COURT OF APPEALS
DECISION
DATED AND FILED

October 24, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP100 **Cir. Ct. No. 2003CV89**

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

WAYNE L. LAUTENBACH, DIANE LAUTENBACH AND WDL TRUST, WAYNE L. LAUTENBACH AND DIANE LAUTENBACH, CO-TRUSTEES,

PLAINTIFFS-APPELLANTS,

V.

KIEHNAU FAMILY TRUST,

DEFENDANT,

COUNTY OF DOOR,

DEFENDANT-RESPONDENT.

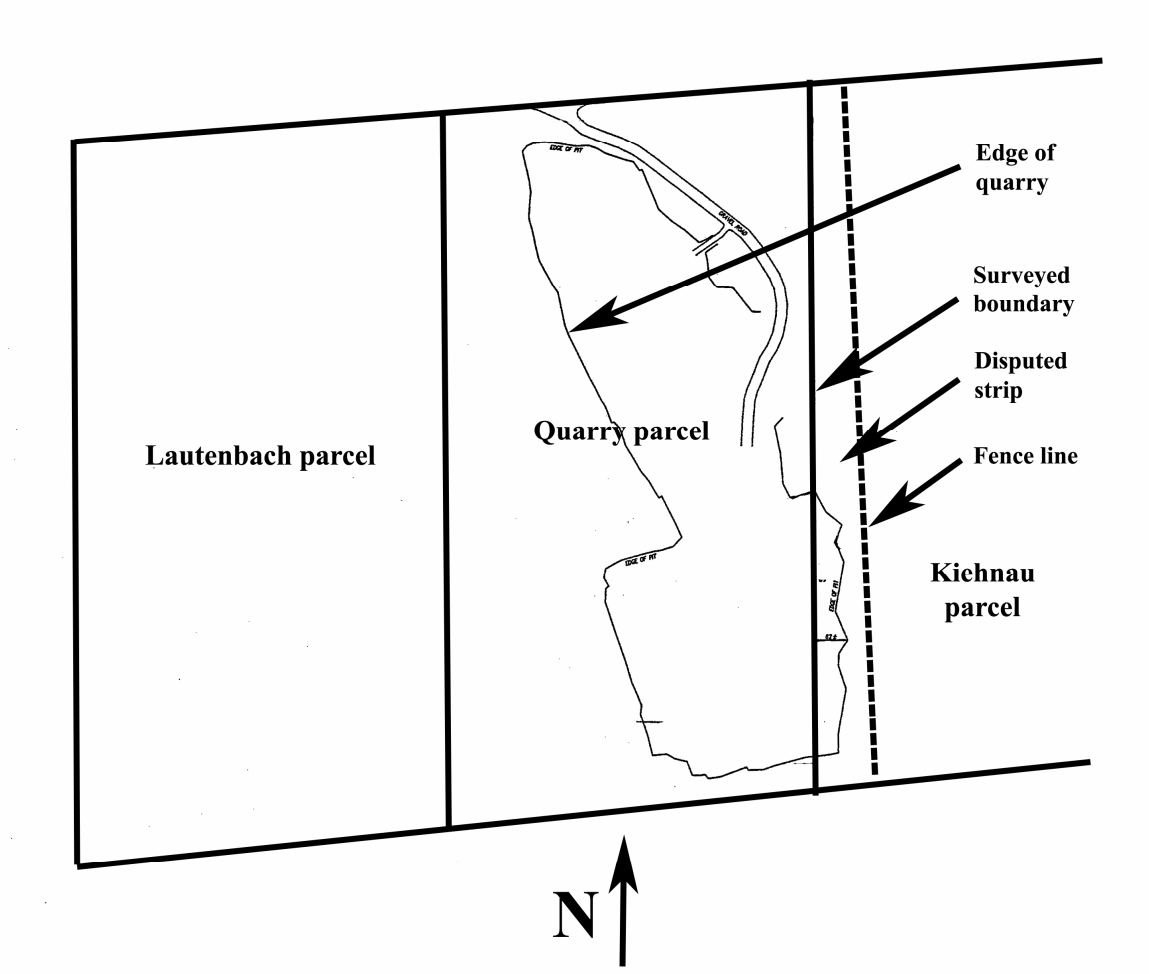
APPEAL from a judgment of the circuit court for Door County: PETER C. DILTZ, Judge. *Affirmed*.

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

¶1 PETERSON, J. This case is a dispute over two adjoining parcels of land in Door County. Wayne and Diane Lautenbach appeal a judgment granting Door County clear title to both parcels. We reject their arguments and affirm the judgment.

