COURT OF APPEALS
DECISION
DATED AND FILED

March 26, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1469 **Cir. Ct. No. 2006CV691**

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

FRED H. LAWTON AND CYNTHIA A. LAWTON REVOCABLE LIVING TRUST, DATED JUNE 16, 1999, FRED H. LAWTON AND CYNTHIA A. LAWTON, TRUSTEES, GARY A. LAWTON, KATHRYN A. SELLIN, AND WILLIAM J. LAWTON REVOCABLE (NOW IRREVOCABLE) TRUST, DATED JUNE 28, 1984, JOYCE R. LAWTON, TRUSTEE,

PLAINTIFFS-APPELLANTS,

V.

BORCHARDT LIVING TRUST, DATED JULY 23, 1993, WAYNE R. BORCHARDT OR DORIS E. BORCHARDT, TRUSTEE,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Reversed and cause remanded with directions.*

Before Vergeront, Lundsten and Bridge, JJ.

¶1 VERGERONT, J. The Lawtons'[1] claims for adverse possession and, alternatively, prescriptive easement of two adjacent portions of land were dismissed after a trial to the court. The disputed portions are the "two-rod strip" and the driveway. The court rejected the claim as to both portions because it determined that the Lawtons had not established the eastern boundary of one portion, the driveway, with the definiteness required by ***Droege v. Daymaker Cranberries, Inc.***, 88 Wis. 2d 140, 146, 276 N.W.2d 356 (Ct. App. 1979). On appeal, the Lawtons contend that, based on the undisputed evidence and the stipulation to the survey, they established as a matter of law adverse possession of the two-rod strip. They also contend that the evidence was sufficient for the court to find the eastern boundary of the driveway with the definiteness required by ***Droege*** and thus they have established adverse possession to the driveway. In the alternative, the Lawtons contend, the findings made by the circuit court support the grant of a prescriptive easement in their favor.

¶2 We conclude that ***Droege*** requires that the circuit court consider separately the two-rod strip and the driveway and decide as to each portion whether the evidence establishes the statutory requirements for adverse possession and a sufficient description of the land. We also conclude that ***Droege*** does not require that, in order to establish a sufficient description, the evidence be free from conflict on the description. Accordingly, we reverse and remand for the circuit court to conduct further proceedings consistent with this opinion, including the particular directions in paragraphs 22, 23, and 28, *infra*.

[1] The plaintiffs are Fred H. Lawton and Cynthia A. Lawton Revocable Living Trust, dated June 16, 1999, Fred H. Lawton and Cynthia A. Lawton, Trustees, Gary A. Lawton, Kathryn A. Sellin, and William J. Lawton Revocable (now irrevocable) Trust, dated June 28, 1984, Joyce R. Lawton, Trustee. We refer to them collectively as "the Lawtons."

BACKGROUND

¶3 In 1957, the father of Fred and Gary Lawton purchased a seventy-acre parcel of farmland in Walworth County. The Lawton family farmed the property from that date until the trial in this action in 2008. According to the Lawtons' trial testimony, until 2005 the Lawton family believed that the northern boundary of their property was the southern boundary of the U.S. Highway 12 right-of-way. They accessed the northern part of their property by means of a driveway from Highway 12 and, they testified, they plowed and planted within two to three feet of the wire fence that ran from the west of the driveway along the highway right-of-way.

¶4 In 2005, the Lawtons were contemplating developing the parcel and hired a surveyor. As a result of the survey, the Lawtons learned that the southern boundary of the highway right-of-way was actually two rods, or thirty-three feet,[2] north of the northern border of their property. The Borchardts,[3] who since 1979 have owned property adjacent to the western border of the Lawtons' property, own the strip of property between the northern border of the Lawtons' property and the southern boundary of the highway right-of-way. We will refer to the property the Borchardts own to the west of the Lawtons' property as "the Borchardts' adjacent parcel" and the property they own to the north of the Lawtons' property as "the Borchardts' northern strip."

