

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**April 23, 2002**

Cornelia G. Clark  
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. 01-2132  
STATE OF WISCONSIN**

**Cir. Ct. No. 99-CV-144**

**IN COURT OF APPEALS  
DISTRICT III**

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**CHARLES E. KELLER AND BARBARA L. KELLER,**

**PLAINTIFFS-APPELLANTS,**

**v.**

**PAUL F. SAWYER,**

**DEFENDANT-RESPONDENT.**

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APPEAL from a judgment of the circuit court for Door County: DENNIS J. MLEZIVA, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

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

¶1 PER CURIAM. Charles and Barbara Keller appeal a judgment denying their adverse possession action against Paul Sawyer. The Kellers contend that they obtained title by adverse possession to (1) land under a corner of their cottage and (2) a portion of land adjacent to their cottage. We agree and reverse

the judgment. However, we limit the adverse possession of the lawn to that area the Kellers and their predecessors in interest actually used and occupied for over twenty years. We therefore remand for the trial court to hold a hearing to give the parties an opportunity to present sufficient evidence to establish the boundary of the land adversely possessed so that the court can partition the land. We also conclude that the Kellers gained a prescriptive easement to the land under the LP tank and surrounding the line that runs from the tank to the cottage.

### **BACKGROUND**

¶2 This dispute relates to two parcels of land along the shore of Green Bay in Door County. Paul Sawyer owns the northern property. The Kellers own the southern property.

¶3 The Kellers purchased their property from John Gower in 1992 by land contract. The land contract was satisfied in 1999 when the Kellers received and recorded a warranty deed. Gower and his wife had purchased the property from his mother, Julie Gower, in the late 1970s. Julie purchased the land in 1955. All documents transferring title contained the same legal description.

¶4 Sawyer purchased his property from Robert and Virginia Davis in 1997. The Davises had owned their property from at least 1955.

¶5 Julie Gower wanted to build a structure on the property after she purchased it. She was friendly with her neighbors, the Murphys to the south and the Davises to the north. Julie attempted to “find” a location that would carve out approximately 100 feet of property on which to build a cottage that would not encroach upon either the Murphy or the Davis properties.

¶6 In 1956, Julie hired Ralph Thomas to survey her property. Thomas did not reduce his survey to a map, but created a legal description based on his survey. Thomas' description differed from the description in the recorded deed Julie acquired when she purchased the property. Thomas' description was never included in a survey or recorded. After creating the description, Thomas put several ribbons on trees located between the Gower and Davis properties to mark the boundary line delineated in his description. Later in 1956, Ralph Cook created a map of Julie's property using Thomas' legal description. Like the description, the map was never recorded.

¶7 Julie Gower and Clara Davis reached an agreement regarding the boundary line between their properties. It appears they agreed that the border would be the line created by Thomas' survey and depicted in Cook's map. Their agreement, however, was never reduced to writing or recorded.

¶8 In 1957, Julie Gower built a cottage on what she thought was her land. The cottage still stands on the property. She constructed it south of the agreed upon boundary line.

¶9 The Gowers installed an LP gas tank and line into the cottage on what they believed was their property shortly after they built the cottage. They also installed a television antenna and a clothesline and created a lawn area. The Kellers continue to maintain all of these improvements. Keller and his wife moved into the cottage in 1992 and since then have resided there continuously as part-time summer residents.

¶10 In 1992, the Kellers commissioned a survey of their property. The survey is based upon the recorded legal description of the property. It comports with that description and shows that a corner of the Kellers' cottage is on Sawyer's

property and that the Kellers use a triangular-shaped part of Sawyer's property as their side lawn.

¶11 On September 15, 1999, the Kellers commenced an adverse possession action against Sawyer. The boundary in dispute is the north line of the Keller property and the south line of the Sawyer property. The cottage and adjoining lawn area cross that line. After a bench trial September 11 and 12, 2000, the trial court denied the Kellers' claims for adverse possession. It awarded Sawyer the land subject to an easement for the Kellers over the land under the corner of their cottage. The Kellers filed a motion for reconsideration, which the court denied. The Kellers now appeal.

