe farms.

¶4 At the conclusion of trial, the circuit court issued an oral decision denying all of Neumann's claims. The court then entered extensive written findings of fact, conclusions of law, and a judgment declaring that the Luethes held title to the disputed parcel. Neumann appealed the judgment. She also filed a motion for a new trial based on newly discovered evidence, which was denied. This consolidated appeal encompasses review of both the original judgment and the order denying the motion for a new trial.

DISCUSSION

¶5 On appeal, Neumann challenges the circuit court's ruling on her adverse possession claim. She also argues that the circuit court erred in denying her motion for a new trial. For the reasons discussed below, we affirm the circuit court on both of these issues.

¶6 We turn first to the adverse possession issue. Pursuant to WIS. STAT. § 893.25(1) (2011-12),[1] a person may commence an action to establish title to real estate if that person, in connection with his or her predecessors in interest, is in uninterrupted adverse possession of the real estate for twenty years. The burden of proof is on the person asserting the claim. ***Allie v. Russo***, 88 Wis. 2d 334, 343, 276 N.W.2d 730 (1979). The "physical possession must be hostile, open and notorious, exclusive, and continuous for the statutory period." ***Id.***

¶7 The circuit court made extensive findings of fact upon which it based its conclusion that Neumann had not met the burden of proof on her adverse possession claim. We will not reverse the circuit court's findings of fact unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). Neumann fails to point to a basis for us to conclude that there was clear error.

¶8 It is clear from Neumann's briefs that the issues she raises on appeal are merely an attempt to re-try the facts of the case. There is no dispute that the Neumann family farmed the land up to the western side of the fence from 1965

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

until 1977. The parties disagree as to what occurred after 1977. Neumann contends that her family continued to farm the land up to where the fence was located even after the fence was removed. She argues that the 1977 fence existed along the eastern boundary of Outlot 1, up to 10 feet east of the section line. Neumann also contends that the Harrison Monument was placed incorrectly and that it should have been placed about ten feet east of its current location.

¶9 The Luethes argue that the 1977 fence existed along the western boundary of Outlot 1, which corresponds with the location of the Harrison Monument and the section line. They contend that Neumann's farm use did not encroach onto Outlot 1 until sometime between 2001 and 2003. The Luethes' position is consistent with the circuit court's findings of fact which, in turn, are supported by the record. The court found that the "boundary line was where Michael Luethe testified." The court further found that there had been a barbed wire boundary fence between the Neumann and Luethe parcels until approximately 1977. Michael Luethe testified at trial that he removed the fence at that time because it was in disrepair. He further testified that the fence he removed emanated from the spot where the Harrison Monument is now located and traveled south.

¶10 At trial, Neumann presented the testimony of Monroe County surveyor Gary Dechant. Dechant prepared a survey of Outlot 1 on April 21, 2011. Based on observations made when he visited the site to prepare the survey, he testified that he would have placed the Harrison Monument ten feet to the east of where it is now. David Luethe, whose land abuts the section corner at issue, testified at trial that he believed the placement of the Harrison Monument was off, and should have been about 12 feet to the east.

¶11 The court found that Michael Luethe's testimony was more credible. We will not overturn credibility determinations on appeal unless the testimony upon which they are based is "inherently or patently incredible or in conflict with the uniform course of nature or with fully established or conceded facts." ***Global Steel Prods. Corp. v. Ecklund Carriers, Inc.***, 2002 WI App 91, ¶10, 253 Wis. 2d 588, 644 N.W.2d 269. As discussed above, Neumann has failed to establish that that is the case here. Therefore, we affirm the circuit court's dismissal of Neumann's adverse possession claim.

¶12 We turn next to Neumann's argument that the circuit court erred in denying her motion for a new trial based on her post-trial discovery of Farm Service Agency (FSA) aerial photographs discovered in the drawer of a family desk. Neumann also presented, as new evidence, the affidavit of county surveyor Gary Dechant, stating that, after the trial, he had corrected the placement of two other Harrison Monuments that had been set by Gary Schneider, the same surveyor who set the Harrison Monument at issue in this case.

¶13 WISCONSIN STAT. § 805.15(3) provides, in relevant part:

> [A] new trial shall be ordered on the grounds of newly-discovered evidence if the court finds that:
>
> (a) The evidence has come to the moving party's notice after trial; and
>
> (b) The moving party's failure to discover the evidence earlier did not arise from lack of diligence in seeking to discover it; and
>
> (c) The evidence is material and not cumulative; and
>
> (d) The new evidence would probably change the result.

"A determination of whether proffered evidence satisfies the statutory standard is left to the discretion of the trial court." ***Mathias v. St. Catherine's Hosp., Inc.***, 212 Wis. 2d 540, 558, 569 N.W.2d 330 (Ct. App. 1997).

¶14 We are satisfied that the circuit court did not erroneously exercise its discretion in denying Neumann's motion for a new trial. As pointed out in the Luethes' brief, although the FSA photographs were not discovered by Neumann until after the trial, the photographs could have been obtained through the FSA office. Indeed, Alan Hoff, Monroe County's land conservation officer, testified at trial about other FSA aerial photographs of the subject property. Thus, it was reasonable for the circuit court to conclude that the FSA photographs did not satisfy the standard for newly discovered evidence. *See* WIS. STAT. § 805.15(3).

¶15 Turning to the affidavit of Gary Dechant, the affidavit states that the placement of the two other Harrison Monuments was "apparently a calculation error." In considering this information, the circuit court concluded that the "mathematical differences changing the markers for two other Harrison Monuments … doesn't give me evidence that would probably change the result of the trial." The court explained that, at trial, the dispute over the Harrison Monument at issue did not relate to a mathematical error, but rather whether physical evidence of the 1977 fence existed at the time the relevant tie sheet was prepared. We agree with the circuit court that Neumann has failed to demonstrate how the post-trial discovery of Schneider's mathematical errors in setting two other Harrison Monuments would likely change the result of the trial. Thus, we affirm the circuit court's denial of Neumann's motion for a new trial.

By the Court.—Judgment and order affirmed.

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