COURT OF APPEALS
DECISION
DATED AND FILED

May 18, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP963 **Cir. Ct. No. 2008CV1468**

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

DENNIS EMMERT,

PLAINTIFF-RESPONDENT,

V.

JOHN MICKELSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for St. Croix County: HOWARD W. CAMERON, JR., Judge. *Affirmed.*

Before Neubauer, P.J., Anderson and Reilly, JJ.

¶1 PER CURIAM. John Mickelson appeals from a circuit court order denying his adverse possession claim to property owned by Dennis Emmert. The circuit court made extensive findings of fact and credibility determinations. We hold that these findings are not clearly erroneous, the circuit court applied the

proper law, and the evidence was sufficient to reject Mickelson's adverse possession claim. We affirm.

¶2 The properties of Emmert and Mickelson border each other on three sides. This case began as an attempt by Emmert to enjoin Mickelson from removing survey stakes placed by Emmert's surveyor, Joseph Granberg. Mickelson then counterclaimed for adverse possession of a disputed border area involving the north and east property boundaries.[1] After a court trial, the circuit court ruled in Emmert's favor and denied Mickelson's adverse possession claim.

¶3 Review of an adverse possession claim presents a mixed question of fact and law. ***Perpignani v. Vonasek***, 139 Wis. 2d 695, 728, 408 N.W.2d 1 (1987). We will uphold the circuit court's findings of fact unless they are clearly erroneous. ***Steuck Living Trust v. Easley***, 2010 WI App 74, ¶11, 325 Wis. 2d 455, 785 N.W.2d 631, *review denied*, 2010 WI 114, 329 Wis. 2d 64, 791 N.W.2d 66 (WI Aug. 18, 2010) (No. 2009AP757). We will independently decide whether the facts found by the circuit court fulfill the legal standard for adverse possession. ***Id.***, ¶11.

¶4 WISCONSIN STAT. § 893.25 (2007-08)[2] permits a person to acquire title to real property by adverse possession for an uninterrupted twenty-year period. The land must be actually occupied and either protected by a substantial enclosure or usually cultivated or improved. Sec. 893.25(2). A person

[1] The parties variously refer to this disputed property as the "overlap area" or the area subject to "overfarming." We refer to the property as "disputed."

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

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 claim[ed] the land as his own." ***Pierz v. Gorski***, 88 Wis. 2d 131, 137, 276 N.W.2d 352 (Ct. App. 1979). Mickelson had the burden of proving the elements of adverse possession by clear and positive evidence. *See* ***Steuck Living Trust***, 325 Wis. 2d 455, ¶15. "The evidence must be strictly construed against the claimant and all reasonable presumptions must be made in favor of the true owner." ***Id.*** The claimant's use must give the titleholder reasonable notice that the claimant asserts ownership. ***Id.***, ¶17.

¶5 In our view, the dispositive issue in this appeal is whether Mickelson used the disputed property for the requisite twenty-year period and whether the use was notorious and visible such that a reasonably diligent titleholder would be apprised that Mickelson claimed the land as his own.

¶6 The circuit court found that Mickelson acquired his property in 1987. Originally, a fence line marked the northern boundary and a tree line marked the eastern boundary of Mickelson's property. In the 1990s, Emmert and Mickelson agreed to remove the fence and tree lines for ease of farming their respective parcels. Mickelson farmed the disputed property from 1987 to 1993 and again from 1999 to the present. From 1993-99, Emmert farmed the disputed property. After the fence and tree lines were removed, the property lines were not visible. No effort was made to mark the boundary lines in another manner or to reestablish the boundary lines after Emmert stopped farming the disputed property.

¶7 The circuit court ruled that Mickelson did not meet his burden to show adverse possession. The court found that Mickelson did not farm the disputed property continuously for twenty years because (1) the northern and eastern boundary lines were not established with any certainty because the boundary lines moved during the time Mickelson farmed the property and (2) Emmert testified that during the six years he farmed the disputed property, there were no exact boundary lines, and the boundary lines were not reestablished. In the absence of exact boundaries, Mickelson could not be deemed to have used Emmert's property in an "open, notorious, visible, exclusive, hostile" manner. Because Mickelson did not show that he possessed the same property owned by Emmert for the requisite twenty-year period, the court denied Mickelson's adverse possession claim and enjoined Mickelson from interfering with Emmert's boundary markers. Mickelson appeals.

