COURT OF APPEALS
DECISION
DATED AND FILED

October 27, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2469 **Cir. Ct. No. 2003CV86**

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

RONALD C. KLEUTGEN AND KATHLEEN M. KLEUTGEN,

PLAINTIFFS-RESPONDENTS,

V.

ROBERT A. MCFADYEN, JR., DEBRA A. MCFADYEN, STANLEY K. SOLTIS AND JOANN P. SOLTIS,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Waushara County: LEWIS R. MURACH, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Lundsten, P.J., Dykman, and Vergeront, JJ.

¶1 LUNDSTEN, P.J. Robert and Debra McFadyen and Stanley and Joann Soltis appeal a judgment of the circuit court finding Ronald and Kathleen

Kleutgen the owners of three parcels of land by adverse possession. The McFadyens and Soltises hold title to the disputed parcels of land. The McFadyens and Soltises argue that the Kleutgens failed to produce evidence that satisfies the statutory standard for adverse possession for all three of the parcels. We agree with the McFadyens and Soltises with respect to only one of the parcels. We disagree and conclude that the Kleutgens met the statutory standard with regard to the other two parcels. We, therefore, affirm in part and reverse in part.

Background

¶2 All of the property owned by the parties to this appeal, as well as the portions of that property in dispute in this case, were at some point prior to 1957 owned by Elgie and Christine Replogle. The property, if viewed as a whole when the Replogles owned it, is rectangular in shape. We refer to this full rectangle of property as the "original Replogle property." The longer borders of the original Replogle property run north to south, bounded by a public road to the south and a lake to the north. The east and west borders are bounded by separately owned property.[1]

¶3 In 1957, the Replogles sold two parcels of their original property to Raymond and Antonette Kleutgen, predecessors in title to the respondents in this

[1] Although both parties submitted different surveys of the property involved to the trial court, and each differed slightly in its conclusions, the parties do not appear to contest the metes and bounds description of the property in dispute here. Because both parties submitted plaintiff's exhibit 2, "the Murphy survey," in the appendices to their appellate briefs, we will assume that the parties stipulate to the measurements on that survey. Thus, this court's description of each party's parcels of property, and those in dispute, are meant to reflect the description as shown on exhibit 2.

case, Ronald and Kathleen Kleutgen. We will refer to these parcels as the "northern deeded parcel" and the "southern deeded parcel."

¶4 The Kleutgens' northern deeded parcel occupies the northwestern-most corner of the original Replogle property. Their southern deeded parcel occupies the southeastern-most corner of that property. Robert and Debra McFadyen and Stanley and Joann Soltis own adjoining parcels that occupy the northeastern-most corner of the original Replogle property. Whether by mistake or design, there is a strip of land that runs across the original Replogle property, from the eastern border to the western border, that was not included in the original deeds to the Kleutgens, Soltises, or McFadyens. For purposes of this action, the parties have separated this disputed strip of land into three distinct parcels, designated as "areas" 1, 2, and 3. We use these same designations.

¶5 Area 1 represents the thirty-three-foot-wide strip of land that begins at the southwest corner of the original Replogle property and runs north for approximately 215.5 feet. Fifteen feet of the width of that strip consists of a gravel road. The remaining eighteen feet of width is grass, the eastern border of which blends seamlessly into the western border of the Kleutgens' southern deeded parcel. The McFadyens and Soltises own a deeded easement for ingress and egress that runs the entire length and width of area 1.

¶6 Area 2 is a grassy strip of land that is thirty-three feet wide and runs west to east, its western edge flush with area 1, and its eastern edge flush with area 3. Area 2 bisects the Kleutgens' two deeded parcels and borders those parcels to the north and south.

¶7 Area 3 is a wooded area that is bordered on its west side partially by area 2 and partially by the Kleutgens' northern deeded parcel. Area 3's northern

border abuts both the McFadyens' and Soltises' properties. Its eastern edge is bordered by separately owned property, and its southern border blends seamlessly into the woods on the northeast corner of the Kleutgens' southern deeded parcel.

