COURT OF APPEALS
DECISION
DATED AND FILED

April 2, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP48 **Cir. Ct. No. 2004CV359**

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

THEODORE L. OLSON AND MARY OLSON,

PLAINTIFFS-RESPONDENTS,

V.

SALLY A. WEBER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Wood County: EDWARD F. ZAPPEN, Judge. *Affirmed*.

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

¶1 PER CURIAM. Sally Weber appeals an adverse possession judgment which declared that Theodore and Mary Olson had obtained title to a portion of land for which Weber was the recorded title holder, and which then awarded the Olsons damages and equitable relief for certain actions Weber had

taken in relation to the disputed property. We affirm for the reasons discussed below.

BACKGROUND

¶2 The Olsons and Weber own contiguous lots along the Wisconsin River in Wisconsin Rapids. Theodore Olson's parents bought his lot in 1962 and he and his wife obtained title after his mother's death in 2002. Weber and her husband purchased their lot in 1985 from Gregory and Jeanine Thibodeau, who had owned it since 1967.

¶3 This appeal involves two disputed strips along the border of the parties' properties. The first area, referred to as Outlot 1, contained a row of lilac bushes and the second area, referred to as Outlot 2, contained a portion of the blacktopped driveway leading to the Olsons house. In 2004, Weber removed the lilac bushes and constructed a fence over the Weber's driveway.

¶4 The trial court made factual findings that the Olsons and their predecessors in interest had used and maintained the lilac bushes and mowed the yard on their side of them and had also exercised exclusive dominion over the driveway since at least 1962 without any express permission. It further found that Weber and her predecessor had never maintained the lilac bushes or the driveway. The court concluded that the Olsons had established adverse possession over both disputed areas. It then awarded the Olsons $1,962.30 in damages for the removal of their lilac bushes and directed Weber to remove the fence at her expense within sixty days.

STANDARD OF REVIEW

¶5 An adverse possession determination presents a mixed question of fact and law, requiring findings concerning the sequence of events and a conclusion as to the legal significance of those events. *See* ***Perpignani v. Vonasek***, 139 Wis. 2d 695, 728, 408 N.W.2d 1 (1987). We will sustain the trial court's findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2) (2007-08).[1] We also defer to credibility determinations made by the trial court unless the underlying testimony was incredible as a matter of law. ***Hallin v. Hallin***, 228 Wis. 2d 250, 258-59, 596 N.W.2d 818 (Ct. App. 1999). Furthermore, although we do not ordinarily defer to the trial court's conclusion of law, we will give weight to a legal determination that is intertwined with the factual findings in support of that determination. ***Wassenaar v. Panos***, 111 Wis. 2d 518, 525, 331 N.W.2d 357 (1983).

DISCUSSION

¶6 WISCONSIN STAT. § 893.25 permits a person to acquire title to real property by adverse possession for an uninterrupted period of twenty years. The statute requires the land to be actually occupied and either protected by a substantial enclosure or usually cultivated and improved. WIS. STAT. § 893.25(2). A person claiming adverse possession must show 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.

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

Pierz v. Gorski, 88 Wis. 2d 131, 137, 276 N.W.2d 352 (Ct. App. 1979). An adverse claimant may "tack" or add his or her time of possession to that of prior adverse possessors with whom her or she is in privity in order to establish continuous possession for the requisite statutory period. ***Perpignani***, 139 Wis. 2d at 724-25.

¶7 Weber does not directly challenge any of the trial court's findings of fact. Instead, Weber contends that the Olsons failed to establish their claim with respect to Outlot 1 because there was no testimony as to who actually planted the lilac bushes. There was no need for such testimony, however. There was ample testimony to support the trial court's finding that it was the Olsons and their predecessors who had openly maintained the bushes and the area around them since 1962. Weber's testimony that she could not see to the Olsons' side of the bushes does not mean that the Olsons' cultivation of the area was not openly visible to anyone who looked.[2] Weber's testimony on that point was also irrelevant since the Olsons had already established ownership by adverse possession by 1982, three years before Weber even bought her lot.

¶8 Although Weber asserts that she is also challenging the trial court's decision with respect to Outlot 2, she offers no argument as to why the Olsons' driveway was not sufficient to establish an open, notorious, visible, exclusive, hostile and continuous use. We are satisfied that the trial court reasonably determined that adverse possession had been established with respect to that area as well.

[2] The trial court also explicitly found that Weber's testimony was "totally and completely lacking" in credibility.

¶9 Weber next argues that the trial court erred in awarding damages and directing her to remove the fence at her expense because she was still the title holder of record when she took those actions. She misunderstands the nature of adverse possession. The whole point of an adverse possession claim is that the recorded title is not dispositive when another party has had exclusive use of the disputed land for a period of more than 20 years. Here, the disputed land had, in fact, belonged to the Olsons and their predecessors by adverse possession since at least 1982, notwithstanding the recorded title. In other words, the effective date of the transfer of ownership was 20 years after the adverse possession began, not the date of the trial court's decision.

¶10 Weber also objects to the Olsons' failure to specify the amount of claimed damages in their complaint and trial court's comments that the lilac bushes were pretty and the fence was ugly. The complaint asked for whatever relief might be equitable, however, and there is no indication that the trial court's aesthetic sense played any role in assessing the amount of damages. The court did not make a punitive damages award. Rather, the court indicated the amount of damages was based upon an estimate for what it would cost to replace the hedge. There is no basis to set aside the trial court's remedy.

By the Court.—Judgment affirmed.

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