

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 31, 2008

David R. Schanker
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. 2007AP34
STATE OF WISCONSIN**

Cir. Ct. No. 2006CV469

**IN COURT OF APPEALS
DISTRICT IV**

COURTYARD APARTMENTS OF MADISON, LLC,

PLAINTIFF-RESPONDENT,

V.

CLIFFORD D. FISHER AND JEAN M. FISHER,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Dane County:
C. WILLIAM FOUST, Judge. *Affirmed.*

Before Higginbotham, P.J., Lundsten and Bridge, JJ.

¶1 PER CURIAM. Clifford and Jean Fisher appeal a judgment dismissing their claim for adverse possession of a disputed parcel of land, and ordering them to remove a shed that encroaches on that land. They contend that the evidence they introduced at the bench trial on their claim established that they

gained title to the disputed property by adverse possession. We disagree and, therefore, affirm.

¶2 The Fishers own three residential lots adjacent to the side and rear of two lots owned by Courtyard Apartments of Madison, LLC. Courtyard's lots contain an apartment building and parking lot, which are separated from the Fishers' lots by a fence Courtyard maintains on the southwest and northwest sides of its property. The dispute here concerns the strip of land, one and a half to two feet wide, lying on the Fishers' side of the fence, but within the surveyed property lines of the Courtyard lots.

¶3 It was undisputed that the Fishers have maintained or used that strip in various ways since purchasing their three lots, in 1982, 1992, and 1999, respectively. Clifford Fisher also testified that the previous owners of the lots he purchased in 1992 and 1999 used the strip, dating back to at least 1982. In 2005, the Fishers installed a shed that lay partially on the Courtyard lots. Only then did Courtyard's owner, John Dohm, object to the Fishers' use of the disputed strip.

¶4 In the photographic exhibits introduced at trial, the disputed strip is essentially indistinguishable from the rest of the Fishers' back or side lots, as the circuit court noted in its decision. Dohm testified that he knew that the property line lay at least a foot outside the fence line. He acknowledged that the Fishers were treating all of the property up to the fence line as part of their yards. Dohm testified that, until the Fishers put their shed on his property, he did not care about their use of the strip of land as part of their back and side yards.

¶5 The circuit court found that Dohm and his employees had improved the disputed strip along a few feet of the northwest boundary of the lot, when a house was demolished and the apartment parking lot constructed in 1989.

However, the court made no finding of any other use or improvement by Courtyard of the area outside its fence. For all intents and purposes, in the court's view, the strip had been used by the Fishers, and their predecessors in title, as part of their back yards. However, the court found that Dohm had permitted this use, and denied the Fishers' adverse possession claim on that basis.

¶6 WISCONSIN STAT. § 893.25 (2005-06)¹ provides that an action for the recovery of real estate is barred by uninterrupted adverse possession for twenty years. Adverse possession under this provision requires enclosure, cultivation, or improvement of the land. WIS. STAT. § 893.25(2). The possession must also be hostile, open and notorious, exclusive and continuous for the statutory period. *Allie v. Russo*, 88 Wis. 2d 334, 343, 276 N.W.2d 730 (1979). "Hostility" for purposes of showing adverse possession means that one in possession claims exclusive right to the land possessed, and actual possession prevents the assumption that the true owner is in possession. *Burkhardt v. Smith*, 17 Wis. 2d 132, 139-40, 115 N.W.2d 540 (1962). Hostile intent does not exist if the use is pursuant to the true owner's permission. *Northwoods Dev. Corp. v. Klement*, 24 Wis. 2d 387, 392, 129 N.W.2d 121 (1964).

¶7 We will affirm the circuit court's findings of fact on an adverse possession claim unless they are clearly erroneous. See *Otto v. Cornell*, 119 Wis. 2d 4, 8, 349 N.W.2d 703 (Ct. App. 1984). It is a question of law whether the findings support the circuit court's decision on the adverse possession claim. See *Perpignani v. Vonasek*, 139 Wis. 2d 695, 728, 408 N.W.2d 1 (1987).

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶8 The circuit court found that Dohm knew that the property lines of his two lots extended beyond his fence. Dohm so testified and, as the circuit court noted, any reasonable observer would conclude as much for Courtyard's southwest boundary, because the southwest side of the apartment building extended beyond the fence on the southwest boundary. Dohm further testified that he observed his neighbors' use of the resulting strip of land outside the fence, and he did not care that they maintained that strip in the same manner as their back and side yards, at least until they installed the shed. In other words, Dohm tolerated the use up to a point, and by doing so gave implicit permission for that use.

¶9 The Fishers contend that, by tolerating their use, Dohm was acquiescing in it rather than permitting it, and use by acquiescence is adverse. *See Allie*, 88 Wis. 2d at 345 (citing *Menzner v. Tracy*, 247 Wis. 245, 19 N.W.2d 257 (1945)). However, for the doctrine of acquiescence to apply, the adverse possessor's use of the disputed property must be exclusive. *See Allie*, 88 Wis. 2d at 345-47, and cases cited therein. Here, the circuit court found that the Fishers' use was not exclusive because Dohm had exercised his ownership right of the disputed strip at least once, when he constructed his parking lot in 1989.

¶10 Additionally, it appears that the doctrine of acquiescence applies to the true owner's acquiescence in a mistaken boundary line that encroaches on his or her property. *See Menzner*, 247 Wis. at 251-52 (explaining that, under the doctrine, "possession up to a line recognized and acquiesced in as a boundary line is adverse as against the adjoining owner"). *See also Beduhn v. Kolar*, 56 Wis. 2d 471, 479, 202 N.W.2d 272 (1972) (for doctrine of acquiescence to apply, there must have been some prior acceptance of the disputed boundary). The evidence undisputedly shows, and the circuit court found, that Dohm always knew his boundary lay outside the fence. Clifford Fisher was also aware the boundary lay

outside the fence. Whether Dohm permitted use of land he knew was his is a different question than whether he mistakenly “acquiesced” in its use, believing that it was not his.

By the Court.—Judgment affirmed.

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

