COURT OF APPEALS
DECISION
DATED AND FILED

September 25, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2063 **Cir. Ct. No. 2005CV484**

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

MARK THORN AND ELLEN THORN,

PLAINTIFFS-RESPONDENTS,

V.

ROD OLSON AND PAM OLSON,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for La Crosse County: JOHN A. DAMON, Judge. *Affirmed*.

Before Higginbotham, P.J., Vergeront and Bridge, JJ.

¶1 HIGGINBOTHAM, P.J. This case arises from an ownership dispute over a .18 acre parcel of land that lies between Ellen and Mark Thorn's residential property and two residential lots that were once a part of Rod and Pam Olson's farm. The Olsons are the record titleholders to the disputed parcel; the

Thorns claim ownership of the parcel by adverse possession. The Thorns brought this action to obtain a judgment declaring them the owners of the disputed parcel by adverse possession, and to recover damages from the Olsons for trespass and intentional interference with contract.

¶2 Following a bench trial, the circuit court entered judgment declaring the Thorns to be adverse possessors, and found in their favor on the trespass and intentional interference with contract claims, awarding damages and costs. The Olsons appeal the circuit court's judgment, arguing that the Thorns failed to present sufficient evidence supporting each of their claims. They also argue that the award of damages was excessive and the costs were unauthorized by statute. We affirm.

Background

¶3 The following facts are taken from the trial testimony and exhibits, and the findings of fact set forth in the circuit court's oral decision. In April 1980, Norbert and Edna Nuttelman deeded a lot from a small section of their rural West Salem farm to their son, John Nuttelman, and his wife, Vicki Nuttelman. The lot was bordered on one side by Wolter Road and bordered on the remaining sides by a field on Norbert and Edna Nuttelman's farm.

¶4 John and Vicki Nuttelman built a house on the lot, which they maintained as a residence. In 1982, they sold the house and lot to Bruce and Cheryl Bradway. The Bradways owned the property until 1988, when they sold it to Terry and Susan Larson. In 1991, the Larsons sold the house and lot to Mark and Ellen Thorn.

¶5 The farm surrounding the house and lot remained in operation until 2000. From 1982 to 1987, John Nuttelman operated the farm, which was still owned by his parents. In 1987, the elder Nuttelmans rented the farm to Rod and Pam Olson. The Olsons purchased the farm in 1993.

¶6 In 2000, the Olsons divided the property surrounding the Thorns' lot into two residential lots. The Olsons hired a surveyor who discovered that part of what appeared to be the Thorns' backyard was property to which the Olsons held record title. A report prepared by the surveyor mapped out this area to which the Olsons had record title but that the Thorns were using. The report estimated that the parcel was .18 acres in area and named it "Outlot #1."

¶7 The Olsons' realtor informed the Thorns of the survey. In spring 2000, the Thorns began negotiations with the Olsons' realtor to purchase the area known as Outlot #1. These negotiations broke down in summer 2000 without an agreement. Shortly thereafter, the Olsons sold the two lots surrounding the Thorns' property to Dave and Paulette Lundin and Stephen and Susan Ahlas, respectively. The Olsons retained record title to Outlot #1, which was now landlocked between the Lundins', Ahlas's and Thorns' residential lots. The Thorns continued to maintain Outlot #1 as a part of their backyard until 2005.

¶8 In February 2005, the Thorns put the house and lot up for sale. Upon learning that the property was on the market, the Olsons contacted the Thorns' realtor to inform them that they had retained record title to Outlot #1. The Thorns expressed an interest in working out a deal to purchase the outlot from the Olsons, but no agreement was reached. Later that spring, the Olsons put up a light-duty fence around Outlot #1 to make a visual statement that they were the true owners of the area.

¶9 In 2005, the Thorns had two accepted offers to purchase and a lease with an option to purchase that fell through because of concerns about the dispute over the outlot. It is undisputed that the Olsons had contact with each of the potential buyers before the buyers cancelled the agreements. We provide additional background about the Olsons' contact with the prospective buyers in the discussion section.

