COURT OF APPEALS
DECISION
DATED AND FILED

January 12, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2787 **Cir. Ct. No. 2013CV576**

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

DENNIS WINCHELL AND SHERYL WINCHELL,

PLAINTIFFS-APPELLANTS,

V.

ERIC PERSCHKE AND CAROLINE PERSCHKE,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Jefferson County: WILLIAM F. HUE, Judge. *Affirmed*.

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

¶1 HIGGINBOTHAM, J. This appeal arises out of a claim of title to a 15- by 290.4-foot area of land ("disputed area") by adverse possession brought by Dennis and Sheryl Winchell against Caroline Perschke and her brother Eric Perschke. The disputed area is on the westernmost part of the Perschkes' lot, and

it abuts the eastern border of the Winchells' lot. This appeal also involves the Perschkes' counterclaim[1] seeking a declaration of interest in the disputed area in their favor, and alleging that the Winchells trespassed on the disputed area and caused damage to the Perschkes.

¶2 The Winchells appeal the circuit court's determination that they failed to show that they adversely possessed the disputed area for twenty continuous years, one of the requirements that must be met to obtain title by adverse possession under WIS. STAT. § 893.25 (2015-16).[2] The Winchells also appeal the court's award of nominal and restorative damages related to the declaration of ownership and the trespass determination.

¶3 We conclude, applying the presumption in favor of the Perschkes and placing the burden on the Winchells to present "clear and positive" evidence that they adversely possessed the disputed area, that the Winchells failed to show that they adversely possessed the disputed area for the requisite twenty continuous years, because the only date the Winchells use to try to define a twenty-year period of adverse possession of the disputed area fell during a period of permissive use. We also affirm the court's damage awards. Accordingly, we affirm.

BACKGROUND

¶4 The following facts are taken from the circuit court's findings of fact and facts taken from the record viewed in a light that supports the court's decision.

[1] The Perschkes included what they styled as a "cross-claim," which is actually a counterclaim.

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

We focus first on the background facts related to the Winchells' purchase of their lot, the moving of their current house from a previous location, and the activities the Winchells engaged in that they contend support their adverse possession claim. We then briefly explain the pertinent background facts related to the Perschkes' purchase of their current lot in April 2013 and to the circumstances that gave rise to this lawsuit.

¶5 As we indicated, the disputed area is a 15- by 290.4-foot strip of land, which is on the westernmost part of the Perschkes' lot and abuts the eastern border of the Winchells' lot. On July 27, 1993, the Winchells purchased their unimproved and mostly wooded lot from James Petrick. At that time, the land contiguous to the east of their lot was a farm field owned by Victor Perschke, Caroline and Eric Perschkes' father. The Winchells incorrectly believed that their lot extended to the western edge of the farm field, although a review of the survey conducted on their lot at that time would have shown that the Winchells' lot ended fifteen feet to the west of the western edge of the farm field.

¶6 The Winchells decided to move their existing house to their new lot from the lot where they previously lived. The Winchells decided that the best route to move the house was from the east, over Victor Perschke's farm field. Dennis Winchell approached Victor to obtain permission to move the Winchells' house over Victor's farm field and onto the Winchell lot. Victor gave the Winchells permission to move the house over his field on certain conditions not relevant to the resolution of this case, allowing the Winchells "to do whatever it took to move their home." Moving the house entailed cutting down trees and clearing brush on the disputed area and removing an existing fence.

¶7 Although the Winchells' purchase of their lot from James Petrick would not close until July 27, 1993, the Winchells obtained permission from Petrick to work on the lot before the closing date to facilitate the move of their house. Dennis Winchell and his brother began preparing the Petrick lot by clearing trees and brush around mid-May 1993, and these preparations continued for several weeks. In addition, Petrick allowed Sheryl Winchell to plant some perennials in the disputed area during mid-May and June of 1993. On August 17, 1993, with Victor Perschke's permission, the Winchells moved their house across Victor's farm field, over what is now Caroline and Eric Perschkes' lot, and onto the Winchells' lot.