¶8 Sometime during or prior to 2004, the McFadyens and Soltises learned that the Kleutgens did not, as the Kleutgens believed, actually have title to areas 1, 2, and 3. The McFadyens and Soltises then acquired title to areas 1, 2, and 3 from Christine Replogle's estate. The administrator for the estate transferred the land by special administrator's deed. Shortly thereafter, the Kleutgens initiated an action seeking ownership of areas 1, 2, and 3 by adverse possession.[2] Alternatively, the Kleutgens asserted that they obtained a prescriptive easement over area 1.

¶9 After a bench trial, the trial court found that the Kleutgens had proved they had adversely possessed areas 1, 2, and 3 for the statutory twenty-year period. Specifically, the court found that the Kleutgens had satisfied the statutory "usually improved" requirement with respect to areas 1 and 2, and the statutory "substantial enclosure" requirement with respect to area 3. Because the trial court found that the Kleutgens had adversely possessed area 1, the court did not reach the issue of whether they had obtained a prescriptive easement over that area.

[2] At trial, the Kleutgens also claimed ownership by adverse possession of a fourth area of land that consisted of a small piece of frontage between the Kleutgens' northern deeded parcel and the Soltises' parcel. That piece of land is not at issue in this appeal.

Discussion

¶10 Robert and Debra McFadyen and Stanley and Joann Soltis are appellants in this case. They have all submitted joint briefs. From this point forward in the opinion, we will refer to them collectively as the appellants.

¶11 The appellants argue that the trial court erred in finding the Kleutgens[3] had acquired each of the three disputed areas by adverse possession. Specifically, they contend that the facts do not demonstrate as a matter of law that the Kleutgens "[u]sually cultivated or improved" areas 1 and 2.[4] We agree with the appellants with respect to area 1, but disagree with respect to area 2. The appellants also argue that the trial court erred in finding that area 3 was "[p]rotected by a substantial enclosure." We conclude that, regardless of whether there was a substantial enclosure, the Kleutgens usually improved area 3 and, thus,

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[3] The adverse possession statute allows for tacking of the period of adverse possession between successive possessors of a disputed property so long as there is privity of estate between them. *See* WIS. STAT. § 893.25(2)(a) (2003-04). Because privity between them has not been challenged here, when we refer to the Kleutgens, we include not only Ronald and Kathleen, but also Ronald's parents, Raymond and Antonette, who are the predecessors in title.

[4] WISCONSIN STAT. § 893.25(2) (2003-04) provides the standard for adverse possession. That statute reads:

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

All further references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

acquired it by adverse possession. We will address each of the three areas separately below.

¶12 We laid out the applicable standard of review in ***Klinefelter v. Dutch***, 161 Wis. 2d 28, 467 N.W.2d 192 (Ct. App. 1991):

> We sustain a trial court's findings of fact unless they are clearly erroneous. The legal significance of those facts, however, is a question of law, which we review de novo. Applied here, the trial court's determinations as to what the parties did, and how the land appeared, are facts. Whether, given those facts, the [party claiming adverse possession] adversely possessed the disputed [property] is a question of law.

Id. at 33 (citations omitted).

Area 1

¶13 Area 1 is comprised of a driveway and a grass-covered portion. The trial court found that the Kleutgens had "usually improved" the thirty-three-foot-wide strip that comprises area 1 by "mow[ing] and maintain[ing] grass along the easement," by granting permission to other parties to use the driveway on it, and by directing holders of the easement over it to mow the grass on at least one occasion. The appellants argue that the Kleutgens granted permission to use the driveway, and directed others to mow the grass around the driveway only a small number of times. The appellants argue, therefore, that the only support for the court's finding that the Kleutgens had usually improved area 1 is their mowing of the grass on it. The appellants contend mowing grass alone is not sufficient to constitute usual improvement.[5] We agree.

[5] In their arguments on this appeal, both parties use terms that do not track the adverse possession statute. For example, the appellants argue that the Kleutgens never "possessed" areas (continued)

¶14 We begin by noting that, for purposes of adverse possession analysis, there are two severable parts of area 1. The first part is the gravel driveway, which constitutes fifteen feet of the width of the thirty-three-foot-wide parcel and runs the entire length of the parcel. The remaining eighteen feet is grass, and constitutes what we view as the second part of area 1. Because the character of these two pieces of land and the Kleutgens' use of them differ, our analysis of whether the Kleutgens adversely possessed area 1 will address each part individually.