#### LEGAL STANDARDS

¶12 Persons seeking to establish title to property by adverse possession must show that they have used the disputed property in a hostile, open and notorious, exclusive and continuous manner for at least twenty years. *Keller v. Morfeld*, 222 Wis. 2d 413, 416-17, 588 N.W.2d 79 (Ct. App. 1998). An essential element of adverse possession is the exclusivity of the occupation or possession.<sup>1</sup> See WIS. STAT. § 893.25(2)(a).<sup>2</sup> "And in calculating the twenty-year period, the adverse possession of predecessors in title may be 'tacked on' to that of the present claimant." *Keller*, 222 Wis. 2d at 417.

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<sup>1</sup> This differs from the establishment of a prescriptive easement, which requires only that the hostile, visible, open and notorious, and continuous and uninterrupted use of the land under a claim of right for twenty years be inconsistent with the exercise of the true owner's possessive rights, not exclusive. *Mushel v. Town of Molitor*, 123 Wis. 2d 136, 144-45, 365 N.W.2d 622 (Ct. App. 1985).

<sup>2</sup> All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶13 Only the premises actually occupied may be adversely possessed, and the land is adversely possessed only if it has been “Protected by a substantial enclosure,” or “Usually cultivated or improved” for twenty years. WIS. STAT. § 893.25(2)(b)1 and 2.

¶14 In *Burkhardt v. Smith*, 17 Wis. 2d 132, 115 N.W.2d 540 (1962), the court defined “usually improved” as “the exclusive use of the occupant as the true owner might use such land in the usual course of events.” The use must also be sufficiently visible to give notice of exclusion to the true owner. *Id.* “Improvements sufficient to apprise the true owners of adverse possession of wild lands must substantially change the character of the land.” *Pierz v. Gorski*, 88 Wis. 2d 131, 137, 276 N.W.2d 352 (Ct. App. 1979). “Where the land remains ‘wild’ after the improvements are completed, no owner should be held to notice of the improvements. Acts which are consistent with sporadic trespass are insufficient to apprise a reasonably diligent owner of any adverse claim.” *Id.*

¶15 “The burden of proving the extent of occupancy rests with the adverse possessor. In the absence of evidence upon which a legal description of the occupied area could be based, the claim of adverse possession must fail.” *Droege v. Daymaker Cranberries, Inc.*, 88 Wis. 2d 140, 146, 276 N.W.2d 356 (Ct. App. 1979). “While absolute precision or utilization of a surveyor is not required to establish lines of occupancy, the evidence must provide a reasonably accurate basis upon which the trial court can partition the land in accordance with sec. 893.08, Stats.” *Id.*

¶16 The evidence of possession must be clear and positive and must be strictly construed against the claimant. *Allie v. Russo*, 88 Wis. 2d 334, 343, 276 N.W.2d 730 (1979). All reasonable presumptions must be made in favor of the

true owner. *Id.* There must be actual visible means by which notice of the intent to exclude is given to the true owner. *Id.* at 344.

¶17 Adverse possession is a mixed question of law and fact. *Perpignani v. Vonasek*, 139 Wis. 2d 695, 728, 408 N.W.2d 1 (1987). The trial court’s findings of fact will not be set aside unless they are clearly erroneous. WIS. STAT. § 805.17(2). The application of those facts to the applicable legal standards is a question of law this court reviews de novo. *Benjamin Plumbing, Inc. v. Barnes*, 156 Wis. 2d 276, 279-80, 456 N.W.2d 628 (Ct. App. 1990).

## ANALYSIS

### A. HOUSE CORNER

¶18 First, the Kellers argue that they proved adverse possession because they showed hostile intent to possess the land under their cottage. As part of this argument, the Kellers dispute the trial court’s finding of fact that there was no hostile intent and the court’s conclusion of law that there was no adverse possession.<sup>3</sup>

¶19 The trial court concluded, “the Plaintiffs have presented sufficient evidence to establish use and occupancy of the Defendant’s property as to the corner of the Gower, now Keller, cottage ... which constitutes an encroachment on the Defendant’s property.” The court nevertheless denied the Kellers’ claim

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<sup>3</sup> The Kellers also maintain that the court should not have relied upon WIS. STAT. § 703.32(2), which pertains to condominiums, when it granted the equitable relief of an easement. Although the condominium statute is not applicable to the case, the court relied upon it only as an analogy. Moreover, that § 703.32(2) applies only to condominiums is not a persuasive reason for why the trial court cannot use it by analogy to work an equitable result.

