COURT OF APPEALS
DECISION
DATED AND FILED

March 8, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP1081 **Cir. Ct. No. 2015CV159**

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

JEAN LYNCH AND MICHAEL LYNCH, SR.,

PLAINTIFFS-RESPONDENTS,

V.

TODD R. BRAAKSMA AND PAMELA S. BRAAKSMA,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Columbia County: ALAN J. WHITE, Judge. *Reversed*.

Before Blanchard, Kloppenburg and Fitzpatrick, 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. Todd and Pamela Braaksma appeal a judgment determining that Jean and Michael Lynch acquired legal title to a parcel of land by

adverse possession.[1] We conclude that Lynch failed to present sufficient evidence at trial to establish adverse possession and, therefore, we reverse.

BACKGROUND

¶2 This dispute concerns an "L"-shaped parcel of land owned by Braaksma and abutting property owned by Lynch.[2] Lynch brought this action to quiet title to the Parcel, claiming adverse possession and demanding injunctive relief. Braaksma counterclaimed, alleging trespass, private nuisance, and interference with interest in property.

¶3 We recite certain undisputed facts taken from a two-day bench trial, and relate additional facts as needed in the discussion section below.

¶4 What we refer to as the Lynch property consists of the land that abuts the Parcel and extends to the north and east, from the inside of both legs of the L-shaped Parcel.

¶5 As indicated, Braaksma's property includes the Parcel, and also includes adjoining cornfields that extend to the south of Parcel-South and to the west of Parcel-West. Neither party disputes that the edges of Braaksma's cornfields adjoining the Parcel varied in location from year to year depending on

[1] For ease of reading, we will use "Braaksma" and "Lynch" to refer to their claims and arguments as parties in this action, and we will refer to Todd Braaksma and Jean Lynch by their first names only when we discuss their testimony and actions as individuals.

[2] Throughout this opinion, we refer to activities on and occupation of the Parcel as they relate to the two legs of the "L." We refer to these legs separately as Parcel-West (the vertical leg of the L) and Parcel-South (the horizontal leg of the L). We refer to the legs as a single unit as the Parcel, which is approximately .675 of an acre in total area.

where the plow was dropped. Jean testified that the edge of the cornfield abutting Parcel-South could vary in location by "[a] couple spans of the lawn mower."

¶6 Between 1986 and 1988, Noah Hershberger owned and lived on the Lynch property. Between 1986 and 1988, Hershberger mowed the grass in Parcel-South between his house on the Lynch property and the approximate edge of the cornfield located on the Braaksma property. Between 1988 and 1989, Hershberger rented the Lynch property to Marietta Yoder, who also mowed the grass in Parcel-South up to the approximate edge of the Braaksma cornfield.

¶7 In 1989, Hershberger sold the Lynch property to Jean Lynch. Beginning in 1989, Jean mowed the grass in Parcel-South up to the approximate edge of the Braaksma cornfield. In the "early '90s" Jean's husband installed a satellite dish in Parcel-South, and in the "middle '90s" Jean planted a few trees, bushes, and flowers, installed horseshoe pits, a playset, and flower beds, and created a rock garden in Parcel-South.

¶8 Beginning in 1989, Jean also mowed the grass in Parcel-West some years and allowed the grass in Parcel-West to "grow up" other years so that her animals could graze during the summer months. At some point in the "late '90s" Jean planted a single evergreen tree in Parcel-West.

¶9 Jean never paid real estate taxes on either leg of the Parcel.

¶10 In 1986, Clarence Annen owned the Braaksma property. In 1993, Clarence Annen sold the Braaksma property to Ken Casey, who sold the Braaksma property to Peter Schwoch in 2001. In 2002 or 2003, Schwoch "brought [a chain-link fence] home and unloaded it with intentions of putting it up around the property line," but when Jean saw Schwoch unloading the fence "she

talked to [Schwoch] about not putting the fence up" and "it was agreed at that time we'd leave it down and see how things went." In 2007 or 2010, Jean offered to purchase the Parcel from Schwoch.[3]

¶11 In 2013, Schwoch sold the Braaksma property to Todd Braaksma. In 2015, Todd installed metal fence posts along the property lines in Parcel-South and Parcel-West where the L abuts the Lynch property, and planted pine trees in Parcel-South, but did not create a fence proper. Jean's horses trespassed on the Braaksma property at least twice, and her dogs and goats trespassed numerous times.