[2] A rod is "a unit of length equal to 5-1/2 yards or 16-1/2 feet." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993).

[3] The owner of the disputed property and the defendant in this action is the Borchardt Living Trust, dated July 23, 1993, Wayne R. Borchardt or Doris E. Borchardt, Trustee. We will refer to the defendant as "the Borchardts."

¶5 The Lawtons filed this action claiming adverse possession of both the driveway and the two-rod strip. The two-rod strip was described in the complaint as an area two rods in width that is west of the driveway, south of the wire fence (which is alleged to begin on the western edge of the driveway and extend to the west), and north of the northern boundary of the Lawtons' property. In the alternative, the Lawtons sought the right to continue to use the driveway and the two-rod strip by prescriptive easement.[4]

¶6 At trial, the parties stipulated to a survey of the disputed area. The survey shows that the southern boundary of the highway right-of-way runs from the eastern boundary of the Borchardts' adjacent parcel east for 574.45 feet at which point it turns north for 32.01 feet and then runs east again. The wire fence is shown as running along the southern boundary of the highway right-of-way, apparently just north of it, from the eastern boundary of the Borchardts' adjacent parcel to the approximate point where the highway right-of-way turns north. At this point the fence stops.[5] As a result of the jog north and then east again in the southern boundary of the highway right-of-way, there is a stretch 33.77 feet along the right-of-way where the distance from the southern boundary of the right-of-way to the Lawtons' northern property line is two rods plus 32.01 feet, not two rods. An arrow marked on the survey points to the middle of this area indicating

[4] The Lawtons do not claim title by adverse possession of the portion of the Borchardts' northern strip that is east of the driveway because, Fred Lawton testified, they never farmed that land.

[5] According to the survey, although the fence stops at this point, it starts again after a gap of what appears from the survey to be at least seventy feet, to the east of the driveway, and continues to the eastern boundary of the Borchardts' northern strip. Because the Lawtons do not claim title by adverse possession to this portion of the Borchardts' northern strip, we do not refer to this portion of the fence in our opinion. When we refer to the "fence," "fence line," or "wire fence" we mean the fence to the west of the driveway.

"location of existing driveway …." However, there are no lines labeled as the western and eastern boundaries of the driveway.

¶7 The parties stipulated that the survey "[a]ccurately identifies and describes the location and boundaries of the area referred to in Paragraph 15 of the Plaintiffs' Complaint as the 'Two-Rod Strip[;]' and … [a]ccurately identifies and describes the property referred to in Paragraph 10 of Plaintiffs' Complaint as the 'Driveway.'" In addition, the parties stipulated that the survey "[p]roperly depicts the location and placement of the Fence described in Paragraph 12 of Plaintiffs' Complaint," and the relevant portions of the Lawtons' and the Borchardts' properties, as well as accurately identifying and describing the highway right-of-way.

¶8 The primary area of dispute at the trial to the court concerned the nature and extent of the Lawtons' use of the two-rod strip and the driveway. At the close of evidence, the court determined that the Lawton family had plowed as close to the wire fence as practical continuously since 1957, perhaps missing a year or two. The court based this determination on the aerial photos and the testimony. The court stated that, if the plowing up to the fence line were the "decisive fact, the plaintiff wins." However, the court determined the Lawtons were not entitled to relief because the evidence varied on the width of the driveway. The court relied on ***Droege***, 88 Wis. 2d at 146, 147, for the proposition that there must be a "reasonably accurate" basis for determining the boundaries of the area claimed by adverse possession. Because of the variation in testimony, the court stated, it could not determine the eastern boundary of the driveway. Apparently the court relied on this determination to reject the claim as to both the driveway and the two-rod strip. Apparently for the same reason, the court determined the Lawtons were not entitled to a prescriptive easement.

