**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**January 27, 2005**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 04-1014** **Cir. Ct. No. 03CV000077**

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

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**LISA AUMANN AND MICHAEL AUMANN,**

**PLAINTIFFS-RESPONDENTS,**

**V.**

**PATRICIA ANDERSON AND ORVILLE ANDERSON,**

**DEFENDANTS-APPELLANTS.**

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APPEAL from a judgment of the circuit court for Iowa County: WILLIAM D. DYKE, Judge. *Reversed and cause remanded.*

Before Deininger, P.J., Dykman and Vergeront, JJ.

¶1 PER CURIAM. Patricia and Orville Anderson appeal from a judgment granting a disputed piece of property to Lisa and Michael Aumann. The Andersons and Aumanns are neighbors and the disputed piece of land lies between their respective lots. The trial court held enforceable an agreement to settle the dispute by having the Andersons relinquish their claim to the property in exchange

for $500. The dispositive issue is whether the parties had an enforceable agreement. We conclude that they did not, and therefore reverse.

¶2 A fence divided the Anderson property to the west, and the Aumann property to the east, when the Aumanns bought their lot in 1998. A subsequent survey revealed that the true lot line lay approximately thirteen feet west of the fence, giving the Aumanns a claim to a portion of what the Andersons believed was their property. After the Aumanns presented the Andersons with the survey results, the parties began communicating through counsel. In October 2001, the Andersons' attorney, Peter Waltz, informed the Aumanns' attorney, Timothy Fenner, that the Andersons claimed ownership of the land up to the fence line by adverse possession. He then extended an offer to purchase title to the thirteen-foot strip for $500.

¶3 In a response letter dated November 16, 2001, Fenner communicated the Aumanns' offer to pay the Andersons $500 if the latter relinquished their adverse possession claim. The letter stated that if the Andersons accepted the offer, the Aumanns planned to remove the fence and plant trees or shrubbery on the surveyed property line.

¶4 On December 3, 2001, Waltz responded with a letter stating in part:

> The [November 16] proposal is acceptable to my clients provided one of Mr. Anderson's concerns is allayed.… He is worried that your clients will plant trees along the property line which will shade out and smother the trees he has planted. Mr. Anderson would like some idea of what your client's plan to do along that area in terms of fence, shrubs or trees.

On December 10, Fenner wrote back detailing the Aumanns' plans for planting a line of arbor vitae trees two feet back from the property line. Fenner also told

Waltz, "Please advise as to whether or not [the Aumanns'] plans present any problems. Once I hear from you, we can then process the resolution of this matter." The Andersons did not respond to that letter. On February 8, 2002, Fenner sent Waltz $500 and a quit claim deed for the Andersons' signature. On February 12, 2002, Waltz returned the deed and the money, explaining that Mr. Anderson had not accepted the proposed agreement and that he had retained another attorney.

¶5 In May 2003, the Aumanns commenced this action, seeking either ejectment or specific enforcement of what they alleged was an enforceable contract. The Andersons answered by denying the existence of an enforceable contract to relinquish their claim, and affirmatively pleading adverse possession. The Aumanns then moved for summary judgment on the basis that the letters of December 3 and December 10 constituted an enforceable contract. The trial court agreed and granted judgment holding the Andersons' claim extinguished in exchange for $500.

¶6 A valid contract requires an offer and an acceptance. ***Briggs v. Miller***, 176 Wis. 321, 325, 186 N.W.2d 163 (1922). An offer and an acceptance exist when the parties mutually express assent. ***Gustafson v. Physicians Ins. Co.***, 223 Wis. 2d 164, 173, 588 N.W.2d 363 (Ct. App. 1998). Where the material facts concerning offer and acceptance are undisputed, as they are here, the existence of a contract becomes a question of law that we decide de novo. ***Id.*** at 172-73.

¶7 The Andersons never accepted the Aumanns' offer to settle the dispute. The response to the offer of December 3, by counsel, stated in unambiguous language that the Andersons still had concerns, and would accept the proposal only if those concerns were addressed. The phrase "is acceptable …

provided" has no other reasonable meaning. The unavoidable corollary is that, until those concerns were addressed, the Andersons retained the option to reject the proposal. The December 10 response from the Aumanns' counsel shows that a final acceptance of the Aumanns' plan was to be obtained before a "resolution" could be "process[ed]." As noted, the only further communication was the letter of Waltz, as former counsel, stating that the Andersons had, in fact, rejected it. An essential ingredient of an enforceable contract was therefore lacking.

¶8 The Andersons contend that not only was there no enforceable agreement, which we accept, but that a remand for further proceedings is unnecessary because they established a *prima facie* case for adverse possession on summary judgment, without any opposing submissions from the Aumanns refuting their proof. However, adverse possession was not the subject of the summary judgment proceeding. Had it been, the Aumanns would have been on notice that they needed to address the issue in their submissions. As it was, they were not. The issue has yet to be litigated.

¶9 Our decision makes it unnecessary to address the remaining issues the Andersons raise on appeal. It does make further proceedings necessary, however, on the remaining claims of the parties regarding ownership of the disputed property.

*By the Court.*—Judgment reversed and cause remanded.

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