¶15 Under the adverse possession statute, to "usually improve" property "means to put to the exclusive use of the occupant as the true owner might use such land in the usual course of events." ***Burkhardt v. Smith***, 17 Wis. 2d 132, 138, 115 N.W.2d 540 (1962). Nonetheless, the "premises should be used in such manner as to indicate reasonably the extent of hostile invasion and conquest." ***Id.*** at 139.

¶16 The Kleutgens used the driveway to access their northern deeded parcel. Sporadically, the Kleutgens gave permission to others to use the driveway. For example, the Kleutgens gave permission to non-appellant neighbors to the west to use the disputed portion of the road to access their property and to access parking space on the Kleutgens' property. The Kleutgens also raked the driveway "once in a while." Stanley Soltis, by filling in depressions with gravel, was the

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1 and 2. The test under the statute, however, is whether the Kleutgens "*occupied*" the land under claim of title continuously and exclusively, and whether that land was substantially enclosed or usually cultivated or improved. WIS. STAT. § 893.25(2). It is, therefore, unclear what the parties mean when they use such terms as "possession." When seemingly inapplicable terminology is used, we will infer which elements of the statute the parties are discussing by looking at the context in which their arguments are made.

only party who affected the physical character of the driveway in any significant way.

¶17 In order for land to be "usually improved," something must be done that is sufficient to put the true owner on notice that a party is claiming ownership of a particular parcel of property. *See* ***id.*** at 139. The record here shows that the Kleutgens gave permission for neighbors to use the driveway only twice during the entire period of purported ownership. Beyond those instances, the Kleutgens' only use of the driveway involved traveling over it and sporadically raking it. The appellants argue that this activity is not enough to constitute usual improvement. We agree. Nothing in the Kleutgens' activity related to the driveway portion of area 1 was sufficient to put the true owner on notice that the Kleutgens were claiming ownership of that piece of property.

¶18 With respect to the eighteen-foot-wide strip of grass that runs parallel to the driveway in area 1, the trial court found that the Kleutgens had usually improved that parcel by mowing and maintaining it, and by directing others to mow or maintain it. The only testimony that the Kleutgens ever directed anyone outside of the Kleutgen family to mow or maintain this strip of grass came from Robert McFadyen. He testified that, when he was eleven or twelve years old, Raymond Kleutgen told him to mow this strip because "it [is] our access road." It is unclear whether this occurred more than once, or just the one time. We agree with the appellants that, because of the infrequency of this direction, this testimony has little effect on the analysis of whether the Kleutgens usually improved this strip of land. Therefore, the primary use on which the trial court could base the conclusion that the Kleutgens usually improved this strip was that the Kleutgens regularly mowed it.

¶19 The appellants argue that mowing alone in this instance cannot constitute sufficient use of the land such that it qualifies as usual improvement. We agree. Although a party claiming ownership by adverse possession need only use the property as the true owner would use it, that use must be capable of putting the true owner on notice that the adverse possessor is making such a claim. *See* ***id.*** at 139. We conclude that, under the circumstances of this case, with nothing denoting a property line between the Kleutgens' lawn and the disputed strip of grass, such as bushes or stones, the mere act of mowing the strip of grass between the Kleutgens' property and the road fails to put the true owner on notice of such a claim. Such a use is susceptible to several other more reasonable interpretations, including that the mowing party is being neighborly because it is more convenient for that party to mow the strip of grass than the true owner.

Area 2

¶20 The trial court found that the Kleutgens had demonstrated adverse possession of area 2, the thirty-three-foot-wide strip of grass bisecting the Kleutgens' two deeded parcels in an east-west direction, because they had mowed, maintained, and used it for recreation. The appellants argue that these are temporary uses, and do not amount to continuous use or "usually improving" the land. We disagree.

¶21 "The requirement of continuity is satisfied by activities that are appropriate to seasonal uses, needs and limitations, considering the land's location and adaptability to such use." ***Otto v. Cornell***, 119 Wis. 2d 4, 7, 349 N.W.2d 703 (Ct. App. 1984). The Kleutgens used the disputed property seasonally, and then only on the weekends and while on vacation. A court must analyze the Kleutgens' use of area 2 within that framework. The fact that the activity was not constant

does not defeat continuity. Rather, the activity must be consistent with such seasonal use. The trial court found that the Kleutgens used area 2 as often as the true owner of the property would for recreational and special event purposes on seasonal property. We agree that the testimony supports this conclusion.