DISCUSSION

¶9 On appeal the Lawtons contend that, based on the undisputed evidence and the stipulation, they established as a matter of law adverse possession of the two-rod strip and the evidence was sufficient for the court to find the eastern boundary of the driveway. They assert that the circuit court erred in applying ***Droege*** and, if ***Droege*** is correctly applied, they are entitled to title by adverse possession to both the two-rod strip and the driveway. In the alternative, the Lawtons contend, the findings made by the court support the grant of a prescriptive easement.

¶10 The Borchardts respond that the Lawtons are making a new argument on appeal by treating the two-rod strip and the driveway as distinct portions of the real estate to which they claim title by adverse possession. They also counter that the court correctly applied ***Droege*** in determining that the eastern boundary of the driveway was not sufficiently definite and that this indefiniteness required dismissal of the adverse possession claim and the prescriptive easement claim with respect to both the two-rod strip and the driveway.

I. Adverse Possession

¶11 A person who, "in connection with his or her predecessors in interest, is in uninterrupted adverse possession of real estate for 20 years [with an exception not relevant here] may … establish title under ch. 841 [Declaration of

Interest in Real Property]." WIS. STAT. § 893.25(1) (2007-08).[6] Real estate is possessed adversely:

> (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
>
> (b) Only to the extent that it is actually occupied and:
>
> 1. Protected by a substantial enclosure; or
>
> 2. Usually cultivated or improved.

Section 893.25(2).

¶12 A claim of adverse possession presents mixed questions of fact and law. ***Klinefelter v. Dutch***, 161 Wis. 2d 28, 37, 467 N.W.2d 192 (Ct. App. 1991). We accept the circuit court's findings of fact unless they are clearly erroneous. ***Id.*** at 33. Whether those facts fulfill the legal standard for adverse possession presents a question of law, which we review de novo. ***Id.***

¶13 We first consider the Borchardts' argument that the Lawtons did not distinguish between the two-rod strip and the driveway before the circuit court. We disagree. As stated above, the complaint identified these as two distinct portions of the Borchardts' property to which the Lawtons were asserting adverse possession and prescriptive easement, and the stipulation regarding the survey referred to these paragraphs in the complaint. The Lawtons' pretrial brief repeated these two distinct identifications. At trial Fred Lawton testified that the claim of

[6] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

adverse possession was for "the driveway plus the land going from the driveway west to the [Lawtons'] western property line."

¶14 It is true the Lawtons' counsel's closing argument did not emphasize the distinction between the two-rod strip and the driveway, but we do not view that as a waiver. Her initial argument focused on the evidence of the Lawtons plowing and planting up to between two and three feet of the wire fence, which is the northern boundary of the two-rod strip described in the Lawtons' complaint and pretrial brief. In response, the Borchardts' counsel pointed to evidence disputing that the Lawtons had plowed and planted on the two-rod strip and, in addition, contended that the evidence did not establish the eastern boundary of the Lawtons' claim, apparently treating the two-rod strip and the driveway as a unit. In reply to this latter argument, the Lawtons' counsel referred to the testimony on both the western and the eastern boundaries of the driveway.[7] We are uncertain why the court did not make any findings on the eastern boundary of the two-rod strip, and instead effectively treated the two-rod strip and the driveway as one unit. However, we are satisfied the Lawtons did maintain in the circuit court that the property they claim by adverse possession consists of the two-rod strip and the driveway, with the eastern boundary of the two-rod strip being the western boundary of the driveway.[8]

[7] The Lawtons' counsel's reference to the testimony of both Fred and Gary Lawton "about the eastern border of that fence" can only mean their testimony on the fence to the west of the driveway. *See* footnotes 4 and 5, *supra*. As explained in paragraph 26, *infra*, according to Fred and Gary's testimony, the eastern end of the fence to the west of the driveway is at the point, or the approximate point, that they consider the western boundary of the driveway.

