COURT OF APPEALS
DECISION
DATED AND FILED

July 30, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1231 **Cir. Ct. No. 2004CV474**

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

IN THE MATTER OF NORDEHL K. UNBEHAUN V. FORTI FAMILY CORPORATION:

ROBERT L. RICHART AND JOHN M. ROBERTS,

INTERVENING PLAINTIFFS-RESPONDENTS,

V.

RYAN KINNAMAN,

INTERVENING DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County: MICHAEL S. GIBBS, Judge. *Affirmed.*

Before Brown, C.J., Anderson, P.J., and Snyder, J.

¶1 PER CURIAM. Ryan Kinnaman appeals from a judgment declaring Robert Richart and John Roberts to be the owners of a portion of an

abandoned roadway by adverse possession. He argues that the circuit court's findings are not supported by the evidence and that he is entitled to certain presumptions afforded the true owner of property. We affirm the judgment.

¶2 Roberts and Richart are owners of adjacent lots on the shore of the Lauderdale Lakes. Their property is accessed by a portion of Rocky Road, that portion being a thirty-three foot wide strip of roadway that commences at Roberts' East property line and dead ends at Richart's West property line. Although the roadway was originally platted as a public road, it was never developed for that purpose. In 1982-1983, a locking gate was erected on the roadway at Roberts' property line. Kinnaman owns lands north of the roadway and claims the right to use the roadway for access to the southern part of his property and the lakeshore. The matter was tried to the court. The circuit court found that Roberts and Richart have acquired ownership of that part of the abandoned public road adjoining their property because they, and their predecessors in title, have used it as private and exclusive driveway for more than twenty years.

¶3 A person claiming title by adverse possession has the burden of proving that the disputed property was used for twenty years 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. *See* ***Harwick v. Black***, 217 Wis. 2d 691, 699, 580 N.W.2d 354 (Ct. App. 1998). The circuit court's findings of fact will not be set aside unless clearly erroneous. WIS. STAT. § 805.17(2) (2005-06).[1]

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

> The question on appeal is whether, resolving conflicts in the evidence to favor the verdict, the findings are contrary to the clear preponderance of the evidence. We will affirm the findings unless a finder of fact, properly applying the law, could not have reasonably concluded that the adverse possessor met his [or her] burden of proof. The finder of fact must strictly construe the evidence against the adverse possessor and apply all reasonable presumptions in favor of the true owner.

Pierz v. Gorski, 88 Wis. 2d 131, 136, 276 N.W.2d 352 (Ct. App. 1979) (citation omitted). Thus, reversal is not required just because there is evidence to support a contrary finding. *See* ***Bank of Sun Prairie v. Opstein***, 86 Wis. 2d 669, 676, 273 N.W.2d 279 (1979). Rather, the evidence in support of a contrary finding must itself constitute the great weight and clear preponderance of the evidence. *See* ***id.*** In addition, the circuit court is the ultimate arbiter of the witnesses' credibility when it acts as the factfinder and there is conflicting testimony. *See* ***id.*** We accept the inference drawn by the trier of fact when more than one reasonable inference can be drawn from the evidence. *See* ***id.***

¶4 We first address Kinnaman's contention that the circuit court failed to afford "all reasonable presumptions" in favor of him as the true owner. Kinnaman offered no proof that the disputed roadway was part of his legal description. It was originally designated a public right of way. It is the purpose of the lawsuit to determine the true owner. It was not error to conclude that Kinnaman was not entitled to favorable presumptions in the assessment of the evidence.

¶5 It is undisputed that the controlled gate was in place prior to May 1984.[2] Kinnaman argues that despite the presence of the gate the adverse

[2] This action was commenced on May 17, 2004 by Richart's predecessors in title. The circuit court looked at the period twenty years prior to May 17, 2004.

possessors' use of the land was not exclusive, hostile, or continuous. *See* ***Pierz***, 88 Wis. 2d at 136. He points to testimony that at times the electronic controls on the gate did not function, that Roberts never got the keypad code when he purchased the property, and that a neighbor had a key to the gate, knew the keypad code, and felt free to use the driveway at all times. He also points to his own testimony that the gate stood open about one-third of the time in the twenty year period, that he went behind the gate "frequently" with the knowledge of the property owners, that when the gate was closed he would reach through the gate and disconnect the arm which would permit the gate to fly open, that he plowed snow behind the gate at least half of the twenty winters, and that he would drive his truck on the roadway behind the gate to maintain the landscape on his property just north of the roadway.

¶6 The evidence Kinnaman relies on does not itself constitute the great weight and clear preponderance of the evidence. Predecessors in title testified that the roadway was treated as private property and there was an agreement to split the cost of maintaining the gate equally between the two properties to the west of the roadway. Those owners maintained the roadway and did snow removal. There was substantial improvement where the gate was installed. There was a concrete pad. Prior to the suit, parts of the roadway adjoining Kinnaman's property was lined with a stone retaining wall and vegetation within the tiers of the wall. All prior owners indicated that no one went through the gate without their permission. The neighbor who indicated that he had complete access to Roberts' property in prior years had a close relationship with the owner. He and the owner had exchanged keys so that each could keep an eye on the other's property. He used the gate and roadway with the owner's permission.

¶7 The circuit court found that Kinnaman did not try to claim a possessory interest in the land until after the commencement of this action. It noted that "the credible testimony supports the assertion that Kinnaman did not use or maintain the disputed land until he became a party to the lawsuit." In short, the circuit court rejected Kinnaman's testimony as incredible. The circuit court's credibility determination may not be disturbed on appeal. *See* ***Plesko v. Figgie Int'l***, 190 Wis. 2d 764, 775-76, 528 N.W.2d 446 (Ct. App. 1994). Indeed, Kinnaman's assertions of free and frequent use of the roadway were called into question by other testimony. From the roadway it was an incline to Kinnaman's property that was not easily travelled. A wooded area stood between Kinnaman's residence and the roadway; there was no direct access from Kinnaman's property to the roadway. A neighbor observed Kinnaman gain access to the roadway by foot and then disengage the gate from the inside.

¶8 Unquestionably, barricading a public road is unlawful. For more than twenty years no action was taken to remove the locked gate placed at the start of the disputed (and later abandoned) roadway.[3] No public work was done on the roadway. We conclude the evidence supports the circuit court's finding that owners of the two properties occupied and maintained the roadway exclusively for the requisite twenty years. That permissive use was allowed of the gate and roadway does not destroy its private nature. *Cf.* ***Povolny v. Totzke***, 2003 WI App 184, ¶18, 266 Wis. 2d 852, 668 N.W.2d 834 (that the public sought permission to use a road demonstrated that the public considered the road's public nature abandoned).

[3] The Town of LaGrange, to which the roadway was dedicated in the original plat, did not file an answer to the complaint and a default judgment was taken against it.

By the Court.—Judgment affirmed.

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