“because they have not proven such rights to the requisite burden as stated above in these Conclusions of Law.” Instead, the court decided “that the Plaintiffs are entitled to a judgment against Defendant granting them an easement to continue to use and occupy the portion of their cottage which encroaches upon the Defendant’s property ....”

¶20 By finding rights to an easement, the court made requisite findings for adverse possession, minus exclusivity. However, with their cottage sitting on it, the Kellers’ use of the land cannot be considered nonexclusive. We also conclude as a matter of law that Julie Gower’s possession of the land under the corner of the cottage was hostile. By establishing a boundary between the Gower and Davis properties, Julie Gower effectively laid claim to the real estate south of that border line, including the area on which the cottage is situated. Building and maintaining a cottage on that real estate since 1957 constitutes open and notorious, exclusive and continuous possession for over twenty years.<sup>4</sup> See *Keller*, 222 Wis. 2d at 416-17.

#### B. TRIANGULAR PIECE OF LAND

¶21 The Kellers also argue that the trial court should have found adverse possession of the triangular-shaped piece of land on one side of their cottage. They contend that the trial court should have looked at activities occurring on and involving this area as a whole because, taken together, they demonstrate adverse

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<sup>4</sup> The Kellers satisfy the requirements for adverse possession of the land under the cottage because their possession is appended to the Gowers’. *Keller v. Morfeld*, 222 Wis. 2d 413, 417, 588 N.W.2d 79 (Ct. App. 1998).

possession.<sup>5</sup> The Kellers again assert that, when their possession is added on to the previous owners', they exclusively occupied the land for over twenty years.

¶22 The trial court concluded that the Kellers and their predecessors had not improved the land in a manner sufficient to give the true owner notice of their possession. It determined that “the plaintiffs have failed to meet their burden of proof to establish adverse possession to a reasonable certainty by the greater weight of the credible evidence under the requirements of Wis. Stat. §893.25 as to any of the Defendant’s real property.” We disagree.

¶23 The court found John Gower’s testimony credible and gave it greater weight than the Kellers’ testimony. The Kellers’ adverse possession of the lawn is limited to that area described in John Gower’s testimony. We conclude that they adversely possessed that portion of the triangular-shaped piece of land that John Gower testified was used as the cottage’s lawn when he owned the property. However, we agree with the trial court that the Kellers failed to establish adverse possession of any area they developed after 1992. In order to satisfy the statutory requirement of twenty years’ possession, the Kellers need to “tack on” their possession to that of the Gowers. *See Keller*, 222 Wis. 2d at 417. As a result,

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<sup>5</sup> The Kellers contend as part of their “as a whole” argument that the trial court should have considered improvements the Kellers made to the area in question. Because we conclude that, as a matter of law, the Kellers adversely possessed that portion of the triangular-shaped land cultivated and maintained by the Gowers as their lawn, we need not specifically consider this argument. As will be seen, we agree that mowing the lawn, installing a television antenna and propane tank, and using a makeshift clothesline constitute the usual cultivation and improvement of an owner of property. *See WIS. STAT. § 893.25(2)*. It is not disputed that the use was exclusive.



their adverse possession is limited to that area used and maintained by the Gowers.<sup>6</sup> *See* WIS. STAT. § 893.25(2).

¶24 John Gower testified that his family considered a portion of the land surrounding the cottage as their lawn from the time they built the cottage. This lawn is smaller than the triangular-shaped piece of land claimed by the Kellers. John Gower testified that he mowed the lawn. He also testified that a television antenna stood in the yard and the Gowers consistently made use of a makeshift clothesline strung between the antenna and bushes from the time the cottage was built. He further noted that portions of the land claimed by the Kellers as lawn and depicted in pictures had been in a state of nature when he owned the land.