¶8 On appeal, Mickelson argues that the circuit court's findings of fact regarding the use of the disputed property and establishment of the boundary lines were clearly erroneous. He challenges numerous findings. We search the record for evidence that supports findings the circuit court made, not for findings it could have made but did not. ***Noble v. Noble***, 2005 WI App 227, ¶15, 287 Wis. 2d 699, 706 N.W.2d 166. Because it was the circuit court's role to resolve conflicts in the testimony, we will uphold its assessments of the witnesses' credibility, and we will not second-guess the circuit court's reasonable factual inferences. ***Global Steel Prods. Corp. v. Ecklund Carriers, Inc.***, 2002 WI App 91, ¶10, 253 Wis. 2d 588, 644 N.W.2d 269. On review, we will not reweigh the evidence, as Mickelson would have us do.

¶9 The record supports the circuit court's findings of fact. In making its findings of fact, the court relied upon evidence supplied by Joseph Granberg,

Emmert's surveyor. Granberg's 2008 survey established the boundary lines for the neighboring properties. Granberg found no remnants of a fence or tree line. Granberg also considered the following as he determined the boundary lines by survey. Aerial pictures from the early 1990s did not show any discernible boundary lines. A lone tree relied upon by Mickelson as evidence of the boundary line was not located on a boundary line, was not visible in the aerial pictures, and was either a sapling or not in existence when Mickelson purchased the property in 1987. Therefore, the tree was not big enough to qualify as a boundary marking tree in 1987.[3] In addition, the plow lines did not accurately indicate the boundaries because the lines moved with the plowing activities.

¶10 The circuit court based its findings upon other evidence it found credible. The court found that the testimony of Dennis and his son, Jerry Emmert, was credible on the question of the location of the boundary lines. The testimony of Mickelson and Todd Henry, Mickelson's employee, was not credible on the topic. Dennis Emmert testified that he and Mickelson agreed to remove the fence and tree lines for ease of farming their respective parcels. Emmert and Mickelson did not agree that the lone tree marked a boundary line. They did not formally reestablish the boundary when Emmert stopped farming the land in 1999.

¶11 Mickelson relied upon the existence of a rock pile to mark the boundary. However, Jerry Emmert testified that the rock pile was not present when he farmed Mickelson's property, and the rock pile was not located on the survey line. Rather, per the Granberg survey, the rock pile was located on

[3] The circuit court found Granberg's assessment of the utility of the tree as a boundary marker credible because Granberg had experience using trees as boundary markers.

property undisputedly owned by Emmert. Dennis Emmert testified that the rock pile appeared in 2008, but there was no rock pile when he farmed the land from 1993 to 1999. The parties did not have an agreement that either the rock pile or the lone tree would mark the property line. Jerry Emmert also testified that when Mickelson farmed the property, the boundary line between the two properties wandered.

¶12 The court found that the northern boundary line moved continually during the past twenty or more years, and the boundary line was not straight, contrary to Mickelson's testimony that the northern and southern boundary lines were parallel. The court also found that the rock pile did not accurately indicate a boundary line because the pile was too new to have been there for twenty years.

¶13 The circuit court's findings of fact were not clearly erroneous. There was credible evidence that the parties were unsure where the boundary lines were, both before and after Emmert's 1993-99 farming period. The circuit court found credible the Emmerts' and Granberg's testimony about the unmarked boundaries. The facts fulfilled the applicable legal standard: whether Mickelson's use of the property was such that a reasonably diligent landowner and the public would be apprised that Mickelson claimed the disputed property as his own.

¶14 Mickelson complains that the circuit court improperly qualified Granberg as a tree expert when it relied upon his testimony that the lone tree was not of sufficient size to use as a boundary marker. Mickelson objected as Granberg was being asked how he decides whether a tree suffices as a boundary marker. Granberg testified that he uses natural markers as part of his survey work, and therefore he has to know different species of trees and whether they are fast or slow growing. The court found that Granberg provided a foundation for his

opinion regarding the use of trees as boundary markers. The court properly exercised its discretion in finding that Granberg's knowledge of trees was within the scope of his expertise as a surveyor. *See* ***Brown Cnty. v. Shannon R.***, 2005 WI 160, ¶37, 286 Wis. 2d 278, 706 N.W.2d 269 (admissibility of expert testimony and expert's qualifications are discretionary with the circuit court).

¶15 Mickelson next argues that the circuit court misapplied the law of adverse possession. We have already held that the circuit court's findings of fact fulfilled the legal standard for adverse possession. Because the property Mickelson claimed was farmed over time by both parties and the boundary markers were removed by the parties and not reestablished, the property subject to Mickelson's adverse possession claim could not be determined with sufficient certainty to support his adverse possession claim.[4]

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).

[4] To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978). ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.")