[8] We recognize that the term "two-rod strip" was not consistently used during the trial to refer to only the portion of the Borchardts' northern strip to the west of the driveway. This in part appears to stem from the fact that the stipulated survey of the entire area of the Borchardts' northern strip is described as "a 2 rod wide strip conveyed to the adjoiner." The Borchardts point (continued)

¶15 We next consider the dispute between the parties over whether the court must, as a matter of law under ***Droege***, consider the two-rod strip and the driveway as one area and deny adverse possession of both the two-rod strip and the driveway if the eastern boundary of the driveway is not sufficiently described. The Lawtons assert that ***Droege*** supports their position that a finding of adverse possession for a portion of the land in dispute is proper, if the requirements for adverse possession are met as to that portion and the description of that portion is sufficient, even if another portion is not sufficiently described. The Borchardts' position, as we understand it, is that under ***Droege***, if the court properly determined that the width of the driveway was not sufficiently described, then it was bound to reject the Lawtons' claim not only to the driveway portion of the disputed area, but also the adjacent two-rod strip.

¶16 Because this issue involves a determination of whether the circuit court applied the correct legal standard, our review is de novo. *See* ***McLellan v. Charly***, 2008 WI App 126, ¶20, 758 N.W.2d 94.

¶17 In ***Droege***, the plaintiff sought title by adverse possession to a triangular tract that had defined boundaries. 88 Wis. 2d at 142. There was evidence of occupancy sufficient to support adverse possession of the road, beach, picnic area, campground, and mowed area within that tract but not of the swamp

---

to this description in their brief on appeal. In addition, at times during the trial, attorneys and witnesses used the term "two-rod-wide strip" to refer to the combined area of the driveway and the portion of the Borchardts' northern strip to the west of the driveway. In spite of the different uses of the term "two-rod strip" during the trial, when we read the pleadings, pretrial briefs, the entire trial transcript, and post-trial arguments, we are satisfied that the Lawtons consistently maintained their position that they were seeking title by adverse possession and a prescriptive easement to the portion of the Borchardts' northern strip west of the driveway and to the driveway.

and the eastern edge of the tract. ***Id.*** at 145. The plaintiff argued on appeal that there was sufficient evidence to allow adverse possession of the entire tract because the unoccupied area was contiguous to the land actually occupied. ***Id.*** The court rejected that argument because the statute, at the time numbered WIS. STAT. § 893.08 (1977), provided that "the premises so actually occupied, and no other, shall be deemed to be held adversely." ***Id.***[9] The court acknowledged that "'not every square foot' must be occupied to constitute adverse possession of the whole tract.…" ***Id.*** (citation omitted). However, the court stated, that rule does not permit "tacking on" a large area of unoccupied land to actually occupied land. ***Id.*** at 146-47.

¶18 The defendants in ***Droege*** argued that the plaintiff had failed to establish entitlement by adverse possession to any portion of the tract because the record did not show the dimensions of the area occupied. The court stated this principle, on which the Borchardts rely:

> In the absence of evidence upon which a legal description of the occupied area could be based, the claim of adverse possession must fail. While absolute precision or utilization of a surveyor is not required to establish lines of occupancy, the evidence must provide a reasonably accurate basis upon which the trial court can partition the land in accordance with sec. 893.08, Stats.

Id. at 146.

¶19 The ***Droege*** court then applied this principle to the evidence:

> Evidence was received that the beach and roadway were located in the southernmost 100 feet of the property. The

[9] The same requirement is in the current version of the statute, with slightly different wording: "… [o]nly to the extent that it is actually occupied…." WIS. STAT. § 893.25 (2)(b).