¶8 Caroline and Eric Perschke acquired title to their lot on April 8, 2013, from the Perschke Trust, which apparently gained title to the land when Victor Perschke passed away. Before acquiring title to the lot, the Perschkes had it surveyed and their lot's boundary lines were delineated by survey flags, which showed that the disputed area was part of the Perschkes' lot. In other words, the survey revealed that the lot purchased in July 1993 by the Winchells did not extend to the edge of Victor's farm field as the Winchells thought, but rather ended fifteen feet west of the farm field. The Winchells recognized that the survey flags showed that the disputed area was on the Perschkes' lot, and they did not dispute the accuracy of the survey in the circuit court. In September 2014, Sheryl Winchell removed the survey flags from the Perschkes' lot without permission from the Perschkes.

¶9 On May 12, 2013, Caroline Perschke visited her lot. The circuit court found that while visiting her lot, Caroline "confronted the Winchells about items the Winchells had placed east of the survey flags, specifically a burning barrel, a pile of wood, and concrete blocks. Ms. Perschke demanded that the

Winchells remove these items from her property." The court also found that Caroline "told the Winchells to stay off her property at this meeting." The court found that the Winchells moved their items after the May 12, 2013 altercation, but that from May 12, 2013, and "up through August 2013, … the Winchells continued to mow the grass adjacent to the farm field and tended their flowers as they had for a long time."

¶10 In a letter from the Winchells' attorney to Caroline Perschke, dated August 28, 2013, the Winchells claimed title to the disputed area by adverse possession. Soon thereafter, the Winchells filed this adverse possession lawsuit against the Perschkes, alleging that the Winchells had taken title to the disputed area by adverse possession. The Perschkes counterclaimed seeking a declaration of title, alleging trespass by the Winchells on two grounds, and claiming damages on the trespass claims.

¶11 A two-day trial was held to the circuit court. In written findings of fact and conclusions of law, the court determined, as pertinent to our resolution of this appeal, that the Winchells' use of the disputed area beginning in mid-May 1993 and extending until some unspecified time after September 5, 1993, was permissive, and therefore, the Winchells had failed to provide a clear starting point for a twenty-year period of continuous adverse possession of the disputed land.

¶12 As for the Perschkes' two trespass counterclaims, the court dismissed the claim that the Winchells trespassed by placing their fire pit and other items on the disputed area. However, the court determined that Dennis Winchell trespassed on the disputed area on September 5, 2013, by mowing the grass in the area. The court awarded the Perschkes $500 in nominal damages on this claim. The court also declared that the Perschkes own the disputed area by

record title and awarded the Perschkes $2,736.67 to reseed the disputed area. Finally, the court awarded the Perschkes $160 to compensate them for the cost of replacing the survey flags that Sheryl Winchell removed from the Perschkes' lot without the Perschkes' permission. The Winchells appeal the court's ruling on the merits and the award of damages.

STANDARD OF REVIEW

¶13 The determination of whether the Winchells have satisfied the twenty-year period requirement for adverse possession requires that we apply WIS. STAT. § 893.25 to the facts of this case. "Whether a given set of facts meets a particular legal standard is a question of law" subject to de novo review. ***State v. Rizzo***, 2002 WI 20, ¶18, 250 Wis. 2d 407, 640 N.W.2d 93. The circuit court's findings of fact will be affirmed unless they are against the "great weight and clear preponderance of the evidence." ***Leciejewski v. Sedlak***, 110 Wis. 2d 337, 343, 329 N.W.2d 233 (Ct. App. 1982).

DISCUSSION

A. *Adverse Possession*

¶14 The general legal principles applicable to adverse possession claims and the standards governing our review of a circuit court's decision on such claims are as follows:

> Pursuant to WIS. STAT. § 893.25(2)(a) and (b), real estate is possessed adversely 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 "[o]nly to the extent that it is actually occupied." In addition, the property must be "protected by a substantial enclosure" or "usually cultivated or improved." Pursuant to § 893.25(1), the adverse possession must be uninterrupted for twenty years.

> In order to constitute adverse possession, "the use of the land must be open, notorious, visible, exclusive, hostile and continuous, such as would apprise a reasonably diligent landowner and the public that the possessor claims the land as his own." "Hostile" in this context does not mean a deliberate and unfriendly animus; rather, the law presumes the element of hostile intent if the other requirements of open, notorious, continuous, and exclusive use are satisfied. "Both ... the fact of possession and its real adverse character" must be sufficiently open and obvious to "apprize the true owner ... in the exercise of reasonable diligence of the fact and of an intention to usurp the possession of that which in law is his own...." The size and nature of the disputed area are relevant in deciding if the use is sufficient to apprise the true owner of an adverse claim.
>
> The party seeking to claim title by adverse possession bears the burden of proving the elements by clear and positive evidence. The evidence must be strictly construed against the claimant and all reasonable presumptions must be made in favor of the true owner. One of these presumptions is that "actual possession is subordinate to the right of [the true] owner."