BACKGROUND

¶2 The following sketch shows the two disputed parcels, marked as "quarry parcel" and "disputed strip," along with the surrounding land:



¶3 The first disputed parcel is the strip marked "disputed strip." The strip totals 2.66 acres and is between 63 and 114 feet wide. The Kiehnaus, who

own the land on the other side of the fence line, are the record titleholders of the strip.[1] However, they have asserted no claim to it, and the dispute over that strip is between the Lautenbachs and the County.

¶4 The second parcel is the parcel marked "quarry parcel." The parties agree the County owns that parcel, but dispute whether the Lautenbachs have the right to farm and cut timber on the portion of the parcel not actually used as a quarry. They also dispute whether it is actually as large as the survey indicates.

¶5 Prior to 2000, all parties believed the two disputed parcels were one parcel with the fence line as the boundary. The discrepancy between the true lot line and the fence line was discovered when the land was surveyed in 2000.

¶6 The Lautenbachs own a dairy farm that includes the parcel marked "Lautenbach parcel." In 1949, Wayne's parents, the previous owners of the farm, sold the quarry parcel to the County. The County was granted fee simple title, and Wayne's parents reserved the right to use the land for farming purposes "until such time as [the County] shall have use" for the land. They also reserved "the use of the wood" on the land.

¶7 After the sale, Wayne's parents continued to farm the land not used as a quarry in both the quarry parcel and the disputed strip. Between 1959 and 1969, Wayne's parents transferred the farm to the Lautenbachs in stages. From the transfer until 2004, the Lautenbachs farmed the portion of the land not used as

[1] Both the Lautenbachs and the Kiehnaus hold their land as part of family trusts with themselves as trustees. Because the distinction between the trusts and the individuals is not relevant here, we refer to the trusts and the individuals collectively by the names of the individuals involved.

a quarry and cut timber on it. Wayne testified he believed, contrary to the deed, that the County had only a mineral lease on the land and that he was the proper owner of the remainder. He testified he treated the land as his own, and never asked the County or the Kiehnaus for permission to use any of it at any time.

¶8 The County began quarry operations soon after the 1949 sale, and operated the quarry continuously throughout its existence. At some point, the quarry expanded into approximately 0.6 of the 2.66 acres in the disputed strip. The County used the portion of the quarry that extended into the strip as needed, but did not use it every year.

¶9 In 1992, the County and the Lautenbachs entered into a license agreement for the quarry parcel. The license agreement allowed the Lautenbachs to farm the land not used as a quarry and strip logs from it, and imposed a number of conditions on their use. A term in the license agreement allowed the County to terminate the license on thirty days' notice.

¶10 On September 30, 2002, the County terminated the license. The Lautenbachs refused to cooperate, and the County eventually removed a variety of equipment and other property owned by the Lautenbachs from the quarry parcel.

¶11 Soon after, the Lautenbachs filed an action to quiet title against the Kiehnaus, alleging that they were the rightful owners of the disputed strip. The Kiehnaus confessed judgment, and the court entered a judgment declaring the Lautenbachs the owner of the strip. The County subsequently moved to intervene and to vacate and reopen the judgment, and its motion was granted. The suit was then expanded to include all claims between the Lautenbachs and the County.

¶12 The matter was tried to the court on January 5, 2005, on four claims: (1) the parties' competing claims to title of the strip; (2) the Lautenbachs' claimed right to use the remainder of the quarry property; (3) the Lautenbachs' claim that the quarry parcel was actually smaller than the survey indicated; and (4) the County's claim for damages for removal of the Lautenbachs' wood and equipment from the quarry property. The circuit court found for the County on all four claims, except that it awarded a smaller amount of damages for removal of the Lautenbachs' property than the County requested.

STANDARD OF REVIEW

¶13 This case involves questions of adverse possession and interpretation of a deed. Whether an element of adverse possession is met is a question of fact, which we affirm unless clearly erroneous. ***Harwick v. Black***, 217 Wis. 2d 691, 703, 580 N.W.2d 354 (Ct. App. 1998). However, whether the facts proven are sufficient to amount to adverse possession is a question of law which we review without deference. ***Perpignani v. Vonasek***, 139 Wis. 2d 695, 728, 408 N.W.2d 1 (1987). Whether a deed is ambiguous is also a question of law, as is the meaning of an unambiguous deed. ***AKG Real Estate, LLC v. Kosterman***, 2006 WI 106, ¶14, 717 N.W.2d 835.