¶10 In July 2005, the Thorns brought suit, seeking a judgment declaring them to be the owners of Outlot #1, and damages for trespass and intentional interference with contract. Following a bench trial, the circuit court concluded the Thorns owned Outlot #1 by adverse possession. The court also found in favor of the Thorns on their trespass and intentional interference with contract claims, awarding $9,535.97 in damages; $8,710.21 in costs and attorney fees, which were doubled to $17,420.42 by application of WIS. STAT. § 807.01; and $514.16 in interest. Additional background about the court's decision is provided later as necessary.

Discussion

¶11 On appeal, the Olsons challenge the circuit court's verdict declaring the Thorns to be the owners by adverse possession of Outlot #1, and determining that the Olsons intentionally interfered with the Thorns' attempts to sell the property.[1] We begin with the adverse possession claim.

[1] The Olsons also challenge the court's finding that the Olsons trespassed on the Thorns' property by erecting the fence around the disputed parcel, as well as the court's award of damages and costs. Regarding the trespass claim, the Olsons argue that the Thorns' claim of trespass cannot lie because the Thorns had no claim to the property at the time the Olsons erected a fence around the property because the Thorns were not owners by adverse possession until the circuit court entered its judgment. The Thorns respond that they took ownership by adverse possession (continued)

Adverse Possession

¶12 Adverse possession not based on a written instrument requires hostile, open and notorious, exclusive and continuous physical possession of land for twenty years. *See* ***Allie v. Russo***, 88 Wis. 2d 334, 343, 276 N.W.2d 730 (1979); WIS. STAT. § 893.25 (2005-06).[2] If possession is by the permission of the

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when the conditions for adverse possession were fulfilled, not only when the judgment was entered in their favor. We decline to address the merits of this issue because the Olsons failed to object to the circuit court's finding of trespass below. ***Portage Daily Register v. Columbia County Sheriff's Dep't***, 2008 WI App 30, ¶27, 308 Wis. 2d 357, 746 N.W.2d 525 (arguments first raised on appeal are generally deemed waived).

Regarding damages, the Olsons object to the damage award on grounds that the Thorns never became owners by adverse possession. This argument fails because, as we explain in ¶¶18-19, the circuit court reasonably concluded that the Thorns proved that they were adverse possessors. We decline to address any other challenge to the damage award advanced in the Olsons' brief-in-chief as vague and insufficiently developed. ***Kristi L.M. v. Dennis E.M.***, 2007 WI 85, ¶20 n. 7, 302 Wis. 2d 185, 734 N.W.2d 375 (insufficiently developed arguments need not be addressed); *see* ***State v. Mechtel***, 176 Wis. 2d 87, 100, 499 N.W.2d 662 (1993) (arguments not made in brief-in-chief may be deemed waived). Regarding costs, the Olsons argue that the "costs awarded to the Thorns [were] not authorized by statute" and were therefore improperly awarded. However, the Olsons fail to argue which of the specific costs awarded were not authorized by statute. Regardless, the Olsons waived their right to raise this issue on appeal by failing to object to the award of costs in the circuit court. *See* ***Witkin, Weiby, Maki, Durst & Ledin, S.C. v. McMahon***, 173 Wis. 2d 763, 768, 496 N.W.2d 688 (Ct. App. 1993) (failure to object to costs precludes review of costs on appeal).

[2] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted. WISCONSIN STAT. § 893.25 provides:

> (1) An action for the recovery or the possession of real estate and a defense or counterclaim based on title to real estate are barred by uninterrupted adverse possession of 20 years, except as provided by s. 893.14 and 893.29. A person who, in connection with his or her predecessors in interest, is in uninterrupted adverse possession of real estate for 20 years, except as provided by s. 893.29, may commence an action to establish title under ch. 841.
>
> (2) Real estate is possessed adversely under this section:
>
> (a) 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

(continued)

record titleholder, the possessor is not hostile and therefore cannot be adverse. ***Northwoods Dev. Corp. v. Klement***, 24 Wis. 2d 387, 392, 129 N.W.2d 121 (1964). An adverse possessor must give notice of his or her intent to exclude the record titleholder of the property by visible means, ***Allie***, 88 Wis. 2d at 344, whether by erecting a substantial enclosure or by cultivating or improving the land. *See* § 893.25.