Steuck Living Trust v. Easley, 2010 WI App 74, ¶¶13–15, 325 Wis. 2d 455, 785 N.W.2d 631 (footnote and citations omitted).

¶15 With the above legal principles and standard of review in mind, we proceed with our analysis.

¶16 The Winchells' sole argument to the circuit court about a starting date for the alleged twenty-year period of adverse possession of the disputed area was based on activities that began in mid-May 1993. However, the circuit court determined that the Winchells' activities in the disputed area from mid-May 1993 to sometime after September 5, 1993, were permissive, and therefore, neither hostile nor notorious. We agree with this determination. The activities that the Winchells engaged beginning in mid-May 1993 to prepare their lot to move their

house were permissive, and therefore, without hostile intent to claim title to the disputed area.

¶17 Permissive use of disputed land defeats a claim for adverse possession because the hostility element of adverse possession is lacking. ***County of Langlade v. Kaster***, 202 Wis. 2d 448, 453 n.2, 550 N.W.2d 722 (Ct. App. 1996); s*ee also* 68 AM. JUR. 3D POF 239 § 4. In the context of adverse possession, hostility refers to the person in possession of the disputed property "claim[ing] exclusive right thereto and actual possession prevents the assumption of possession in the true owner." ***Burkhardt v. Smith***, 17 Wis. 2d 132, 139-40, 115 N.W.2d 540 (1962).

¶18 The record indicates that the Winchells obtained permission to use the disputed area from two different property owners: James Petrick and Victor Perschke. As we indicated, Petrick sold the Winchells their lot and was the owner of the lot in mid-May 1993, when the Winchells claim they began to adversely use the disputed area. Victor, as we stated above, was the true owner of the disputed area at the time the Winchells purportedly began using the disputed area in mid-May 1993 and when the Winchells moved their house onto their lot on August 17, 1993.

¶19 As to permission from James Petrick, the circuit court found that in mid-May 1993 the Winchells sought and obtained permission from Petrick to begin preparing the lot for the eventual move of their house from its previous location. Significantly, Dennis Winchell testified that he believed at the time of the house-move preparations that the disputed area was part of the lot he was purchasing from Petrick. Thus, it follows that the Winchells believed that any activity on the disputed area prior to the closing of their lot on July 27, 1993, was

done with Petrick's permission. Ultimately, as we explain in the next paragraph, the Winchells' subjective belief that they were using the disputed area with Petrick's permission, even though he was not the area's true owner, proves fatal to their argument that adverse possession began in mid-May 1993.

¶20 The Winchells' subjective belief that they were using the disputed area with James Petrick's permission demonstrates their lack of intent to possess the disputed area in a hostile manner. "A request for permission is relevant under the circumstances regardless of whether it is sought from the true owner, because the request goes to the possessor's subjective intent to claim title." ***Wilcox v. Estate of Ralph Hines***, 2014 WI 60, ¶33, 355 Wis. 2d 1, 849 N.W.2d 280. In order to satisfy the hostility element of an adverse possession claim, "a possessor must subjectively intend to claim ownership of the disputed property." ***Id.***, ¶24. The problem for the Winchells is that the evidence shows that the Winchells did not subjectively intend to claim title to the disputed area during the period from mid-May 1993 to July 27, 1993.

¶21 In addition, the Winchells had permission from Victor Perschke to use the disputed area during the pertinent time period. The circuit court found that the Winchells received Victor's permission "to do whatever it took to move their home." The law is well established that where possession of property is with the permission of the true title owner "there could not be the hostile intent necessary to constitute adverse possession." ***Northwoods Dev. Corp. v. Klement***, 24 Wis. 2d 387, 392, 129 N.W.2d 121 (1964). The Winchells acknowledged at trial, and the circuit court determined, that sometime during the spring of 1993 Victor gave the Winchells permission to move their house over part of his farm field. The court determined that Victor permitted the Winchells' activities in the disputed area beginning in mid-May 1993, which included transplanting perennials, clearing

trees and brush, and removing a fence. The Winchells moved their house on August 17, 1993, over Victor's farm field and through the disputed area, at which point their permission from Victor to use his property lapsed. Thus, it is undisputed that the Winchells' activities in the disputed area during the summer of 1993, at least until the house was moved and laid on its foundation on August 17, were permissive.

