COURT OF APPEALS
DECISION
DATED AND FILED

February 23, 2012

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP904 **Cir. Ct. No. 2008CV584**

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

JAMES SCHULTZ AND PAMELA SCHULTZ,

PLAINTIFFS-RESPONDENTS,

V.

MARK FRISCH AND THERESA FRISCH,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Marathon County: JILL N. FALSTAD, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Vergeront, Higginbotham and Sherman, JJ.

¶1 HIGGINBOTHAM, J. This adverse possession claim concerns a boundary dispute between Mark and Theresa Frisch and James and Pamela Schultz.[1] Frisch appeals the trial court's judgment that Schultz's predecessors in interest established title to the disputed land by adverse possession. Frisch argues that any use of the disputed area was permissive. Frisch also appeals the judgment finding that Mark and Theresa Frisch trespassed upon Schultz's property. Finally, Frisch appeals the trial court's award of $500 in attorney's fees to Schultz. We affirm the trial court's judgment. However, we reverse on the amount of the attorney's fees awarded to Schultz and remand for a determination of attorney's fees pursuant to WIS. STAT. § 814.02(2) (2009-10).[2]

Background

¶2 Frisch and Schultz are neighbors. This dispute centers on the location of the property line between their respective residences. Schultz filed a quiet title action seeking a declaration that he and his wife were the owners in fee simple of the disputed property by way of adverse possession. The complaint alleges that Schultz has established title to the disputed area by adverse possession based on the open, notorious, exclusive, continuous, and hostile use of this property by Schultz's predecessors in interest for more than thirty years prior to Schultz taking ownership of the property in 2004.

[1] We will refer to both the Frisches and the Schultzes in the singular throughout the rest of the opinion, except where we refer to a specific individual's testimony or actions, where we will refer to them by first and last name.

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶3 The following facts are taken from the trial testimony and the trial court's decision. Clyde and Grace Jacobitz are the predecessors in interest to the property owned by Schultz. The predecessors in interest to Frisch's property are Leonard and Claire Hebert. In 1969, Clyde Jacobitz decided to construct a workshop on the side of his garage facing the Heberts' property. He approached Leonard Hebert regarding the location of the lot line to ensure that the workshop would not encroach on Hebert's property. Hebert did not know the location of the boundary line, and told Jacobitz "don't worry about [the property line]." Hebert testified that he "was so busy making a living that I didn't concern myself with [the actual location of the property line]." Jacobitz then built the workshop.

¶4 The Heberts also testified that Grace Jacobitz maintained a one-foot deep flower bed on the Hebert/east side of the workshop until at least 1980 and perhaps until at least 1997. Prior to being taken down by Frisch, there was a tree located approximately thirty inches from the Schultz garage that Frisch and the parties' predecessors in interest agreed was on Frisch's property.

¶5 In 2006, Schultz removed the workshop and built a two-car garage on the existing concrete slab. After Schultz built the new garage, he received a letter from Frisch's attorney in March 2008 demanding that the garbage containers Schultz had placed on the east side of the garage be removed. Schultz removed the garbage containers later that spring.

¶6 In 2007, Frisch hired Timothy Vreeland to conduct a survey of his land so that Frisch could build a fence around his property. Vreeland's survey moved the property line four to six feet west of the property line established by the Schultz/Jacobitz hedge, which had framed three sides of the Schultz backyard since at least 1957. Vreeland testified that he used plat maps and other survey

tools to determine where to begin his survey measurements. Deed corrections filed with the county were introduced at trial noting that one of the streets used by Vreeland to establish his survey commencement points was not located as indicated in the original 1859 plat mat utilized by Vreeland. Vreeland did not look at the deeds filed with the county or county tax maps in preparing his survey. Vreeland agreed that the boundaries he identified on his survey did not match the occupation lines established in the neighborhood. Vreeland testified that surveys done in the past could be up to four to five feet off their boundaries. Under Vreeland's survey, Schultz's neighbor to the west would lose four to five feet of his property, including half of his driveway.

