COURT OF APPEALS
DECISION
DATED AND FILED

November 22, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP19 **Cir. Ct. No. 2003CV425**

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

JAMES R. RUBENZER AND PRISCILLA S. RUBENZER,

PLAINTIFFS-APPELLANTS,

V.

MENSCH, LLC,

DEFENDANT-RESPONDENT,

KNUTEL/GEHL FAMILY TRUST,

INTERVENING DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Washington County: ANDREW T. GONRING, Judge. *Reversed and cause remanded.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

¶1 PER CURIAM. James and Priscilla Rubenzer appeal from a judgment that they did not adversely possess a forty-five-foot strip of land owned by the Knutel/Gehl Family Trust and awarding Mensch, L.L.C., damages on its claim that the Rubenzers abused process by commencing this suit against Mensch before Mensch purchased the property from the Trust. The Rubenzers argue that the jury instruction on adverse possession was inadequate, evidenced partiality and misled the jury and that the jury's verdict is not supported by the evidence. We agree that the jury was not fully instructed regarding adverse possession and that there can be no recovery on the abuse of process claim. We reverse the judgment and remand for a new trial on the adverse possession claim.

¶2 The Rubenzers cut weeds, removed rocks, leveled, seeded with grass, and mowed a forty-five-foot strip of land just beyond their property line and part of a farm field formerly owned by Al Gehl, now owned by the Trust. In addition to maintaining a lawn on the strip, the Rubenzers placed structures on the strip. They used it for a horseshoe pit, a birdhouse, an electronic underground dog fence, and to store lumber, vehicles, trailers and garden equipment.

¶3 Portions of Gehl's adjacent field were used by neighborhood children for play, construction of a fort, and dirt bike paths and jumps. Gehl's property also included a large wooden area that was separated from the farm field by a public gravel road. In 1974, Gehl gave the Rubenzers permission to harvest firewood in the woods to keep the woods clear of dead trees. Gehl's daughters and one son-in-law testified that the Rubenzers were given permission to use the entire property owned by Gehl. A jury determined that the Rubenzers had not adversely possessed the forty-five-foot strip of Gehl's property.

¶4 The Rubenzers challenge the jury instruction on adverse possession. The trial court did not use WIS JI—CIVIL 8060, the standard jury instruction on adverse possession. The trial court has broad discretion when instructing a jury. ***Nowatske v. Osterloh***, 198 Wis. 2d 419, 428, 543 N.W.2d 265 (1996), *abrogated on other grounds by* ***Nommensen v. American Continental Ins. Co***., 2001 WI 112, 246 Wis. 2d 132, 629 N.W.2d 301. If there is error in the instructions, a new trial is warranted only if the substantial rights of a litigant have been affected. ***Nommensen***, 246 Wis. 2d 132. A litigant's substantial rights are affected if there is a reasonable possibility that the error contributed to the outcome of the action. ***Id***., ¶52. A reasonable possibility of a different outcome is a possibility sufficient to undermine our confidence in the outcome. ***Id***.

¶5 The elements of adverse possession are that the disputed property was used for the requisite period of time 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. ***Harwick v. Black***, 217 Wis. 2d 691, 699, 580 N.W.2d 354 (Ct. App. 1998). To address the issue of consent or permission suggested by trial testimony that there was permission to use all of the Gehl land, the trial court instructed the jury:

> The plaintiffs' possession or occupancy of the property must be "hostile." "Hostile" does not mean a deliberate, willful or unfriendly intent. Possession or occupancy of real estate may be "hostile" when made in good faith or in bad faith, by mistake or with the intent to claim the property wrongfully. "Hostile" means that the person in actual possession the land claims exclusive right to it. *However, if possession of the land was pursuant to permission of the title owner during the required period of possession, there can be no hostile intent necessary to constitute adverse possession.* (Emphasis added.)

