COURT OF APPEALS
DECISION
DATED AND FILED

July 5, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP3097 **Cir. Ct. No. 2003CV612**

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

GARY G. BAUMANN AND JUDITH A. BAUMANN,

PLAINTIFFS-RESPONDENTS,

V.

BRIAN SAARI AND AMY L. SAARI,

DEFENDANTS-APPELLANTS,

JOHN L. JONAS AND CHERRYL R. JONAS,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Marathon County: DOROTHY L. BAIN, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Brian and Amy Saari appeal a judgment granting Gary and Judith Baumann title to a thirty-three-foot by sixty-seven-foot strip of land. The court concluded the Baumanns acquired title to the strip through adverse possession. The Saaris assert the Baumanns failed to prove their claim. However, the Saaris raise only factual challenges on appeal. Because the trial court's decision is supported by the record, we affirm the judgment.

Background

¶2 The eastern edge of the Saaris' lot abuts the western edge of the Baumanns' lot along a line that is just over 111 feet long. The Baumanns acquired their lot in 1978 from Amy Saari's grandfather, John Jonas. Amy's uncle, James Jonas, occupied the Saaris' lot from 1960 to 2001, selling it to the Saaris in 2002.

¶3 When the Baumanns purchased their lot, they believed the western boundary to be thirty-three feet west of their attached, "tuck-under" garage.[1] They did not commission a survey. When the Saaris purchased their lot in 2002, they obtained a survey. It was discovered that the true lot line ran extremely close to the Baumanns' garage. The Baumanns brought this action seeking title to the eastern-most thirty-three feet of the Saaris' lot.[2]

¶4 At trial, the court heard evidence on the Baumanns' use of the disputed strip. The evidence demonstrated that since 1978, the Baumanns have:

[1] A tuck-under garage is one accessed from the rear of the home.

[2] The Baumanns also brought suit against John and Cherryl Jonas, alleging various theories of misrepresentation. The claims against the Jonases appear to have been resolved but in any event are not before us on appeal.

> [M]owed the grass; parked cars, campers, boats, and snowmobiles; spread gravel; cleared the area of snow; and stacked split firewood. When their children were young they maintained a children's wading pool and a child's sandbox for several years on the disputed strip. In addition, a cemented swing set was put in place on the strip for many years. In 1984, the Baumanns erected a basketball pole; the pole was cemented into the ground and remained in place until 2002, when it was removed by the Saaris. In addition, the Baumanns planted flower beds and trees in the disputed strip, and the Baumann children played on it. …
>
> … A roadway or trail that allowed access from the front driveway to this "tuck-under garage" was present on the west side of the garage – in the disputed strip – when the Baumanns purchased the house and they continued to use it to access the garage. This roadway was approximately three to five feet from the house and was approximately twelve feet wide.

¶5 The court also noted that the Saaris' witnesses' memories failed any time they were asked about anything that might potentially help the Baumanns, including things already documented by photographs. The court therefore explicitly found the Baumanns' witnesses more credible than the Saaris' witnesses.

¶6 Ultimately, the court concluded the Baumanns had demonstrated their adverse possession of a portion of the Saaris' property. The court was satisfied the Baumanns showed possession of the land west of their garage, but concluded there was not the same evidence of use of the land north of the garage. Accordingly, the court did not award the Baumanns the entire portion they claimed title to, but rather only the southern sixty-seven feet of the eastern thirty-three feet. This parcel extends seventeen feet north of the garage, reflecting an area used to access the tuck-under garage. The Saaris appeal.

Discussion

¶7 The Baumanns made their claim for adverse possession under WIS. STAT. § 893.25,[3] which states, in relevant part:

> **(1)** … A person who, in connection with his or her predecessors in interest, is in uninterrupted adverse possession of real estate for 20 years … 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
>
> (b) Only to the extent that it is actually occupied and:
>
> 1. Protected by a substantial enclosure; or
>
> 2. Usually cultivated or improved.

¶8 The burden of proof is on the party asserting an adverse possession claim. ***Harwick v. Black***, 217 Wis. 2d 691, 699, 580 N.W.2d 354 (Ct. App. 1998). To succeed, the party claiming adverse possession must show the disputed property was used for the requisite time period "in an open, notorious, visible, 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." ***Id.***

¶9 Whether the adverse claimant's use of the land "was open, continuous, notorious, hostile, and exclusive" presents questions of fact. ***Id.*** at 703. We do not set aside factual findings unless clearly erroneous. WIS. STAT.

[3] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

§ 805.17(2). In addition, determinations of witness credibility are the exclusive province of the trial court, not this court. *See* ***In re Estate of Dejmal***, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980).

¶10 The Saaris essentially raise three arguments. The first argument is that the trial court failed to apply the appropriate evidentiary presumptions. "The finder of fact must strictly construe the evidence against the adverse possessor and apply all reasonable presumptions in favor of the true owner." ***Pierz v. Gorski***, 88 Wis. 2d 131, 136, 276 N.W.2d 352 (Ct. App. 1979).