¶7 After receiving the survey and checking with legal counsel, Frisch began constructing a fence in front of the Schultz garage, inside the outside wall of the garage by approximately two feet. Frisch also began cutting down bushes in the hedge surrounding the backyard of the Schultz property, which had been there since before the Heberts moved into their house in 1957. Frisch acknowledged that before receiving the survey, he believed the hedge belonged to Schultz and their predecessors in interest. Frisch cut down and dug out the roots of these bushes after he knew that Schultz disputed Frisch's assertion of their property line. Frisch also placed three to four "no trespassing" signs "every so many feet," five to six feet inside Schultz's side of the disputed property line, including directly under Schultz's clothesline. Frisch also testified to his mowing and other activities relating to the boundary line between the Schultz property and his own since his purchase of his property in 2001, including the fact that Schultz would also mow on the east side of the garage at times.

¶8 Schultz commenced this action to quiet title. Frisch moved for summary judgment, which the court denied. A two-day trial was presented to the

court. The court concluded that title to the disputed area had vested in Clyde and Grace Jacobitz by adverse possession not later than 1997 and that such title had been conveyed to James and Pamela Schultz. The court entered judgment granting title to that property to Schultz, ordered the fence removed and the property restored to the condition that existed prior to the encroachment, and awarded damages to Schultz in the stipulated amount of $575 and costs.

¶9 The court found that "the backyard of the Jacobitz property was enclosed by a hedge of bushes, which constituted an enclosure on such property." The court determined that Clyde Jacobitz had constructed the workshop in about 1969 "with the acquiescence of Leonard Hebert" and that neither Hebert nor Jacobitz were aware of the true property line between their properties. The court found the current garage was built on the same concrete slab on which the workshop had been built; that the telephone or utility pole had been accepted as marking the east line of the Jacobitz property for over twenty years; and that the Jacobitzes had maintained a flower bed along the full length of the east side of the shed/garage from 1969 until at least 1997. The court found that it was undisputed that a tree located thirty inches from the northeast corner of the property was located on the property held and possessed by the record owners of Lot 11 (Hebert/Frisch). The court further determined that "the Jacobitz' [sic] made such use of property east of the garage as an owner might," including "planting and maintaining a flower bed, and for access to and from the front of their land to the backyard," and that such use was consistent with the standards of adverse possession. The court determined that Mark and Theresa Frisch had trespassed on Schultz's property, with intentional and malicious disregard of Schultz's legal rights, and that Frisch damaged the Schultz's property "by digging up the bushes on the property and erecting a fence and signs on … the property."

¶10 The court found that the "east line of the adversely possessed property, runs from the large tree on the north line of the adjacent properties; thence south to the utility pole currently standing on the property; thence south to a point thirty (30") inches east of the northeast corner of the Schultz' garage; thence south on a line thirty (30") inches from and parallel with the east wall of the garage; extended to the right of way of Elm Street." Frisch appealed. Additional facts, as necessary, are set forth in the discussion section.

DISCUSSION

A. ADVERSE POSSESSION UNDER WIS. STAT. § 893.25(2)[3]

¶11 Our review of an adverse possession claim presents a mixed question of fact and law. ***Perpignani v. Vonasek***, 139 Wis. 2d 695, 728, 408

[3] WISCONSIN STAT. § 893.25 states:

> **Adverse possession, not founded on written instrument. (1)** An action for the recovery or the possession of real estate and a defense or counterclaim based on title to real estate are barred by uninterrupted adverse possession of 20 years, except as provided by s. 893.14 and 893.29. A person who, in connection with his or her predecessors in interest, is in uninterrupted adverse possession of real estate for 20 years, except as provided by s. 893.29, may commence an action to establish title under ch. 841.
>
> **(2)** Real estate is possessed adversely under this section:
>
> (a) Only if the person possessing it, in connection with his or her predecessors in interest, is in actual continued occupation under claim of title, exclusive of any other right; and
>
> (b) Only to the extent that it is actually occupied and:
>
> 1. Protected by a substantial enclosure; or
>
> 2. Usually cultivated or improved.

