COURT OF APPEALS
DECISION
DATED AND FILED

October 19, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP1801 **Cir. Ct. No. 2003CV101**

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

JEFFREY A. STOIKES, JANE C. STOIKES, JAMES M. STOIKES, JUDITH L. STOIKES, TIMOTHY G. STOIKES AND ROBIN L. STOIKES,

PLAINTIFFS-RESPONDENTS,

V.

JOSEPH DREMSA AND MACHELLE DREMSA,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Crawford County: MICHAEL KIRCHMAN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Joseph Dremsa and Machelle Dremsa appeal a judgment that, in part, rejected their claim of adverse possession against owners of

an adjacent parcel. The issue is whether the Dremsas presented sufficient evidence to support their claim. We conclude they did not, and affirm.

¶2 This action was commenced by Jeffrey Stoikes and the other Stoikes plaintiffs against the Dremsas. The complaint alleged that the Stoikes plaintiffs hold record title to a certain parcel, and that the Dremsas have title to a certain parcel to the Stoikes plaintiffs' south. As relevant to this appeal, the Stoikes plaintiffs sought a judgment declaring that they are the owners of the entire parcel to which they hold record title, and rejecting any potential adverse possession claim by the Dremsas. The Dremsas' answer claimed adverse possession. The issue was decided by the circuit court on a factual record consisting of exhibits, stipulated facts, deposition testimony, and courtroom testimony. The court held that the Dremsas failed to prove that their use of the property was adverse, and entered judgment as requested by the Stoikes plaintiffs.

¶3 The pertinent facts do not appear to be disputed. Both parcels were originally owned by John Dremsa. In 1954, John sold the north parcel to his daughter Marie Roesellet (Joseph's aunt) and the south parcel to his son Fred Dremsa (Joseph's father). Siblings Marie and Fred continued as adjoining owners until the next recorded change in ownership, in 1983, when defendant Joseph Dremsa bought the south parcel. In 1988, the north parcel held by Marie was deeded outside the family by sheriff's deed, and eventually became property of the Stoikes plaintiffs in 1994.

¶4 The recorded boundary between the two parcels is a straight east-west line that appears to follow a section line. Since at least 1942, a fence has existed along an irregular line that is in the same general area and orientation as the recorded boundary, but does not precisely follow it. At points, the fence runs

north of the recorded legal boundary and, at other points, the fence runs south of the legal boundary. The land north of the fence is generally sloping and wooded, and the only agricultural purpose it is suited for is grazing, while the land south of the fence is suitable for growing crops. The Dremsas' adverse possession claim in this case concerns those areas that are north of the recorded boundary of their property, but south of the fence.

¶5 Adverse possession issues raise mixed questions of fact and law. ***Klinefelter v. Dutch***, 161 Wis. 2d 28, 37, 467 N.W.2d 192 (Ct. App. 1991). We sustain a circuit court's findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2) (2003-04).[1] Whether those facts meet the standard for adverse possession is a question of law, which we review independently. ***Klinefelter***, 161 Wis. 2d at 33. As applied, the question of what the parties did, and how the land appeared, are facts; whether, given those facts, the claimants adversely possessed the disputed area is a question of law. ***Id.*** To constitute adverse possession, the use of the land must be open, notorious, visible, exclusive, hostile and continuous, such as would apprise the landowner and the public that the possessor claims the land as his own. ***Pierz v. Gorski***, 88 Wis. 2d 131, 137, 276 N.W.2d 352 (Ct. App. 1979).

¶6 On appeal, the Dremsas make two arguments. First, they argue that they presented sufficient evidence to establish a claim of adverse possession under the terms of WIS. STAT. § 893.25, which provides:

> **(1)** An action for the recovery or the possession of real estate and a defense or counterclaim based on title to

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

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

¶7 The circuit court found that the Dremsas had not shown that either their or their predecessors' use of the property north of the boundary was adverse. That continues to be a disputed issue on appeal.

¶8 Hostile intent does not exist if the use is pursuant to the permission of the true owner. ***County of Langlade v. Kaster***, 202 Wis. 2d 448, 453 n.2, 457, 550 N.W.2d 722 (Ct. App. 1996). In their opening brief, the Dremsas assert that they satisfied the element of adversity, but they do not specifically describe what evidence they think satisfies the requirement of hostile use. In their reply brief, it appears they may have abandoned this theory entirely in favor of their second theory, discussed below. However, we will address hostile intent nonetheless.

¶9 Until 1954, both parcels were owned by John Dremsa. Obviously, he could not possess adversely against himself, regardless of where the fence was placed, and so the earliest that the required twenty-year period of adverse possession could have started was 1954. From 1954 to 1983, the parcels were

owned separately by siblings Fred and Marie. From 1983, defendant Joseph Dremsa owned the south parcel, while Marie retained the north parcel until 1988. Because a period of adverse possession starting in 1988 would not have reached the twenty-year mark by the time this action started, any successful claim of adverse possession must include at least a portion of the 1954-1988 period in which Fred, and then Joseph, were owners alongside Marie.