¶13 In a declaratory action for adverse possession, the burden of proof is on the party asserting the claim. ***Madsen v. Holmes***, 57 Wis. 2d 148, 155-56, 203 N.W.2d 865 (1973). The finder of fact must strictly construe the evidence against the adverse possessor and apply all reasonable presumptions in favor of the record titleholder. ***Pierz v. Gorski***, 88 Wis. 2d 131, 136, 276 N.W.2d 352 (Ct. App. 1979). On review, we will uphold the circuit court's findings of fact on a question of adverse possession unless they are clearly erroneous. *See* ***Leciejewski v. Sedlak***, 110 Wis. 2d 337, 343, 329 N.W.2d 233 (Ct. App. 1982) (factual findings on issue of adverse possession will be sustained unless they are contrary to the great weight and clear preponderance of the evidence); ***State v. Hambly***, 2008 WI 10, ¶16 n.7, 307 Wis. 2d 98, 745 N.W.2d 48 ("clearly erroneous" and "great weight and clearly preponderance of the evidence" tests for reviewing factual findings are essentially the same). When reviewing whether the evidence is sufficient to support a finding of adverse possession, we will affirm the circuit court's determination unless the evidence is so lacking that "a finder of fact,

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(b) Only to the extent that it is actually occupied and:

1. Protected by a substantial enclosure; or

2. Usually cultivated or improved.

properly applying the law, could not have reasonably concluded that the adverse possessor met his [or her] burden of proof." ***Pierz***, 88 Wis. 2d at 136.

¶14 The Olsons contend that the circuit court's judgment declaring the Thorns to be the owners of Outlot #1 by adverse possession was based on clearly erroneous findings of fact. The Olsons appear to argue that, as a result of these clearly erroneous findings, the evidence was insufficient for the circuit court to conclude that the Thorns met their burden of proof. We disagree.

¶15 The circuit court found[3] that the period of adverse possession began in 1980 with John Nuttelman's maintenance of the disputed area as his yard. The Olsons contend that this finding is clearly erroneous because Nuttelman, whom the circuit court found to be a credible witness, testified that he kept the same property lines as established in 1980 through 1987, first as the owner of the house and lot, then as the operator of the Nuttelman farm, by plowing up to the property line in the field adjacent to the lot. The Olsons argue that this testimony establishes that any encroachment beyond the original property lines must have occurred after 1987, and thus the disputed area was not adversely possessed for the requisite twenty years prior to the 2006 circuit court judgment.

[3] The circuit court's oral decision contains extensive factual findings. The circuit court also chose to adopt proposed factual findings submitted by the Thorns. The judgment of the circuit court makes reference to Findings of Fact and Conclusions of Law that presumably incorporated the proposed findings adopted by the court. However, neither the Findings of Fact and Conclusions of Law nor a copy of the Thorns' proposed findings is in the record before us. One would expect that the Thorns' proposed findings adopted by the circuit court support the judgment in favor of the Thorns. And because the Olsons are responsible for ensuring that the record on appeal is complete, we assume that the missing material supports the circuit court's ruling. ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 27, 496 N.W.2d 226 (Ct. App. 1993).

¶16 The court agreed that Nuttelman kept the same property line from 1980 to 1987, but further found that this line included the disputed area. We conclude that this finding has support in the record. Nuttelman testified that the area he maintained as a yard had an elliptical or "half-moon" shape that resembled the shape of the lot with the disputed area included. As the circuit court observed, this shape differed from the angular, polygon-shaped lot described on the deed. Nuttelman testified that there were "no corners on that property" and that he "couldn't really see" the property stakes. Based on the foregoing testimony, we conclude that the circuit court's finding that the yard that Nuttelman and the Bradways maintained from 1980 to 1987 included the disputed area was not clearly erroneous.