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. Whether those facts fulfill the legal standard for adverse possession we review de novo. ***Id.*** "Our standard of review is the same regarding the doctrine of acquiescence." ***Id.***

¶12 WISCONSIN STAT. § 893.25(2) provides that real estate is possessed adversely only if "the person possessing it, in connection with his or her predecessors in interest, is in actual continued occupation under claim of title, exclusive of any other right," and "[o]nly to the extent that it is actually occupied." In addition, the property must be "protected by a substantial enclosure" or "usually cultivated or improved." Sec. 893.25(2) (a) and (b). The adverse possession must be uninterrupted for twenty years. Sec. 893.25(1). However, the twenty-year period need not have occurred immediately before the filing of a court action. ***Harwick v. Black***, 217 Wis. 2d 691, 699, 580 N.W.2d 354 (Ct. App. 1998). Rather, "adverse possession for any twenty-year time period is sufficient to establish title in the adverse possessor." ***Id.*** at 701. Thus, if the activities of the Jacobitzes as predecessors in interest fulfill the standards for adverse possession, the twenty-year requirement is met.

¶13 In order to constitute adverse possession, "the use of the land must be open, notorious, visible, exclusive, hostile and continuous, such as would apprise a reasonably diligent landowner and the public that the possessor claims the land as his own." ***Steuck Living Trust***, 325 Wis. 2d 455, ¶14 (quoting ***Pierz v. Gorski***, 88 Wis. 2d 131, 137, 276 N.W.2d 352 (Ct. App. 1979)). "'Hostile' in this context does not mean a deliberate and unfriendly animus; rather, the law presumes the element of hostile intent if the other requirements of open, notorious,

continuous, and exclusive use are satisfied." ***Steuck Living Trust***, 325 Wis. 2d 455, ¶14 (citations omitted). "'Both ... the fact of possession and its real adverse character' must be sufficiently open and obvious to 'apprise the true owner ... in the exercise of reasonable diligence of the fact and of an intention to usurp the possession of that which in law is his own....'" ***Id.*** (citations omitted). Of particular relevance in deciding if the use is sufficient to apprise the landowner of an adverse claim is the nature and size of the disputed area. ***Id.***

¶14 "The party seeking to claim title by adverse possession bears the burden of proving the elements by clear and positive evidence." ***Id.***, ¶15. We strictly construe the evidence against the claimant and make all reasonable presumptions in favor of the true owner. ***Id.*** One presumption is that "actual possession is subordinate to the right of [the true] owner." ***Id.*** (citation omitted).

¶15 Frisch argues that the evidence is insufficient to establish adverse possession under the statutory standards. We understand Frisch to argue that Hebert gave permission to Jacobitz to construct the workshop by acquiescing in the shop's location. Using Frisch's words, Frisch argues that because Hebert "acquiesced" in Jacobitz using this land, Jacobitz's use was "permissive" and therefore Jacobitz never established adverse possession of the disputed area. Therefore, according to Frisch, the time-line for establishing an adverse possession claim first began to run when Schultz purchased the property from Jacobitz in 2004. Frisch misunderstands the distinction between "acquiescence" and "permissive use" in the context of determining adverse possession.

¶16 In his reply brief, Frisch maintains that "acquiescence means use is permissive" because "there cannot be adverse possession in the face of acquiescence and/or permission." In support, Frisch cites three cases: ***Leciejewski***

v. Sedlak, 110 Wis. 2d 337, 343, 329 N.W.2d 233 (Ct. App. 1982); ***Nagel v. Philipsen***, 4 Wis. 2d 104, 110, 90 N.W.2d 151 (1958); and ***Seybold v. Burke***, 14 Wis. 2d 397, 111 N.W.2d 143 (1961). None of these cases supports Frisch's position that "acquiescence means use is permissive."

¶17 In ***Sedlak***, we rejected Leciejewski's assertion that the Sedlaks used the disputed property with the permission of neighboring property owners and confirmed the trial court's finding—that the Sedlaks had taken possession of the property by adverse possession—was supported by the evidence. ***Sedlak***, 110 Wis. 2d at 342-45. There is nothing in ***Sedlak*** that even broaches the topic of whether acquiescence is equivalent to permission.