DISCUSSION

¶14 We discuss: (1) the parties' competing claims to the disputed strip; (2) the Lautenbachs' claim of rights to the portion of the quarry parcel not used as

a quarry; and (3) the Lautenbachs' claim that the quarry parcel conveyed was actually smaller than the approximately twenty-one acres shown in the survey.[2]

¶15 We conclude the County adversely possessed the disputed strip and is therefore the proper owner of it. We also conclude the Lautenbachs do not have a right to use the property, either under a prescriptive easement or under the 1949 deed. Finally, we reject the Lautenbachs' claim that the deed conveyed less property than is shown in the survey.

I. The disputed strip

¶16 The parties here both claim ownership of the disputed strip by adverse possession.[3] However, they have narrowed the issue to whether the County adversely possessed the strip. That is, the parties apparently agree that if the County adversely possessed the strip, the County is the rightful owner of the land, and if not, the Lautenbachs are the rightful owner. We decide this issue on that basis, assuming without deciding that the approach the parties have taken is correct.[4]

¶17 To prove a claim of adverse possession, a party must show that "the person possessing [the land], in connection with his or her predecessors in interest, is in actual continued occupation under claim of title, exclusive of any other

[2] The Lautenbachs do not challenge the award of damages against them.

[3] This presents an unusual adverse possession problem. Typically, adverse possession cases pit the record titleholder against an alleged adverse possessor. Here, however, the dispute is between two alleged adverse possessors.

[4] *See* Lautenbachs' brief at 16, County's brief at 21-22.

right." WIS. STAT. § 893.25(2)(a).[5] Adverse possession exists "[o]nly to the extent that [the land] is actually occupied and: (1) [p]rotected by a substantial enclosure; or (2) [u]sually cultivated or improved." ***Id.***

¶18 The parties dispute whether the County was in "actual continued occupation" of the disputed parcel and whether its occupation was "exclusive of any other right."

A. Actual continued occupation

¶19 The "actual continued occupation" requirement is intended as a codification of previous law. ***Harwick***, 217 Wis. 2d at 699. It is consistent with the longstanding principle that "[a]ctual occupancy means the ordinary use of which the land is capable and such as an owner would make of it." ***Burkhardt v. Smith***, 17 Wis. 2d 132, 138, 115 N.W.2d 540 (1962).

¶20 Here, the circuit court concluded:

> [W]hile the county use of [the quarry parcel and the disputed strip] was essentially limited to quarrying, I find that the county did put the area from the western edge of the actual quarry to the Kiehnau fence-line to use in a manner in which a quarry owner would normally use it. First, it is established that the quarry does occupy about .6 acres of the disputed parcel. Second … you cannot quarry to the edge of your property. Setbacks prevent this and common sense indicates it is unwise to quarry to your exact boundary, due to such factors as erosion. I further agree that the diminishing asset rule is applicable to the county's quarry usage.

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

¶21 We affirm this finding. The disputed strip is less than 100 feet wide in most places. A requirement that the County extract rock from the entire strip every year in order to adversely possess it is not consistent with the rule that a party need only make use of the property in the way that an ordinary owner would. We agree the County used the strip as an ordinary quarry user would when it quarried part of the strip, used another part for setbacks and set other parts aside for future use.[6] We therefore uphold the circuit court's finding that the County was in "actual continued occupation" of the disputed strip.

B. Exclusive occupation

¶22 The Lautenbachs argue the County never exclusively occupied the strip because the Lautenbachs were occupying the land at the same time. The circuit court did not make an explicit finding on this particular issue. However, the court did find that the Lautenbachs' use of the property was permissive:

> Any doubt about whether the plaintiffs' usage … was permitted by the county, is removed by the plaintiffs entering into the 1992 license agreement. … It is inconceivable that the plaintiffs acknowledged that their usage of the [quarry parcel] was permissive, and yet had it in their minds that they were continuing an adverse possession [of the disputed strip].

[6] The Lautenbachs take issue with the circuit court's statement that it agreed with the diminishing asset rule. *See* ***Sturgis v. Winnebago County Bd. of Adjustment***, 141 Wis. 2d 149, 153, 413 N.W.2d 642 (Ct. App. 1987). We need not decide whether the diminishing asset rule should be extended to adverse possession cases because we read the circuit court's statement as an additional basis for its finding rather than part of the rationale for its finding. Because we affirm the circuit court's finding based on its primary rationale—that the County used the land as an ordinary quarry owner would—we need not address this alternate argument. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (court should decide cases on the narrowest possible grounds).

¶23 In making this finding, the court rejected Wayne Lautenbach's testimony that he had always believed the land was his. Because of the 1992 lease, the court instead believed testimony indicating the County gave the Lautenbachs permission to use the parcel because of the friendly relationship between the two. This credibility determination was well within the court's province as fact finder. *See* ***Yurmanovich v. Johnston***, 19 Wis. 2d 494, 501, 120 N.W.2d 707 (1963).