¶22 The Winchells argue that the evidence does not support the circuit court's determination that the Winchells' use of the disputed area beginning in mid-May 1993 was permissive, and that even if their use was initially permissive, "there is no logical reason why the permission granted would not lapse until after September 5, 1993," as the court determined. The Winchells' argument focuses solely on the court's determination that Victor Perschke gave the Winchells permission to "do whatever it took to move their home" over Victor's farm field and onto the Winchells' lot. This argument fails for the simple reason that the Winchells do not contest the court's finding that James Petrick gave the Winchells permission to engage in activities to prepare their lot and evidence that shows that these activities took place with permission from mid-May 1993 until the house closing on July 27, 1993.

¶23 As for Victor Perschke's permission, the Winchells argue that it was limited to moving their house over the farm field and that their other work in the disputed area was not permissive. To support their argument, the Winchells rely on ***Leciejewski***, in which the court determined that adverse possession can be established despite limited permission from the true owner. ***Leciejewski***, 110 Wis. 2d at 337. In ***Leciejewski***, the true owner gave the adverse possessor permission to build a chicken shed and dynamite part of the disputed property, but in spite of these facts of permissive use, the court found that the adverse possessor

established a claim based on other activities that improved and cultivated the disputed property. *See* ***id.*** at 344.

¶24 The problem with the Winchells' reliance on ***Leciejewski*** is that, unlike in ***Leciejewski***, the circuit court here determined that all of the activities that the Winchells engaged in to prepare their lot for moving their house were permitted by Victor Perschke. Therefore, any activities that the Winchells engaged in on the disputed area prior to and including August 17, 1993, were insufficient to establish the commencement of an adverse possession claim because the activities were not "sufficiently open and obvious" in their "real adverse character, to apprize the true owner" of the adverse claimant's "intention to usurp the possession of that which in law is his own." *See* ***Allie v. Russo***, 88 Wis. 2d 334, 343-44, 276 N.W.2d 730 (1979) (quoting another source).

¶25 In sum, we reject the Winchells' argument that their activities on the disputed area on and before August 17, 1993, were done without permission. The Winchells offered no other theory about when their alleged period of adverse possession began even though the circuit court encouraged them to propose alternative starting points. Because the Winchells have not established a proper starting point, they cannot establish a twenty-year period of possession, and thus, their claim fails.

B. *Damages*

¶26 As stated above, the circuit court ruled in favor of the Perschkes on their counterclaims against the Winchells, which sought a declaration of interest in the disputed area and damages for trespass. The court awarded the Perschkes $3,396.67 in total damages: $500 in nominal damages for Dennis Winchell's trespass; $160 in compensatory damages for restaking the survey flags, which the

court found Sheryl Winchell had pulled out; and $2,736.67 in restorative damages to reseed the disputed area to its natural state. On appeal, the Winchells challenge only the $500 nominal damages award and the $2,736.67 award to reseed the Perschkes' lawn. We first address the nominal damages awarded related to Dennis's trespass and then address the damages awarded to reseed the disputed area.

¶27 Our review of a challenge to an award of damages is highly deferential. We may not disturb the fact finder's finding of the amount of damages "[i]f there is any credible evidence which under any reasonable view supports the … finding." ***D.L. Anderson's Lakeside Leisure Co., Inc. v. Anderson***, 2008 WI 126, ¶26, 314 Wis. 2d 560, 757 N.W.2d 803 (quoting another source). "When we review a damage award …, we … determine whether the award is within reasonable limits, and we review the evidence in the light most favorable to support the damage award." ***Teff v. Unity Health Plans Ins. Corp.***, 2003 WI App 115, ¶41, 265 Wis. 2d 703, 666 N.W.2d 38.

