COURT OF APPEALS
DECISION
DATED AND FILED

May 4, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2881-FT **Cir. Ct. No. 2004CV395**

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

KATHLEEN A. BINDEL,

PLAINTIFF-APPELLANT,

V.

SHELA M. JENNINGS AND BAKER STREET GRILL, LLC,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Wood County: EDWARD F. ZAPPEN, JR., Judge. *Affirmed.*

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

¶1 PER CURIAM.[1] Kathleen Bindel appeals a judgment awarding property to Shela Jennings and Baker Street Grill, LLC, by adverse possession. Bindel contends that the evidence introduced at trial does not adequately support the adverse possession award, by which she loses title to a strip of her business property measuring 101.06 feet by 10.67 feet. We affirm because we conclude that the evidence was sufficient to establish the respondents' claim.

¶2 Since 1996, Bindel has owned a lot and building in Wisconsin Rapids, which she uses for her dog grooming business. Approximately twenty feet of lawn separates her building from a building housing the Baker Street Grill, which lies on a lot owned by Shela Jennings directly east of Bindel's lot.

¶3 The original north-south line dividing the two lots lay just a few inches west of the Baker Street Grill building, giving Bindel ownership of almost the entire lawn between the buildings. However, Bindel and all previous and present owners and occupiers of the Jennings' lot since 1982 believed that a post in the ground 10.67 feet west of the true line marked the boundary between the properties. The parties learned of the actual property line only because of surveys done in 2004, after which Bindel commenced this action for ejectment. Shela Jennings and the Baker Street Grill counterclaimed for adverse possession of the 10.67-foot strip of land.

¶4 At trial, one of the former owners of Jennings' lot testified that, after buying the lot in 1982 and until selling it in 1996, he maintained all of the lawn between the two buildings, including the disputed strip, and also maintained two

[1] This is an expedited appeal under WIS. STAT. RULE 809.17 (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

preexisting horseshoe pits that extended from his property into the strip. Additionally, he shoveled the adjacent sidewalk up to the post midway between the buildings, in accord with his belief that it marked the property line. The owner from 1996 until 2001 assigned maintenance responsibilities to a lawn service, which continued to mow the disputed strip during that time. The lawn service owner testified that the horseshoe pits remained as an incursion into the strip, and the tavern then operating in the Baker Street Grill building also put picnic tables in the strip. Bindel confirmed the presence of picnic tables on the strip of land after Jennings bought the Baker Street Grill property.

¶5 In 2003, Baker Street Grill owner Peter Jennings installed a concrete patio in the area of the strip where the horseshoe pits formerly lay, and installed some railroad ties and mulch up to the edge of the 10.67-foot strip. Peter Jennings continued the previous owners' practice of mowing the remaining grass portion of the strip. Until a dispute arose over encroachment on her property, Bindel occasionally mowed all the way to the Baker Street Grill building. She did not know, however, that she was mowing her own property, and did not object to its continued use by the Baker Street Grill building occupants.

¶6 Based on this evidence, the trial court held that Jennings and the Baker Street Grill, and their predecessors, had used the 10.67-foot strip of land adversely for more than twenty years, and that Bindel's occasional mowing did not defeat adverse possession because her mowing was a "neighborly accommodation" rather than a co-use or co-possession. Bindel argues otherwise in her appeal.

¶7 Adverse possession not founded on the written instrument requires proof of twenty years of uninterrupted possession of the disputed property to the

extent the property is actually occupied and usually cultivated or improved. WIS. STAT. § 893.25. The party asserting adverse possession bears the burden of proof. ***Allie v. Russo***, 88 Wis. 2d 334, 343, 276 N.W.2d 730 (1979). The burden includes a showing that the disputed property was used for the requisite period of time and in an open, notorious, visible, exclusive, hostile, and continuous manner that would apprise a reasonably diligent landowner and the public that the possessor claimed the land as his or her own. ***Pierz v. Gorski***, 88 Wis. 2d 131, 136-37, 276 N.W.2d 352 (Ct. App. 1979). Whether the facts as found by the trial court establish adverse possession is a question of law. *See* ***Klinefelter v. Dutch***, 161 Wis. 2d 28, 33, 467 N.W.2d 192 (Ct. App. 1991).

¶8 The evidence here was sufficient to establish title by adverse possession. The respondents and their predecessors in interest have continuously possessed and occupied the strip of land, treating it as their property since 1982, satisfying the twenty-year requirement. Bindel and her predecessors acquiesced in that use and possession for more than twenty years, as well. Furthermore, the use was open because of the recreational facilities in plain view and the lawn maintenance activities. This use and activity also satisfied the "usually improved" test, because they were uses and activities of a typical owner. The uses and activities put the true owners on notice of a claim to their property. The new dividing line was clearly demarcated by a post in the ground and, later, by railroad ties. Finally, the use was exclusive. We agree with the circuit court that Bindel's occasional mowing, during the time she believed she did not own the land, is reasonably viewed as an act of neighborliness. Under these circumstances, the respondents sufficiently proved their claim.

By the Court.—Judgment affirmed.

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