COURT OF APPEALS
DECISION
DATED AND FILED

October 19, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2614 **Cir. Ct. No. 2004CV654**

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

MARK C. WANTUCH,

PLAINTIFF-RESPONDENT,

V.

JENS O. LUEBOW AND MADISON VETERINARY CLINIC LTD.,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Dane County: MICHAEL N. NOWAKOWSKI, Judge. *Affirmed*.

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

¶1 PER CURIAM. Jens Luebow and Madison Veterinary Clinic Ltd. (collectively, Luebow) appeal the circuit court's judgment in favor of Mark Wantuch. Luebow challenges the circuit court's ruling that Wantuch is entitled to a narrow strip of Luebow's land based on adverse possession. We affirm.

¶2 Wantuch owns property directly north of property owned by Luebow. Many years ago, there was a cattle fence on the property boundary. The fence was taken down about the time Luebow's predecessor-in-interest built a veterinary clinic on the land. After the clinic was built, an asphalt parking lot was installed on the north end of the Luebow parcel. There is a gravel driveway that runs on the southern border of the Wantuch parcel. Over time, the gravel driveway on the Wantuch parcel widened over several feet of Luebow's property to abut the asphalt parking lot.

¶3 A day after Wantuch purchased the property in 2003, Luebow put up a new fence on the property line that bisected the area that had been used as a driveway on the Wantuch parcel. Wantuch then brought this adverse possession action to claim a seven-and-one-half-foot strip of land running the length of his property on the southern edge. After a trial, the circuit court awarded Wantuch a four-foot strip of Luebow's land extending eighty-one feet to the east of his west lot line.

¶4 "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 …." WIS. STAT. § 893.25(1) (2003-04).[1] "The sole test of adverse possession is the physical character of the possession." ***Allie v. Russo***, 88 Wis. 2d 334, 343, 276 N.W.2d 730 (1979). "This physical possession must be hostile, open and notorious, exclusive and continuous for the statutory period." ***Id.*** A person claiming adverse possession of land must prove

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

adverse possession by the greater weight of the credible evidence. ***Kruse v. Horlamus Indus., Inc.***, 130 Wis. 2d 357, 358-59, 387 N.W.2d 64 (1986).

¶5 Luebow argues that there was insufficient evidence to establish that Wantuch, or his predecessors-in-interest, improved or maintained the disputed parcel. We reject this argument. The testimony at trial and the photographic evidence established that the disputed area was improved with a gravel driveway. The evidence showed that the driveway existed in substantially the same condition for more than twenty years. Land is considered "improved" for purposes of adverse possession if it is "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). Wantuch and his predecessors-in-interest used the driveway as the true owner might—in fact, they thought they *were* the true owners—by traversing it to reach the garage and by parking cars on it. The fact that they did not more regularly maintain the driveway is not inconsistent with their adverse possession claim because they treated the land as a "true owner" would have treated it.

¶6 Luebow argues that there is insufficient evidence to show that Wantuch provided visible notice of an intent to exclusively occupy the land. Luebow suggests that the threshold question is whether the improvement "significantly altered the character of the land in a manner which would give a reasonably diligent landowner notice of adverse possession," quoting ***Pierz v. Gorski***, 88 Wis. 2d 131, 138, 276 N.W.2d 352 (Ct. App. 1979). Under this test, there is no question that Luebow had notice. The land was actively being used as a driveway by the Wantuch parcel, with cars parking on it and driving to and fro.

¶7 Luebow counters that he had occasionally used the driveway to store plowed snow and that it had been used by others in the past to access the veterinary clinic's parking lot. The circuit court specifically took the incidental use by Luebow and others into account in deciding to award Wantuch a four-foot strip of land, rather than a seven-and-a-half-foot strip. The court did not award all of the land because it concluded that Wantuch had not established that his use of the three-and-a-half-foot portion was exclusive.

¶8 Luebow argues that the circuit court erred in trying to reconcile the testimony of Glenn Birrenkott, a former owner of the Wantuch parcel, with the testimony of Luebow's surveyor, Mead & Hunt, about the location of the old cattle fence. Birrenkott testified that the old fence was located in nearly the same location as the boundary between the gravel driveway and the blacktop parking lot. The surveyor testified that the former fence was located one foot north of the new fence, which would place the old fence several feet north of where Birrenkott believed it to be. Luebow contends that the circuit court should have believed the testimony of the surveyor because all reasonable presumptions must be made in Luebow's favor as titleholder. *See* WIS. STAT. § 893.30 ("[T]he person establishing a legal title to the premises is presumed to have been in possession of the premises …."); ***Allie***, 88 Wis. 2d at 343 ("All reasonable presumptions must be made in favor of the true owner."). The court was required to start with the presumption favoring title ownership, but the court was not required, as Luebow argues, to resolve all conflicts in the testimony in favor of the titleholder. Were it so, there would be little need for trial. More importantly, the dispute about the location of the old cattle fence, which existed over fifty years ago, had no significant relevance to the issues in this case.

¶9 Luebow argues that the circuit court impermissibly allowed Wantuch to give surprise testimony at trial. The surprise testimony consisted of Wantuch's statements at trial reducing his adverse possession claim from a narrow strip of land spanning the entire length of his property to a narrow strip of land coextensive with the area where the gravel driveway was, eliminating a portion of the claim to the east of where the driveway lay. Luebow claims this change constituted a "trial by ambush." *See* ***Haack v. Temple***, 150 Wis. 2d 709, 716, 442 N.W.2d 522 (Ct. App. 1989) ("'Wisconsin has abandoned the concept of "trial by ambush" where neither side of the lawsuit knows until the actual day of trial what the other side will reveal in the way of witnesses or facts.'" (citation omitted)). We agree with Wantuch that "[t]he concession that the evidence did not show an adverse possession claim to an additional strip of property extending to the back or eastern boundary of the property was certainly not prejudicial to Luebow and can hardly be considered as a prejudicial surprise, or trial by ambush."

¶10 In sum, the circuit court's finding that the southern portion of the driveway was openly and continuously used by Wantuch and his predecessors-in-interest for over twenty years is supported by the record. The court based its decision both on the testimony and on the photographs, stating that "[t]he aerial photographs do not lie." We conclude there is sufficient evidence to support the circuit court's decision that Wantuch is entitled to a four-foot strip of the land based on adverse possession.

By the Court.—Judgment affirmed.

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