¶12 The circuit court ruled that Lynch and Lynch's predecessors had adversely possessed both Parcel-South and Parcel-West for twenty years.[4] Braaksma filed a motion to reconsider, which the circuit court denied. Braaksma appeals.

DISCUSSION

¶13 Braaksma argues that Lynch failed to present sufficient evidence to establish adverse possession. We first address the applicable standard of review, then we review the applicable law, and, finally, we address Braaksma's argument by applying the law to the facts of this case.

[3] Schwoch testified that Jean offered to purchase the parcel from him in 2007; Jean testified that her offer to purchase the Parcel occurred in 2010. As we explain in the discussion that follows, whether this offer occurred in 2007 or 2010 does not affect our analysis.

[4] The circuit court also awarded Braaksma $1 for the trespass by Lynch's animals. Braaksma does not appeal this part of the court's judgment.

I. Standard of Review

¶14 An appeal of an adverse possession claim presents a mixed question of fact and law. ***Wilcox v. Estate of Hines***, 2014 WI 60, ¶15, 355 Wis. 2d 1, 849 N.W.2d 280. The length of time of occupancy, the area occupied, and the nature and character of the occupancy are issues of fact. *See* ***Milwaukee Cnty. v. Milwaukee Yacht Club***, 256 Wis. 475, 478, 41 N.W.2d 372 (1950). We accept the circuit court's findings of fact unless they are clearly erroneous; and, we search the record to support the circuit court's findings of fact. ***Wilcox***, 355 Wis. 2d 1, ¶15; ***Hofflander v. St. Catherine's Hosp., Inc.***, 2003 WI 77, ¶70, 262 Wis. 2d 539, 664 N.W.2d 545. However, whether these facts are sufficient to establish adverse possession is a question of law that we review de novo. ***Wilcox***, 355 Wis. 2d 1, ¶15. In other words, accepting as true the circuit court's findings of fact that are not clearly erroneous based on our search of the record, we independently analyze whether those facts satisfy the legal standard for adverse possession. ***Id.***; ***Hofflander***, 262 Wis. 2d 539, ¶70.

II. The Essential Elements of Adverse Possession

¶15 "Adverse possession is a legal action that enables a party to obtain valid title of another's property by operation of law." ***Wilcox***, 355 Wis. 2d 1, ¶19; *see also* WIS. STAT. § 893.25(1) (2015-16).[5] "'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 ....'" ***Steuck Living Trust***

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

v. Easley, 2010 WI App 74, ¶14, 325 Wis. 2d 455, 785 N.W.2d 631 (quoted source omitted). Moreover, permissive use or occupation defeats a claim for adverse possession. *See* ***Ludke v. Egan***, 87 Wis. 2d 221, 230, 274 N.W.2d 641 (1979).

¶16 WISCONSIN STAT. § 893.25 codifies the common law elements of adverse possession: continuous, open, notorious, exclusive, and hostile possession. ***Wilcox***, 355 Wis. 2d 1, ¶25. In addition, WIS. STAT. § 893.25(2)(a) and (b) provide that only the premises actually occupied under exclusive claim of title may be adversely possessed, which means that the land must either be "1. Protected by a substantial enclosure" or "2. Usually cultivated or improved," and that the occupation be continuous for twenty years.

¶17 Thus, property is adversely possessed only if the possessor, for a period of twenty years, "is in actual continued occupation under claim of title, exclusive of any other right," and the property is "[p]rotected by a substantial enclosure" or "[u]sually cultivated or improved." WIS. STAT. § 893.25(2)(a), (b); ***Wilcox***, 355 Wis. 2d 1, ¶19.

¶18 The party claiming title by adverse possession bears the burden of proving the elements by clear and positive evidence. ***Steuck Living Trust***, 325 Wis. 2d 455, ¶¶15, 17 ("The elements of adverse possession are directed to the *claimant's* use of the land, and the claimant has the burden to prove those elements by clear positive evidence." (emphasis in original)). Proving the elements by clear and positive evidence means that adverse possession may not be established by inference. *See* ***Zeisler Corp. v. Page***, 24 Wis. 2d 190, 198, 128 N.W.2d 414 (1964). Additionally, the evidence must be strictly construed against

the claimant and all reasonable presumptions must be made in favor of the true owner. ***Steuck Living Trust***, 325 Wis. 2d 455, ¶15.