¶10 The potentially relevant evidence on hostile use was mainly in the form of deposition testimony by defendant Joseph Dremsa and Fred's former wife, now Margaret Pettera. We will not fully detail their testimony here. However, it shows there was an informal, perhaps unspoken, understanding between Fred and Marie that the fence would be left in place, and the owners would continue to use the land on their own side of the fence for cultivation and grazing, respectively. This arrangement apparently occurred without dispute and with continued good relations between the families. As to what happened after Joseph Dremsa assumed control of the south parcel, he testified that he was not aware of any agreement between himself and Marie, whether verbal or otherwise, and that he farmed the area up to the fence because that "has always been the line fence."

¶11 This evidence shows no sign of hostile use as between Fred and Marie. On the contrary, the testimony by Pettera, in particular, shows that the arrangement was the product of agreement. A use that is permissive in the beginning can be changed into one that is hostile only by the most unequivocal conduct on the part of the user. ***Kaster***, 202 Wis. 2d at 455. There is nothing in the testimony to suggest that Joseph, when he assumed control of the south parcel, took any action that would satisfy that standard. Therefore, we conclude that the Dremsas failed to show hostile use.

¶12 We turn next to the Dremsas' second theory, which is that when adjoining landowners have agreed on a dividing line, erect a fence, and then occupy up to the fence, their possession is mutually adverse. The argument is not that, at the time of the 1954 purchases, it was the intent of grantor John Dremsa, or of purchasers Fred or Marie, for the legal boundary to be established where the fence was, instead of as recorded in the deeds. Rather, the argument is that after twenty years of the fence's existence by agreement of the owners, the fence became the legal boundary.

¶13 Resolution of this issue requires careful attention to two types of agreements that are suggested by these facts, but are separate and distinct concepts. The first type of agreement is that adjoining landowners can agree to install or leave standing a fence that does not precisely track the legal boundary, and can further agree to honor that fence in conducting their respective farming and grazing operations or other uses of the land but without intending to change the legal boundary itself. The second type of agreement is that adjoining landowners can agree to alter the legal boundary to conform it to a fence that does not currently track the legal boundary.

¶14 We begin by addressing the latter type of agreement. For that issue, the question is: Did the Dremsas prove that there was ever an agreement between the owners of these parcels to change the legal boundary to conform to the existing fence? We conclude that the evidence was insufficient to show such an agreement. None of the evidence shows that Fred and Marie had a clear understanding of the legal boundaries, or that they intended to cause any change to the legal boundaries as recorded in the deeds that conveyed their parcels to them. The closest that the evidence comes to addressing this question is Joseph Dremsa's answer when asked: "So everybody thought that the fence line was the property

line?" Joseph replied: "Well, yeah. I don't think anybody ever surveyed it to really know where the section line actually run [sic] through there …." This answer is insufficient because the question was too vague in its use of the term "everybody," and there is no evidence in his answer that anybody knowingly intended to change the originally deeded boundary. Nor was there any evidence that Joseph and Marie agreed to change the legal boundary after Joseph took control of the south parcel.

¶15 Finally, we return to the first type of agreement, and the issue here is whether an agreement by landowners to leave a fence in place and honor it in practice creates an adverse possession interest by operation of law, even when the parties did not also have an agreement to change the legal boundary itself. The Dremsas may be arguing that this is the holding of several cases, including ***Bader v. Zeise***, 44 Wis. 96, 102 (1878), in which the court stated that it "would seem incontestible, that if two coterminous proprietors *agree upon and establish a dividing line* between their premises, and actually claim and occupy the land on each side of that line continuously for twenty years, such possession will be adverse, and confer a title by prescription" (emphasis added). It is clear from this passage that one part of this principle is that the owners have "agreed upon a [new] dividing line" that deviates from the true legal dividing line. This simply brings us back to whether the Dremsas proved that there was an agreement between any owners to change the legal boundary. We conclude there is no such proof.

¶16 Beyond these cases, the Dremsas have not offered any other authority for the proposition that an agreement by landowners to leave a fence in place and honor it in practice creates an adverse possession interest by operation of law, even when the parties did not also have an agreement to change the legal

boundary itself. The proposition is inconsistent with the idea that a permissive use of the property does not lead to adverse possession. Therefore, we reject the argument.

¶17 In summary, we conclude that the Dremsas failed to establish their adverse possession claim, and the circuit court therefore properly entered judgment declaring the Stoikes plaintiffs to be the owners of the full parcel described in their deed.

By the Court.—Judgment affirmed.

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