> map prepared by a surveyor shows the easternmost portion of the roadway is approximately 60 feet west of the eastern boundary. This evidence is sufficient to allow the trial court to award Droege that parcel of land.
>
> The camping and picnicking areas were not adequately described to allow adverse possession of those areas. The evidence presented at trial delineated neither the area that was brushed, nor the northern boundary of the campground. Droege described the camping area as "north of the beach." Most of the camping was done "down close to the river," within "fifty feet or so." These descriptions are insufficient to allow the trial court to accurately partition the land. Where the adverse possessor elects to proceed on an all-or-nothing basis and fails to provide the trial court with evidence of the extent of actual occupancy upon which the land could be partitioned, failure to prove adverse occupancy of any substantial portion of the land is fatal to the entire claim. *Where, as here, evidence was presented as to the extent of occupancy of only a portion of the land, only that portion may be awarded*.
>
> The judgment is reversed except insofar as it awards Droege the southernmost 100 feet of the parcel, approximately 60 feet west of the eastern boundary. On remand, the trial court will determine the appropriate legal description of this parcel.

Id. at 146-47 (emphasis added).

¶20 We agree with the Lawtons that ***Droege*** supports their position that they are entitled to adverse possession of any portion of the property to which they claim title if the requirements of the statute are met as to that portion and the description is sufficiently definite. Thus, the circuit court erred in denying the claim of adverse possession to the two-rod strip solely because of its determination that the eastern boundary of the driveway was not sufficiently described. The correct approach is to consider separately the two-rod strip and the driveway and decide as to each whether the evidence establishes the statutory requirements for adverse possession and also establishes a sufficient description.

¶21 We do not understand the Borchardts to contend that, if the two-rod strip is considered separately from the driveway, the testimony on the boundaries of the two-rod strip is insufficient under ***Droege***. It appears undisputed that the southern boundary of the two-rod strip is the northern boundary of the Lawtons' property, which is two-rods south of the southern boundary of the highway right-of-way. It also appears undisputed that the western boundary of the two-rod strip is the eastern boundary of the Borchardts' adjacent parcel. The court found that the Lawtons had plowed up to the fence line as close as practical continuously since 1957, perhaps missing a year or two. This finding can only be referring to the fence running along the southern boundary of the highway right-of-way from the eastern boundary of the Borchardts' adjacent parcel to the approximate point where the right-of-way turns north. *See* footnotes 4 and 5, *supra*. This fence is shown on the survey map as extending 574.45 feet from the western boundary of the two-rod strip—the eastern boundary of the Borchardts' adjacent parcel—to approximately three feet from where the highway right-of-way turns north. Thus, according to the circuit court's finding on the plowing, it would appear that the eastern boundary of the two-rod strip is, at a minimum, the point where the fence ends and may be a few feet to the east beyond that point.

¶22 The circuit court questioned the exact distance between the southern boundary of the highway right-of-way and the fence, because on the survey the fence appears to be a few feet north of that boundary.[10] However, we do not understand the Lawtons to claim any portion of the highway right-of-way, and the

[10] We emphasize again that by "fence" we mean the fence to the west of the driveway. *See* footnote 5, *supra*. The fence to the east of the driveway is south of the southern boundary of the highway right-of-way because of the right-of-way's jog to the north.

court found that the Lawtons plowed to within two or three feet of the fence, not all the way up to it because that would entangle the machinery in the fence. If there is a factual dispute on this or any other point that needs to be resolved in order to arrive at the precise boundaries of the two-rod strip, the circuit court should resolve them on remand. However, based on our review of the record, we do not see any evidence that would support a conclusion that the description of the two-rod strip is not sufficient to permit the court to partition the land.

¶23 The Borchardts contend that, even if the description of the two-rod strip is sufficiently definite, the circuit court did not make all the findings necessary to a determination that the Lawtons adversely possessed that area as required by the statute. The Borchardts assert that the court's finding that the Lawtons plowed as close to the fence line as practical since 1957, with the exception of one or two years, does not address the statutory requirement that the claimant be "in actual continued occupation under claim of title, exclusive of any other right," WIS. STAT. § 893.25(2)(a), because there was testimony that the Borchardts' tenants used the two-rod strip. The Lawtons reply that the court's statements indicate that it found all the statutory requirements were established for the two-rod strip. On remand, the circuit court can clarify what statutory requirements it found were established and make any remaining necessary findings.