¶17 The Olsons further contend that the circuit court's conclusion of adverse possession was clearly erroneous because the Larsons' occupation of the disputed area was not hostile, noting that Terry Larson testified in deposition that he obtained the permission of the Olsons before planting trees and storing logs on the property now in dispute. This argument also fails to prove that adverse possession of the property was not continuous because the Olsons did not own the adjoining property (they were renting from the elder Nuttelmans) until 1993, two years after the Larsons sold the house and lot to the Thorns. No evidence was presented that the Larsons sought the permission of the owners of the farm to use the disputed area. Thus, the circuit court's finding that possession of the disputed area was hostile and continuous for the statutory time period was not clearly erroneous because the Larsons' occupation of the disputed area remained hostile to the record titleholders of the farm at the time, the Nuttelmans.

¶18 We conclude that sufficient evidence exists to support the circuit court's conclusion that the Thorns met their burden of proving adverse possession.

There is no argument that, after 1987, the disputed area was occupied continuously by the Thorns and their predecessors in interest, the Larsons, without the permission of the record titleholders. Photographs and testimony established that, after 1987, trees and shrubs were planted in the disputed area, the lawn was mowed and a garden was planted. At various times, the area contained a holding tank and later a septic system, birdfeeders, birdbaths and a structure for storing wood.

¶19 Likewise, for the period of 1980 to 1987, the record contains sufficient evidence to support the court's conclusion. As discussed, the court reasonably concluded that the area the Nuttelmans maintained as their yard from 1980 to 1982 included the area now in dispute.[4] Additionally, Terrence Herbst, a neighbor who lived across the road from 1978 to 2004, testified that he was familiar with the lot boundary—he mowed the lawn several times for the Nuttelmans before the Bradways moved in and often rode his ATV near the boundary of the disputed area—and that the boundary was essentially the same from 1979 to 2000.[5] Based on the foregoing, we conclude that the Thorns

[4] The Olsons argue that the period John Nuttelman owned the house and lot cannot count in the required twenty-year period because a child cannot claim adverse possession against a parent, citing without elaboration ***Hahn v. Keith***, 170 Wis. 524, 174 N.W. 551 (1920), and ***Allen v. Ellis***, 125 Wis. 565, 104 N.W.739 (1905). These cases establish no such rule. Regardless, even if such a rule did exist, it would not have precluded the circuit court's finding that the property was adversely possessed for more than twenty years because John Nuttelman sold the property to the Bradways in 1982, twenty-three years before the Olsons sought to reestablish possession.

[5] The Olsons suggest that the only evidence of adverse possession from 1980 to 1987 was that the disputed area was mowed, and that mowing an area is insufficient to establish adverse possession of the property. Because they cite no supporting authority for this argument we decline to address it. *See* ***State v. Flynn***, 190 Wis. 2d 31, 39 n. 2, 527 N.W.2d 343, 346 n. 2 (Ct. App. 1994) (arguments insufficiently developed, inadequately briefed, or lacking citations to authority need not be addressed).

presented sufficient evidence for the circuit court to conclude that they met their burden to prove adverse possession.[6]

Intentional Interference with Contract

¶20 To prove a claim for intentional interference with contract, a plaintiff must show that (1) he or she had a contract or prospective contractual relationship with a third party; (2) the defendant interfered with that relationship; (3) the interference was intentional; (4) a causal connection exists between the interference and damages; and (5) the defendant was not justified or privileged to interfere. ***Wangard Partners, Inc. v. Graf***, 2006 WI App 115, ¶37 n.6, 294 Wis. 2d 507, 719 N.W.2d 523. Providing truthful information or honest advice to a third party within the scope of a request for advice is an affirmative defense to a claim of interference with contract. *See* ***Liebe v. City Finance Co.***, 98 Wis. 2d 10, 13, 295 N.W.2d 16 (Ct. App. 1980).

¶21 The Olsons argue that the circuit court erred in concluding that the Olsons intentionally interfered with the Thorns' efforts to sell the house and lot. They assert as an affirmative defense that they merely provided truthful information about the property dispute when contacted by each of the three prospective buyers. They note that none of the prospective buyers gave testimony that the Olsons provided untruthful information about the dispute or urged them to cancel the sale in their conversations with them. We nonetheless conclude that sufficient evidence was presented for the circuit court to conclude that the Thorns

[6] The Olsons' brief contains a section entitled "[t]itle by adverse possession has not ripened" which recites hornbook law on adverse possession but fails to present an argument. We are not certain of the argument that the Olsons may have intended to make, and, regardless, it is not our responsibility to make their arguments for them. ***Id.***

had proven that the Olsons intentionally interfered with their attempts to sell the house and lot.