¶24 This finding negates the Lautenbachs' exclusivity argument because the exclusivity requirement is one part of whether a possessor treated the land as an owner would. *See* ***Otto v. Cornell***, 119 Wis. 2d 4, 7, 349 N.W.2d 703 (Ct. App. 1984). The County's choice to permit the Lautenbachs to use the land was wholly consistent with the actions of an owner, and therefore did not have any impact on the County's exclusivity of possession. We therefore conclude the County's possession of the land was exclusive despite the Lautenbachs' use of it.

II. The Lautenbachs' claimed right to use the quarry parcel

¶25 The Lautenbachs argue they have the right to use land in the quarry parcel not used for actual quarrying operations. They make two arguments. First, they argue they have the right to farm and cut timber under the 1949 deed transferring the land from Wayne's parents to the County. Second, they argue they have a prescriptive easement to cut timber and farm the remaining land.

A. The 1949 deed

¶26 Wayne's parents transferred the quarry parcel to the County by deed dated April 28, 1949. In the deed, Wayne's parents transferred fee simple title to the County. However, they made the following reservation of rights:

> The grantors herein [Wayne's parents] shall have the privilege of using the land described herein for farming purposes until such time as the grantee [the County] shall have use for the same.
>
> The grantors shall also have the use of the wood upon the place.

Wayne's mother quitclaimed her rights under this deed to the Lautenbachs in 2000.

¶27 The circuit court held: (1) these rights were personal to Wayne's parents and were not assignable; (2) the phrase "until the [County] shall have use for the same" meant Wayne's parents had the use of the property until the County determined, at its discretion, that it had a use for the land; and (3) the phrase "until the [County] shall have use for the same" applied to both provisions in the deed.

¶28 In their brief, the Lautenbachs argue the rights were in fact assignable. However, they do not dispute the second two conclusions made by the circuit court, and repeated in the County's brief. They therefore concede that the circuit court's interpretation of the deed is the correct one. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979).

¶29 Thus, even if the Lautenbachs' assignability argument is correct, their claim under the deed still fails. The only right reserved in the deed was the right to use the land until the County decided it had use for it. The County decided

it had use for the land when it terminated the lease in 2002. Therefore, no rights under the deed exist at this time, and there is nothing to assign.

B. Prescriptive easement

¶30 A prescriptive easement is formed when a party adversely uses, as opposed to possesses, land. WIS. STAT. § 893.28(1). The adverse use must be of the same character as the adverse and hostile possession required for adverse possession. ***Shellow v. Hagen***, 9 Wis. 2d 506, 511, 101 N.W.2d 694 (1960). As discussed above, the circuit court found that the Lautenbachs' use of the property was permissive, and its finding is not clearly erroneous. This negates any possibility that the use was adverse and hostile as is required for a prescriptive easement. We therefore reject the Lautenbachs' argument that a prescriptive easement was created.

III. The size of the quarry parcel

¶31 The final issue is the size of the parcel originally conveyed to the County in 1949. The Lautenbachs argue their parents conveyed exactly twenty acres. The County argues, and the survey shows, that the property conveyed was half of the particular "forty" in question, and because that "forty" was actually approximately forty-two acres, the property conveyed was half of the "forty," or about twenty-one acres.

¶32 The property conveyed was described as follows:

> The East one-half (1/2) of the Northwest Quarter of the Southwest Quarter (NW 1/4 of the SW 1/4) of Section 18, Township 29, North of Range 27 East.

The "Northwest Quarter …" refers to the "forty" that Wayne's parents owned. The "East one-half" means that Wayne's parents kept the western half of the "forty" and conveyed the eastern half to the County. We discern no ambiguity in the language of the deed, and the Lautenbachs concede this point.

¶33 The Lautenbachs argue, however, that this deed contains a latent ambiguity. A latent ambiguity exists where the language of a written instrument, though clear on its face, has more than one possible meaning when applied to the facts to which it refers. ***In re Gibbs' Estate***, 14 Wis. 2d 490, 496, 111 N.W.2d 413 (1961). When a latent ambiguity exists, extrinsic evidence is admissible in order to determine the meaning of the instrument. ***Id.***

¶34 Here, no latent ambiguity exists. It is true that in 1949, both parties believed the parcel they were splitting was forty acres when in fact it was forty-two. However, this fact does not change the meaning of the instrument. The instrument unambiguously splits a specific parcel in half, with half going to each party. This is the only possible meaning of the deed regardless of the size of the parcel. We therefore affirm the circuit court's holding that half of the parcel, or about twenty-one acres, was conveyed under the 1949 deed.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.