¶24 Turning to the driveway, we examine the court's determination that the Lawtons did not meet their burden to establish the eastern boundary with the degree of specificity required by ***Droege***. There is no dispute that there is a driveway that has a northern boundary on the highway right-of-way and a southern boundary on the Lawtons' northern property line. The survey points to the general

location of the driveway, but does not identify the western and eastern boundaries of the driveway or the width of the driveway.

¶25 The circuit court is correct that there was varying testimony from the Lawtons on the width of the driveway. However, a conflict in testimony does not prevent the court from determining width. If the court can resolve the conflict by choosing the more credible testimony, then the width is not indefinite. Even if the court views all conflicting testimony as having equal weight, we see no reason why the court should not find the driveway to be the narrowest width supported by the testimony. Of course, a circuit court could properly reject all testimony on a particular point as not credible, and the Borchardts suggest this is what the circuit court did here. However, we do not understand the circuit court to have decided that no testimony on the width of the driveway is credible.

¶26 It is true that testimony on the width of the driveway, in itself, does not establish the eastern boundary of the driveway unless there is evidence of a western boundary. However, there was evidence of the western boundary. Fred Lawson testified that the west side of the driveway was "the post that would be on that fence line running to the west," which appears to be the eastern boundary of the two-rod strip. *See* paragraph 21, *supra*. The Borchardts do not point to any testimony disputing his testimony. Gary Lawson's testimony is consistent with Fred's because, in Gary's calculations on the width of the driveway, he used the black square on the survey where the highway right-of-way turns north as the western border of the driveway and that, according to the survey, is within approximately three feet of the end of the fence that Fred used as the western boundary of the driveway.

¶27 It may be that the court found that, regardless of the width of the driveway, the Lawtons did not establish exclusive use of the driveway as required by the statute. The court stated that "[the Lawtons] have not specifically demonstrated a use to the exclusion of all others ever of that driveway and an exact width." However, the court's ensuing discussion on the driveway concerned only the conflict of evidence on the width of the driveway. The Borchardts' brief indicates they do not believe the court made any other ruling on the driveway; they ask for a remand if we determine the description is sufficient so that the court can make findings on whether the evidence meets the exclusiveness requirement of the statute.

¶28 We conclude we must reverse and remand the court's determination that the Lawtons did not establish the eastern boundary of the driveway with sufficient definiteness under ***Droege***. ***Droege*** does not require that the testimony on the boundaries of the claimed property be free of conflict. We are unable to understand why this record does not permit the court to find the western boundary of the driveway and resolve the conflicts in the testimony to arrive at an eastern boundary. Although we are remanding, nothing in this opinion is intended to limit on remand the court's ability to find facts, weigh evidence, and make credibility determinations with respect to the western and eastern boundaries of the driveway—or any other disputed issue of fact the court finds necessary to resolve on remand. If the court determines that the issue of the exclusiveness of the Lawtons' use of the driveway is dispositive, it may make the findings that support that conclusion without addressing the western and eastern boundaries of the driveway.

II. Prescriptive Easement

¶29 It appears that the court dismissed the claim for a prescriptive easement for the same reasons it dismissed the adverse possession claim. On appeal both parties' contentions on prescriptive easement involve arguments we have addressed in discussing the adverse possession claim. Accordingly, we reverse and remand on the prescriptive easement claim as well.

CONCLUSION

¶30 We reverse the judgment dismissing the claims of adverse possession and prescriptive easement and remand for further proceedings consistent with this opinion, including the particular directions in paragraphs 22, 23, and 28, *supra*.

By the Court.—Judgment reversed and cause remanded with directions.

Not recommended for publication in the official reports.