¶22 The evidence of the Olsons' conduct after the Thorns secured agreements with the second and third respective potential buyers support a reasonable inference that the Olsons did not merely provide truthful information for the purposes of advising the prospective buyers, but rather intended to disrupt the buyers' nascent agreements with the Thorns. The second potential buyers, Jennifer and Terry Loging, agreed to purchase the property without Outlot #1, on condition that the septic system and LP tank be moved from Outlot #1 onto a part of the property not in dispute. The Thorns removed the septic system and LP tank as agreed.

¶23 In the meantime, Pam Olson alerted LaCrosse County that the sunroom of the Thorns' house, which the Thorns added in 1994, was too close to the Olsons' property (Outlot #1), violating a setback requirement. The Thorns requested a variance to the setback rules, which the county granted. The Olsons appealed the county's decision to the circuit court, and informed the Logings of the appeal. The next day, the Logings cancelled the agreement to purchase the house and lot. The Logings did not want to buy if there was a chance that expensive modifications would be necessary to bring the sunroom into compliance with the setback requirement, and they did not care to wait for the appeals process to resolve the matter definitively. Terry Loging later testified that he and his wife cancelled the agreement because they could not wait for the legal process to resolve the matter conclusively.

¶24 The timing of the Olsons' decision to bring the setback issue to the county—they presumably knew of the setback issue for five years before they

alerted the county while the property sale was pending—supports a reasonable inference that the Olsons pursued the setback issue with the county to interfere with the sale of the property to the Logings. Moreover, the circuit court gave no credence to Pam Olson's testimony on why she alerted the county about the setback problem; Olson said that she and her husband did not want to be so close to people who might be in the sunroom while they were using the parcel, even though the Olsons had never even entered the .18 acre, landlocked parcel before 2005. Olson's lack of a credible explanation in the circuit court's view for her decision to report the setback issue further supports an inference that the actual reason for this action was to interfere with the Thorns' attempted sale of the house and lot.

¶25 The third potential buyers, James and Diana Youngman, signed a lease with an option to purchase. Shortly after the Youngmans moved in, the Olsons fortified the fence around Outlot #1 with wooden fence posts to which "no trespassing" signs were affixed facing the house. James Youngman testified that he called Pam Olson after the fence was fortified. His conversation with Olson convinced him that the property dispute was a "little more intense" than it had first appeared. The Youngmans found an inspection report left anonymously in their mailbox appearing to indicate that the house had unacceptable levels of radon. They also received an anonymous note that accused them of attempting to steal someone else's property.

¶26 In its oral ruling, the circuit court did not explicitly find that the Olsons were the source of the anonymous notes. However, the circuit court could have reasonably infered from the circumstances that the Olsons authored the notes. Moreover, it would have been reasonable to conclude that the purpose of the notes, and the purpose of the fortification of the fence and posting of "no

trespassing" signs, was to intimidate the Youngmans into not exercising the option to purchase.

¶27 Of course, the Olsons may have had additional motivations beyond the desire to prevent the Thorns from selling the house and lot. However, the circuit court could have reasonably concluded that the Olsons intended to interfere with the sale of the house and lot because one natural and probable consequence of the Olsons' actions was that the prospective buyers would become discouraged and decide to look elsewhere. *See* WIS JI—CIVIL 2780 (ordinarily reasonable for the fact finder to infer that a person intends the natural and probable consequences of his or her actions).

Conclusion

¶28 In sum, we conclude that sufficient evidence exists in the record for the circuit court to conclude that the Thorns met their burden of proof to establish adverse possession of the disputed parcel. We further conclude that sufficient evidence was presented to prove the Thorns' claim of intentional interference with contract. All other arguments made by the Olsons on appeal are deemed waived. We therefore affirm.

By the Court.—Judgment affirmed.

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