¶11 It appears the Saaris' support for their argument is the fact that the trial court ruled in the Baumanns' favor; they point to nothing in the record conclusively demonstrating the court ignored any presumptions. The difficulty, however, with the Saaris' reasoning is that evidentiary presumptions do not supersede the trial court's responsibility to make factual findings and assess witness credibility. The judgment in the Baumanns' favor is not a function of ignoring presumptions but, rather, of the trial court rejecting the Saaris' witnesses and their testimony regarding the Saaris' use of the disputed parcel.

¶12 The Saaris' second argument is that there is insufficient evidence to support the Baumanns' claim to the "entire parcel." To the extent this refers to the Baumanns' claim for the entire eastern thirty-three feet, the court agreed and for that reason awarded only the southern sixty-seven feet of the eastern thirty-three feet. If, however, the Saaris' contention is that there is no evidence the Baumanns occupied every square inch of the parcel awarded, the Baumanns did not need to make such a showing. "The argument that one claiming adverse possession must actually lay his hands, so to speak, upon the entire lot and keep them there as if

covering the premises with a mantle was soundly rejected" by the supreme court. ***Burkhardt v. Smith***, 17 Wis. 2d 132, 138, 115 N.W.2d 540 (1962).

¶13 The Saaris' final argument is that the evidence does not support the trial court's finding of exclusive use because: (1) there was no physical demarcation of the Baumanns' claim; (2) the Saaris used part of the disputed parcel; and (3) certain items like the basketball hoop and flower box were not on the property for the requisite twenty years.

¶14 The Saaris' assertion regarding the physical demarcation is two-fold. At times, they complain there was no physical barrier, like a fence, around the parcel. At other points, they assert there is no evidence the neighbors could differentiate between the Baumanns or the Saaris using the parcel. WISCONSIN STAT. § 893.25 allows adverse possessions claims after twenty years, to the extent the land is "[p]rotected by a substantial enclosure" or "[u]sually cultivated or improved." WIS. STAT. §§ 893.25(2)(b)1 and 2. Thus, demarcation with a physical barrier is only one way of supporting a claim for adverse possession.

¶15 "Adverse possession without inclosure need not be characterized by a physical, constant, visible occupancy or improved by improvements of every square foot …." ***Burkhardt***, 17 Wis. 2d 132, 137-38. "'Usually improved' means to put to the exclusive use of the occupant as the true owner might use such land in the usual course of events." ***Id.*** at 138. There was evidence the Baumanns mowed the lawn, parked cars and snowmobiles, stacked wood, and did other things on the parcel. All of these activities would be readily observed by the public.

¶16 The Saaris suggest, however, that if the public cannot identify precisely which party is responsible for the lot's use, an adverse possession claim must fail. The Saaris' argument is unreasonable because, carried to its logical

conclusion, it would require adverse possessors to prominently display their names on all items in the disputed parcel so as to advertise their claim. The Saaris cite no authority to suggest that adverse possession of a parcel in a "manner that would apprise … the public that the possessor claimed the land as his or her own" is quite that exacting. *See* ***Harwick***, 217 Wis. 2d at 699.

¶17 To the extent the Saaris claim they have used the disputed parcel as well, the trial court rejected evidence of their use. For example, while the Saaris claimed they also mowed the lawn, the court noted that two neighbors testified that they had only ever seen the Baumanns tend to the lot. Moreover, the "true owner's casual reentry upon property does not defeat the continuity or exclusivity of an adverse claimant's possession." ***Otto v. Cornell***, 119 Wis. 2d 4, 7, 349 N.W.2d 703 (Ct. App. 1984).

¶18 Finally, the Saaris' argument that neither the basketball hoop nor the flower box had been in place for twenty years is unavailing.[4] Essentially, they assert that the Baumanns rely on those two items to establish the timeline of their ownership. This argument ignores the trial court's factual findings. The court concluded the adverse possession began when the Baumanns moved into the home in 1978 and began using the lot for a variety of purposes.

¶19 When we consider adverse possession, we do not consider each encroachment in isolation. *See* ***Burkhardt***, 17 Wis. 2d at 138-39. Continuity of

[4] In their main brief, the Saaris discuss the basketball hoop and the flower box as fixtures in an attempt to make comparisons to cases relying on the installation of permanent fixtures as indicative of adverse possession. Only in their reply brief do the Saaris raise for the first time an argument that the Baumanns outright failed to prove twenty years of continuous occupation. However, we do not consider arguments raised for the first time in the reply brief. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980).

possession can be satisfied by seasonal uses. ***Id.*** at 139. Thus, the trial court held that the Baumanns had, since 1978, displayed open, hostile, and exclusive use of the parcel by mowing the lawn; parking cars, campers, boats, and snowmobiles; spreading gravel and clearing snow; storing firewood; placing a wading pool, a sandbox, and a swing set for the children to play on; erecting and cementing a basketball hoop; planting flowers and trees; and using the lot to access the garage. We do not view each of these activities in isolation, nor will the seasonal nature of some activities necessarily defeat the continuity of the claim. *See* ***id.*** Taken as a whole, the record contains sufficient evidence to support the trial court's findings and we will not disturb them on appeal.

By the Court.—Judgment affirmed.

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