1. Damages for Trespass

¶28 As we indicated, the circuit court determined that Dennis Winchell trespassed by mowing grass on the disputed area on September 5, 2013. Although the court determined that the Perschkes presented no evidence that Dennis's trespass caused any compensable injury, the court determined that the Perschkes were entitled to nominal damages in the amount of $500. The court also awarded $160 to the Perschkes in actual damages to replace the survey stakes that Sheryl Winchell removed from the Perschkes' lot. The Winchells concede the $160 compensatory damage award, but they challenge the nominal damages award on

the ground that the law prohibits awarding both compensatory and nominal damages.

¶29 The Winchells argue that "it is inappropriate to award the same party both nominal and actual damages." They argue that nominal damages may be awarded only when actual damages have not been proven, citing ***Hajec v. Nowitzke***, 46 Wis. 2d 402, 417, 175 N.W.2d 193 (1970). The Winchells argue that nominal damages are appropriate "[o]nly where the court's concern is with the vindication of legal rights," citing ***Diana Shooting Club v. Kohl***, 156 Wis. 257, 259, 145 N.W. 815 (1914), and that, unlike nominal damages, actual damages are given to make the injured party whole, citing ***White v. Benkowski***, 37 Wis. 2d 285, 290, 155 N.W.2d 74 (1967). In other words, as we understand the Winchells' argument, because the Perschkes have proved that they are entitled to $160 in actual damages to replace the survey stakes, case law does not permit them to receive nominal damages for Dennis Winchell's trespass. According to the Winchells, granting both awards amounts to a "double recovery." We reject the Winchells' argument for two reasons.

¶30 First, the Winchells' argument is undeveloped. Although the Winchells cite case law in support of their argument, they do not apply that case law to the facts of this case to explain why they should prevail under their legal analysis. Second, to the extent that we understand the Winchells' argument, the Winchells' reliance on ***Hajec*** is inapt. We understand the ***Hajec*** court as holding that nominal and compensatory damages are not available for the same claim. This rule makes sense; what purpose does awarding nominal damages serve where actual damages are awarded for the same claim?

¶31 However, in this case, the nominal and actual damages were not awarded for the same claim, but rather for two separate claims: nominal damages were awarded for Dennis Winchell's trespass, and actual damages were awarded for the separate claim that Sheryl Winchell removed the survey stakes from the Perschkes' lot. The Winchells do not explain why it would be inappropriate to award nominal damages to a plaintiff for one claim and actual damages for a separate claim. In short, the Winchells point to no authority that prohibits the award of nominal and actual damages for two entirely separate and unrelated claims, and they develop no argument that these two claims are in some sense intertwined.

2. Restorative Damages

¶32 Turning to what the circuit court referred to as restorative damages, the circuit court determined that the Perschkes were "entitled to a declaration and grant of an order restoring the property to its original boundaries," and to that end, awarded the Perschkes $2,736.67 to reseed the Perschkes' lawn in the disputed area. Although the court did not explain how it determined the amount of this award, it is evident from the record that the court based this award on an estimate prepared by a landscaping company on behalf of the Perschkes in support of several damage claims raised by the Perschkes. The estimate was prepared on September 8, 2014, for several landscaping projects that the Perschkes intended to pursue after this litigation had completed. Part of the estimate shows itemized yard work projects at a total cost of $2,736.67.

¶33 The Winchells argue that the $2,736.67 the circuit court awarded to the Perschkes to restore the landscape on the disputed area was an improper exercise of the court's discretion because the evidence does not support awarding

any amount of damages for this purpose. Specifically, the Winchells argue that, in light of the absence of evidence that they harmed any part of the disputed area, the $2,736.67 awarded to the Perschkes to restore the area to its natural state was an erroneous exercise of the court's discretion.

¶34 However, the Winchells fail to explain why the landscaping that the Perschkes proposed to restore the disputed area to its natural state was unreasonable in light of the undisputed evidence that the Winchells in fact altered the disputed area in multiple respects. By completely failing to engage on these issues, the Winchells fall short in providing us with a basis to conclude that the circuit court improperly exercised its discretion in awarding the Perschkes $2,736.67 as restorative damages.

CONCLUSION

¶35 Accordingly, we affirm the circuit court's ruling that the Winchells failed to establish a twenty-year period of adverse possession. We also affirm the circuit court's award to the Perschkes in the amount of $500 for nominal damages and $2,736.67 for restorative damages.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.