¶6 We conclude that an error of omission occurred in the giving of this instruction. "If the elements of open, notorious, continuous, and exclusive possession are satisfied, the law presumes the element of hostile intent." ***Burkhardt v. Smith***, 17 Wis. 2d 132, 139, 115 N.W.2d 540 (1962).[1] WIS JI—CIVIL 8060 informs the jury of the available presumption in its definition of hostile intent.[2] The trial court omitted that important language. Thus, the Rubenzers were denied the benefit of the presumption to which they may have been entitled to.

¶7 We see no error in the trial court's inclusion of the language regarding permission. *See* ***Northwoods Dev. Corp. v. Klement***, 24 Wis. 2d 387, 392, 129 N.W.2d 121 (1964) (recognizing that if possession is pursuant to permission of the true owner, there is not hostile intent necessary to constitute adverse possession). However, it was for the jury to decide whether evidence of permission rebutted the presumption of hostile possession. *See* ***Malinowski v. Elliott***, 254 Wis. 81, 83, 35 N.W.2d 331 (1948) (burden upon the person opposing title by adverse possession to overcome the presumption of adverse possession); ***Hamachek v. Duvall***, 135 Wis. 108, 114, 115 N.W. 634 (1908) ("Continuous and

[1] We summarily reject the Trust's contention that because of age of the precedent, the presumption recognized in ***Burkhardt v. Smith***, 17 Wis. 2d 132, 139, 115 N.W.2d 540 (1962), is no longer the law in Wisconsin. It is of no significance that the presumption was not repeated in ***Allie v. Russo***, 88 Wis. 2d 334, 343, 276 N.W.2d 730 (1979), where the court held there was no proof that the occupation of disputed land was exclusive, ***id***. at 348, and thus the presumption would not have applied. In ***Keller v. Morfeld***, 222 Wis. 2d 413, 420 n.3, 588 N.W.2d 79 (Ct. App. 1998), this court cited ***Burkhardt***'s statement of the presumption and thus recognized its vitality.

[2] WIS JI—CIVIL 8060 provides in part: "'Hostile' does not mean a deliberate, willful, or unfriendly intent. If the characteristics of open, notorious, exclusive, and continuous possession are satisfied, the law presumes the element of hostile intent. 'Hostile' means that the person in actual possession of the land claims exclusive right to it."

exclusive possession for the statutory period raises the presumption that the possession was adverse and perfects the title in the possessor, unless the other party affirmatively shows that for a part of the time at least the possession was not in fact adverse."). For this reason we conclude that the failure to instruct the jury of the available presumption was prejudicial error. Although there was evidence of permissive use, we cannot determine if the jury would have deemed the scope of permission sufficient to rebut the presumption of hostile intent. Without an instruction on the available presumption, a directed verdict on permissive use occurred. A new trial is necessary on the adverse possession claim.[3]

¶8 On June 17, 2003, the Rubenzers commenced this action against Mensch alleging that Mensch was the record owner of the former Gehl property and claiming title to a 180-foot portion of the property. Mensch answered that it was not the record owner. It acknowledged that as of February 16, 2003, it had a contract with the Trust to purchase the property. Its abuse of process counterclaim alleged that the suit was commenced to obstruct its purchase of the property. The Trust intervened in the action as the record owner of the property. It acknowledged that it had entered into a contract to sell the property to Mensch but

[3] Because we require a new trial, we need not address the Rubenzers' claim that the jury should have been instructed that only express consent to use the property defeats hostile possession, their undeveloped and waived claim that the special verdict was prejudicial, their challenge to the sufficiency of the evidence to support the jury's adverse possession verdict, or the claim raised for the first time in their reply brief that a new trial should be granted in the interests of justice. We observe that there is no basis for the Rubenzers' contention that the trial court should have instructed the jury on the law of acquiescence. The doctrine of acquiescence applies only to forgive the lack of adverse intent when one occupies part of his or her neighbor's land due to an honest mistake as to the location of the boundary. *See* ***Buza v. Wojtalewicz***, 48 Wis. 2d 557, 562-63, 180 N.W.2d 556 (1970); ***Chandelle Enters., LLC v. XLNT Dairy Farm, Inc.***, 2005 WI App 110, ¶8, 282 Wis. 2d 806, 699 N.W.2d 241, *review denied*, 2005 WI 150, 286 Wis. 2d 100, 705 N.W.2d 661. The doctrine has no application where, as here, there is no dispute that the Rubenzers knew they were occupying land beyond the border of their property.