¶19 As we explain, Lynch's adverse possession claim fails because Lynch failed to establish clear and positive evidence at trial showing that Lynch (1) "[u]sually cultivated or improved" Parcel-West as required by WIS. STAT. § 893.25(2)(b), and (2) that Lynch's cultivation or improvement of Parcel-South was continuous for twenty years as required by WIS. STAT. § 893.25.[6] We address each leg of the L in turn.

III. Adverse Possession as to Parcel-West

¶20 Braaksma argues that Lynch's undisputed occupation of Parcel-West was, as a matter of law, too "sporadic and limited" to satisfy the requirement that the property has been "[u]sually cultivated or improved." *See* WIS. STAT. § 893.25(2)(b). We agree.

¶21 A party's occupation of land may constitute usual cultivation or improvement if that occupation provides "actual visible means by which notice of the intent to exclude is given to the true owner," ***Allie v. Russo***, 88 Wis. 2d 334, 344, 276 N.W.2d 730 (1979), and if "'the fact of possession and its real adverse character' [is] 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 ....'" ***Steuck Living Trust***, 325 Wis. 2d 455, ¶14 (quoted source omitted). For instance, in ***Leciejewski v. Sedlak***, 116

[6] Neither in the circuit court nor on appeal has Lynch agreed that any portion of the L was "[p]rotected by a substantial enclosure." WIS. STAT. § 893.25(2)(b).

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. Our supreme court concluded that these acts constituted usual cultivation or improvement. ***Id.***; *see also* ***O'Kon v. Laude***, 2004 WI App 200, ¶¶16-20, 276 Wis. 2d 666, 688 N.W.2d 747 (evidence that plaintiffs mowed grass, planted raspberries, piled debris, and maintained a garden on a disputed strip of property between two city lots was sufficient to raise a genuine issue of material fact as to usual cultivation or improvement.).

¶22 The circuit court concluded that Lynch "cared for" Parcel-West since 1989. The circuit court based this conclusion on its findings that "Exhibits 10 and 11 clearly indicates a number of alleged encroachments …. On the westerly line the encroachments consist of some pine trees between 8 and 14 feet tall as well as a Box Elder tree.... Also, at one time a clothesline consisting of two cross posts existed in the disputed area. (Exhibit 45)."

¶23 Braaksma argues that these factual findings with respect to the box elder tree, the pine trees, and the clothesline are clearly erroneous. We agree. There is no evidence in the record regarding the planting or maintenance of a box elder tree. Jean testified that she did not plant the pine trees along the western boundary of the Parcel. And, there is no testimony establishing that the clothesline, as it appeared "at one time" depicted in an exhibit, was actually located on Parcel-West, and numerous other exhibits entered into evidence reveal otherwise. Further, Lynch does not in Lynch's response brief dispute these factual challenges and this is an additional ground on which to reverse. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) ("Respondents on appeal cannot complain if

propositions of appellants are taken as confessed which they do not undertake to refute." (quoted source omitted)).

¶24 Braaksma also argues that the remaining evidence upon which the circuit court relied to find that Lynch cared for Parcel-West fails as a matter of law to establish adverse possession of Parcel-West. The record does show, in support of the circuit court's conclusion that Lynch "cared for" Parcel-West since 1989, that Lynch occupied the area in the following ways: mowing the grass in Parcel-West some years, allowing animals to graze there in summer months in other years within portable pens or next to a movable calf hutch, sometimes driving over Parcel-West to access the back door of the Lynch house prior to 2007, planting a single evergreen tree in the "late '90s," and twice trimming a pine tree. We conclude that this type of occupation was not sufficiently visible and consistent to apprise the true owner of Lynch's adverse claim to Parcel-West, as required by the cases cited above.