¶22 In addition to the mowing, maintenance, and recreational uses of area 2, undisputed testimony also established that the Kleutgens erected a linear series of lights that began on the Kleutgens' southern deeded parcel, crossed area 2, and continued into the Kleutgens' northern deeded parcel. Raymond Kleutgen also testified that power and phone lines running to both the Kleutgens' northern and southern deeded parcels were buried under area 2. We conclude that all of this activity evidences exclusive use "as the true owner might use such land in the usual course of events," ***Burkhardt***, 17 Wis. 2d at 138, and is sufficient to put the true owner on notice that the Kleutgens were claiming ownership of this piece of property.

Area 3

¶23 The trial court found that the Kleutgens had adversely possessed area 3 because it was protected by "a substantial enclosure." Specifically, the court found that the fence that bordered the eastern edge of area 3 stood as a boundary marker for the property from 1957, when the Kleutgens purchased the two parcels of land, until at least 1982, when the fence was partially destroyed by the effects of a storm. The appellants argue that because the fence was built by the true owners of area 3, the Replogles, it cannot be said to have put the true owners on notice that the Kleutgens were claiming ownership of that area. Regardless of whether the fence constituted a substantial enclosure, however, we conclude that the Kleutgens adversely possessed area 3 by usually improving it.

¶24 The appellants claim that area 3 is "wild" land and is therefore subject to the wild lands rule in ***Pierz v. Gorski***, 88 Wis. 2d 131, 276 N.W.2d 352 (Ct. App. 1979). In ***Pierz***, we stated: "Improvements sufficient to apprise the true owners of adverse possession of wild lands must *substantially change the character of the land*." ***Id.*** at 137 (emphasis added). It is not apparent that the wild lands rule applies to adverse possession actions under WIS. STAT. § 893.25. *See* ***Klinefelter***, 161 Wis. 2d at 37 ("Section 893.25, Stats., makes no distinction between 'wild lands' and any others."). But even assuming the rule does apply, the trial court correctly concluded that area 3 was akin to a "private park," not "wild land." Area 3 is a relatively small area, consisting of between 70 and 100 trees. It is regularly maintained and cleared of branches and debris and is immediately adjacent to the Kleutgens' property. Apart from noting that the area is characterized in the record as wooded, the appellants do not explain why, either as a legal or factual matter, area 3 should be considered wild. Therefore, we apply the normal test for "usually improved" to area 3.

¶25 The trial court found that the Kleutgens regularly cleaned area 3. This included clearing fallen trees, branches, leaves, and debris. The court also found that the Kleutgens regularly used area 3 for recreation and camping. In addition, undisputed testimony indicated that the Kleutgens used area 3 as a place for storage of trailers and boats. Testimony from all parties involved points to the conclusion that this use of the land did put the public on notice that the Kleutgens claimed ownership of area 3. Both Stanley Soltis and Robert McFadyen testified that they believed or assumed area 3 belonged to the Kleutgens. While not dispositive of the issue, that testimony tends to support the trial court's findings, and refutes the appellants' argument that the Kleutgens' use of area 3 was not "visible" enough to provide notice of claimed ownership.

¶26 "What might be required to constitute adverse possession of a city lot is not necessarily applicable to rural or lake property in an unimproved area." ***Burkhardt***, 17 Wis. 2d at 139. We conclude that the Kleutgens' use of area 3 was consistent with how a true owner would use the land on a rural or lake property, and was sufficient to put the true owners on notice that the Kleutgens claimed ownership of that property.

Conclusion

¶27 We affirm the trial court's finding that the Kleutgens have proven adverse possession of areas 2 and 3. We reverse the trial court's finding that the Kleutgens adversely possessed area 1. Our resolution of the ownership of area 1 resurrects the Kleutgens' claim to a prescriptive easement over area 1, an issue the trial court did not reach because it concluded that the Kleutgens owned area 1. Therefore, we remand for a determination of that issue.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

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