¶25 As indicated, the trial court found John Gower credible. We therefore conclude as a matter of law that the land he identified as the lawn was adversely possessed. The use of the land by the Gowers and the Kellers was hostile, open and notorious, and exclusive and continuous for more than twenty years. *See Keller*, 222 Wis. 2d at 416-17. Because the Kellers' claim is not based in a written document, only the premises actually occupied are subject to adverse possession. *See* WIS. STAT. § 893.25(2). The Kellers have not owned the property for twenty years, so they must append their possession to that of the Gowers to satisfy the requisite statutory period. *See Keller*, 222 Wis. 2d at 417. Although there is no "substantial enclosure" protecting the lawn, the Gowers' use

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<sup>6</sup> Sawyer does not expressly argue for this result. We reach it based on our independent application of the legal requirements for adverse possession to the facts as found by the trial court. Sawyer does not differentiate between the lawn and the land remaining in a state of nature. Instead, he focuses on his argument that the Gowers, and then the Kellers, used the land with permission from the Davises, Sawyer's predecessors in title. We reject that argument because the Gowers and Kellers used the land as their own and have satisfied the requirements for adverse possession.

of it was the usual cultivation and improvement consistent with ownership. *See* WIS. STAT. § 893.25(2). Simply put, they used the lawn area as their own and thereby gave sufficient notice of exclusion to the true owner. *See Burkhardt*, 17 Wis. 2d at 138.

### C. LP TANK

¶26 The Kellers attempt to claim adverse possession of the entire triangular-shaped portion of land because there is an LP tank with a line running into the cottage on land otherwise in a state of nature. They argue that the LP tank substantially changed the character of the land that was otherwise in a state of nature. *See Pierz*, 88 Wis. 2d at 137. We conclude that the use of the land underneath the tank itself and along the line that runs from the tank into the cottage did not constitute adverse possession. Rather, we conclude that the Kellers' use of the land created a prescriptive easement.

¶27 A prescriptive easement requires hostile, visible, open and notorious, and continuous and uninterrupted use of land for twenty years. *Mushel v. Town of Molitor*, 123 Wis. 2d 136, 144-45, 365 N.W.2d 622 (Ct. App. 1985). The use must be inconsistent with the exercise of the true owner's possessive rights, but it need not be exclusive. *Id.*

¶28 The placement and use of the LP tank was not an exclusive use of the land. The Kellers used the land in such a way to give rise to an easement, but that use was non-exclusive. The line was underground and one could walk over it or otherwise use the land without knowledge of its existence. Also, the tank is movable and therefore not a permanent improvement to the land.

## CONCLUSION

¶29 We reverse the judgment and conclude that the Kellers, with their predecessors in interest, adversely possessed the land under the corner of their cottage and that portion of the lawn developed and maintained by the Gowers for over twenty years. Further, we conclude that the Kellers' use of the land under the LP tank and the line running from the tank to the cottage constitutes a prescriptive easement. We affirm the remainder of the judgment.

¶30 The only evidence of the dimensions of a portion of the adversely possessed area was an exhibit on which John Gower made marks to depict the property in question. As indicated, the trial court found Gower credible, but determined that the marks he made on the exhibit were insufficient to permit the court to describe the land adversely possessed. We therefore remand for further proceedings for the trial court to hear evidence and create legal descriptions of the land we have concluded the Kellers adversely possessed, and the land to which they are entitled to an easement, so that the court can partition the land.

¶31 Although the trial court did not have the evidence necessary to create a legal description, it can elicit the evidence on remand. *See Droege*, 88 Wis. 2d at 146. Absolute precision is not necessary, and it is within the court's discretion whether to utilize the services of a surveyor. *Id.* Nevertheless, the court must take evidence sufficient to "provide a reasonably accurate basis upon which the trial court can partition the land ...." *Id.* The burden of presenting this evidence will be on the Kellers.

*By the Court.*—Judgment affirmed in part; reversed in part and cause remanded with directions. No costs to either party.

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