¶25 The occupation of property described in ***Leciejewski***, 116 Wis. 2d at 636-37, and ***O'Kon***, 276 Wis. 2d 666, ¶¶16-20, provided notice of the claimants' intent to exclude the true owner by visibly and permanently altering the character of the land through the construction of buildings and the planting and maintaining of a permanent garden. Here, however, Lynch's inconsistent mowing and grazing, two instances of tree trimming, and planting of a single tree, were not conspicuously or continuously visible throughout the year, or over the course of many years, and did not permanently alter the character of the land in such a way that would give notice of Lynch's intent to exclude the true owners of

Parcel-West.[7] *See* ***Pierz v. Gorski***, 88 Wis. 2d 131, 138, 276 N.W.2d 352 (Ct. App. 1979) (ruling that plaintiffs did not adversely possess an area outside of the curtilage of a home because spraying for poison ivy and army worms, planting clover and trees, and cutting windfalls and trees chewed by beaver were neither visible nor sufficiently adverse to apprise the true owner of a claim). In essence, while Lynch certainly may have used Parcel-West, the facts do not establish that such use constituted actual occupation in the form of usual cultivation or improvement because Lynch's use did not provide notice of an intent to exclude the true owner. Rather, the activities described by Lynch are more consistent with sporadic, trivial, and benign trespass. *See* ***Pierz***, 88 Wis. 2d at 139.

¶26 Citing ***Otto v. Cornell***, 119 Wis. 2d 4, 8, 349 N.W.2d 703 (Ct. App. 1984), Lynch argues that "[p]lanting trees and mowing the lawn may establish adverse possession in some circumstances." However, ***Otto*** is inapposite because the claimant in ***Otto*** "planted four maple trees to *mark the boundary*" and "mowed and maintained the lawn around [those] trees." ***Id.*** at 6 (emphasis added). No evidence in the record indicates that Lynch's planting of a single evergreen tree, and the inconsistent grass mowing some years and allowing the grass to grow up other years for animal grazing, were for the evident purpose of visibly marking the boundary line of Parcel-West under claim of exclusive title.

¶27 In sum, we conclude that Lynch failed to present clear and positive evidence to establish adverse possession because the facts established at trial

[7] As Braaksma points out in the reply brief, the single evergreen tree that Jean testified she planted was gone by 2010, when a survey of the Parcel demarcating the actual boundaries of the Braaksma property occurred.

failed to show that Lynch "[u]sually cultivated or improved" Parcel-West as required by WIS. STAT. § 893.25(2)(b)2.

IV. Adverse Possession as to Parcel-South

¶28 Braaksma argues that Lynch's occupation of Parcel-South, assuming it amounted to usual cultivation or improvement, started at the earliest after 1992 and ended at the latest in 2010 (for a period of eighteen years), and, therefore, Lynch failed to prove continuous occupation of Parcel-South for the twenty-year statutory period. WIS. STAT. § 893.25.[8] We agree.

¶29 Braaksma first argues that, based on the facts and as a matter of law, the twenty-year statutory period could not have commenced until after 1992. We agree. It is undisputed that between 1986 and 1992, the only occupation of Parcel-South by Lynch and Lynch's predecessors was the occasional mowing of grass up to the approximate edge of Braaksma's cornfield. As stated, a party's occupation of land may constitute usual cultivation or improvement if that occupation provides "actual visible means by which notice of the intent to exclude is given to the true owner." ***Allie***, 88 Wis. 2d at 344. Although mowing grass, *in combination with other activities*, may be evidence of usual cultivation or improvement, *see, e.g.*, ***O'Kon***, 276 Wis. 2d 666, ¶¶16-18, we conclude that occasional mowing alone does not suffice to apprise the true owner of an

[8] Braaksma also argues that the circuit court erred by concluding that Lynch proved by clear and positive evidence actual occupation of Parcel-South because the edge of the cornfield, which established the boundary of Parcel-South, varied in location from year to year. Because we conclude that Lynch failed to prove continuous occupation of Parcel-South, whatever the boundary, for the twenty-year statutory period, we do not address this argument. "An appellate court need not address every issue raised by the parties when one issue is dispositive." ***Barrows v. American Family Ins. Co.***, 2014 WI App 11, ¶9, 352 Wis. 2d 436, 842 N.W.2d 508 (2013).

exclusive adverse claim to the land. And, Lynch does not develop a legal argument to the contrary.