the sale had not yet closed. An amended complaint was filed alleging that the Trust was the record owner of the property and claiming title to only the forty-five-foot strip of the property.

¶9 The jury found that the Rubenzers engaged in abuse of process by filing this action against Mensch. The jury's verdict will be sustained if there is any credible evidence to support it. ***Morden v. Continental AG***, 2000 WI 51, ¶38, 235 Wis. 2d 325, 611 N.W.2d 659. We review the evidence in a light most favorable to the jury's determination in recognition of the jury's role to determine the credibility of the witnesses and the weight given to their testimony. ***Id.***, ¶39. When the circuit court approves the jury's verdict, special deference to the jury's determination is afforded.[4] ***Id.***, ¶40. In such cases, the court of appeals will not overturn the jury's verdict unless there is such a complete failure of proof that the verdict must have been based on speculation. ***Id.***

¶10 Abuse of process has two elements: first, "a willful act in the use of process not proper in the regular conduct of the proceedings," and second, subsequent misuse of the process or use of the process "to effect an object not within the scope of the process." ***Schmit v. Klumpyan***, 2003 WI App 107, ¶¶7, 8, 264 Wis. 2d 414, 663 N.W.2d 331. Whether the evidence is sufficient to support a cause of action for abuse of process is a question of law to be decided de novo by the appellate court. ***Id.***, ¶5.

[4] We have not been provided with a transcript of the hearing on the motions after verdict. All we know is that the trial court rejected the Rubenzers' contention that the evidence was not sufficient to support the abuse of process verdict.

¶11 There was evidence that the Rubenzers were interested in purchasing the Gehl property in order to preserve their view of the vacant land. They were upset that the Trust had not offered to sell the land to them even after they had expressed an interest in doing so. They also opposed development of the property by anyone other than the Gehl children. They believed the land had been sold to Mensch because in the spring of 2003 there was some clearing of the land.

¶12 Although there was evidence of a personal animus regarding the transfer of the property to Mensch and the subsequent development that was to occur, that alone is not sufficient to support an abuse of process claim. *See* ***id.***, ¶11 (an incidental motive of spite does not establish abuse of process); ***Pronger v. O'Dell***, 127 Wis. 2d 292, 297, 379 N.W.2d 330 (Ct. App. 1985) (evidence must establish more than the proper use of process with a bad motive). Here there was no use of the lawsuit for a purpose outside of the legal purpose of establishing title to a portion of the property by adverse possession. The Rubenzers could not have used the lawsuit for the purpose of obstructing the sale to Mensch when they thought the sale had already been completed and Mensch was the record owner.

¶13 Moreover, there are arguable facts to support the Rubenzers' adverse possession claim. Once they were foreclosed from purchasing the property by the sale or intended sale to Mensch, an adverse possession action was their only remedy to gain title to a portion of the property. In this respect the case is like ***Schmit***, 264 Wis. 2d 414, ¶23, where we held that because Schmit was stymied by Klumpyan's refusal to sell jointly owned property, the only alternative Schmit had was to commence a partition action to force either a physical division of the property or a sale of the property. We concluded that a partition action was not an abuse of process because it was not used to provide a benefit Schmit was not

entitled to in the partition action. ***Id.***, ¶27. We hold that Mensch's counterclaim fails as a matter of law to establish a claim for abuse of process.

By the Court.—Judgment reversed and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2003-04).