¶30 Braaksma next argues that Lynch failed to prove continuous occupation of Parcel-South for the twenty-year statutory period under claim of title because either of the following occurred to interrupt the statutory period: Schwoch re-entered the Parcel in 2002 or 2003 and came to an agreement with Jean not to erect a fence, or Jean offered to purchase the Parcel from Schwoch in 2007 or 2010. Again, we agree.

¶31 Braaksma argues that, because Schwoch and Jean came to an agreement that Schwoch would refrain at that time from erecting a fence along the property line in the Parcel in 2002 or 2003,[9] Lynch's subsequent occupation of the Parcel following this agreement was with Schwoch's permission and, thus, does not satisfy the WIS. STAT. § 893.25 requirement that the occupation of property is under a claim of title. *See* ***Northwoods Dev. Corp. v. Klement***, 24 Wis. 2d 387, 392, 129 N.W.2d 121 (1964) ("if possession was pursuant to permission of the true owner, there could not be the hostile intent necessary to constitute adverse possession"); ***Wilcox,*** 355 Wis. 2d 1, ¶¶22, 33 ("the 'claim of title' requirement in WIS. STAT. § 893.25" "corresponds to the common law 'hostility' element").

[9] Schwoch testified that, when Jean observed him beginning to install the fence, "[s]he asked where I was going to go with it, and I said I was going to put it up around the property line because I was tired of her animals using – running the property at large. And she talked to me about not putting the fence up, what can we do about keeping the fence down. And I guess it was agreed at that time we'd leave it down and see how things went." Lynch did not rebut this testimony at trial, nor does Lynch now on appeal point to evidence that could be used to rebut this.

¶32 Alternatively, Braaksma argues that, even if Schwoch did not grant Lynch permission to continue occupying the land, Lynch's offer to purchase the Parcel from Schwoch in 2007 or 2010 was an express declaration of non-ownership inconsistent with the "claim of title" requirement in WIS. STAT. § 893.25.[10] *See* ***Wilcox***, 355 Wis. 2d 1, ¶24 ("[a] party who expressly disclaims ownership of property ... is not 'claiming title' to the property. Therefore, express declarations of non-ownership ... [are] properly considered by a circuit court in determining whether the 'claim of title' requirement in WIS. STAT. § 893.25 has been satisfied.").[11]

¶33 Lynch in response does not address Braaksma's argument as to either of these two specific instances involving interruption of the twenty-year period, beyond stating in conclusory fashion that "sporadic re-entry by the true owners over the years" did not suffice "to dispossess the Lynches." Lynch fails to develop this assertion and we will neither develop it for Lynch nor consider it further. *See* ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987) (we do not develop parties' arguments for them); ***State v. Pettit***, 171

[10] When Jean was asked, "Did Mr. Schwoch approach you or did you approach him about purchasing this disputed parcel, or how did that come about?" she answered, "We stopped and –either he was going in and out of his driveway and I was up there working, something, and we stopped and we were visiting.... And I said, 'How about if I buy this stretch?' He says, 'Great.' He says he didn't need it. It was no good to him."

[11] The circuit court relied on ***Herzog v. Bujniewicz***, 32 Wis. 2d 26, 145 N.W.2d 124 (1966), to conclude that "any statement made by the plaintiff about purchasing the property is not found to conclusively show they knew they had no entitlement to the property." However, ***Herzog*** is inapposite because the plaintiff in ***Herzog*** had already adversely possessed the property at issue for the statutory period when the plaintiff offered to purchase the property, whereas here, Lynch had not possessed the land adversely for the requisite statutory period when she offered to purchase the Parcel from Schwoch. *See* ***id.*** at 33.

Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) ("We may decline to review issues inadequately briefed.").

¶34 In sum, we agree with Braaksma that the statutory period began in 1992 at the earliest, and we rely on either Schwoch's grant of permission in 2002 or 2003, or on Lynch's offer to purchase in 2007 or 2010, to conclude that Lynch's adverse possession claim as to Parcel-South fails because Lynch did not occupy the land under claim of title for the requisite twenty years.

CONCLUSION

¶35 For these reasons, we conclude that Lynch failed to present sufficient evidence at trial to establish adverse possession of either leg of the Parcel. Accordingly, we reverse.

By the Court.—Judgment reversed.

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