¶18 Similarly, we find no support for Frisch's position in either ***Nagel*** or ***Seybold***. The court in ***Nagel*** considered and applied the acquiescence doctrine, but we found no consideration of the concept that acquiescence is the same as permissive use. *See* ***Nagel***, 4 Wis. 2d at 107-110. In ***Seybold***, the supreme court considered whether the facts supported acquiescence by the defendant in a quiet title action. ***Seybold***, 14 Wis. 2d at 403-04. However, as in the two other cases we have discussed, the court does not address the issue of whether acquiescence means the use is permissive.

¶19 The law draws a distinction between acquiescence and permissive use. Acquiescence is simply another form of adverse possession. *See* ***Steuck Living Trust***, 325 Wis. 2d 455, ¶35. In eliminating the hostile intent requirement of adverse possession, "courts developed the doctrine of acquiescence under which … a party could acquire land by adverse possession if the true owner acquiesced in such possession for twenty years." ***Id.*** On the other hand, permissive use *defeats* a claim for adverse possession. *See* ***Ludke v. Egan***, 87

Wis. 2d 221, 230, 274 N.W.2d 641 (1979). In other words, under permissive use, ownership is retained in the property.

¶20 Accordingly, an owner simply doing nothing to determine whether another's actions or use of certain property constitutes "encroachment" onto his property does not equal permissive use. ***Steuck Living Trust***, 325 Wis. 2d 455, ¶¶35-36. Rather, that situation is similar to circumstances where two owners use a common marker (like a fence, tree, or concrete slab) to jointly determine their lot line. This use of a common marker or "acquiescence" in a boundary line is not "permissive use," but constitutes adverse possession by any owner who uses property not deeded to him for the statutory twenty-year period. *See* ***id.***, ¶35. ("'[A]cquiescence by adjoining owners in the location of a fence as establishing the common boundary line of their respective properties was conclusive as to the location of such line' where the fence had stood in the same location for more than twenty years.") (citation omitted). The distinction between the doctrines of acquiescence and permissive use is significant in light of the evidence adduced at trial.

¶21 Turning to that evidence,[4] we conclude that the record supports the trial court's finding that the workshop built on the concrete slab now holding Schultz's two-car garage was with the acquiescence of Leonard Hebert. Hebert testified that Clyde Jacobitz approached him in 1969 and expressed an interest in building a workshop onto his garage. Jacobitz wanted to ensure that the shop would not encroach on Hebert's property. Hebert testified that neither he nor

[4] We will not set aside a trial court's findings of fact unless clearly erroneous, and give due regard to the trial court's opportunity to judge the credibility of the witnesses. WIS. STAT. § 805.17(2).

Jacobitz knew where the true property line existed and that he simply told Jacobitz to build the shop. On cross-examination, Frisch's counsel attempted to frame Hebert's statement to Jacobitz as granting Jacobitz permission to build the shop. Hebert disagreed with this characterization and went on to explain that he was not concerned about where the property line between the two properties lay. It is readily apparent that not only did Hebert reject the idea that he gave permission to Jacobitz to build the shop, but it is also clear that the only reasonable inference to be drawn from this exchange between Hebert and Jacobitz was that both individuals acquiesced in the location of the property line between their respective properties. *See* ***Steuck Living Trust***, 325 Wis. 2d 45, ¶¶35-36. Essentially, Hebert expressed no interest in the true location of the property line between his and Schultz's property and left it up to Schultz to establish what that line was.

¶22 Frisch next argues that the evidence does not support the trial court's conclusion that Jacobitz had met the standards for adverse possession. He also argues that Schultz failed to take the necessary steps to establish adverse possession in his own right of the disputed area since he purchased the property in 2004. We reject these arguments. As we have explained in paragraph 21, the record supports the court's conclusion that Jacobitz met the standards for adverse possession and therefore Schultz, as the successor in interest to the property, owns the disputed area in fee simple. Consequently, we reject Frisch's assertion that Schultz was obligated under the law governing adverse possession to take any steps in addition to those made by the Jacobitzes to retain his right to title to the property by adverse possession.

¶23 In any event, we observe that the only argument Frisch makes concerning the Jacobitz's claim on the land is that the flower garden had not been continuously maintained for twenty years. Frisch asserts that the garden "was

only planted, at the most, between 1969[5] and 1980," and that Frisch had mowed this area from 2001 through 2004. The record does not support Frisch's assertion. Claire Hebert testified that flowers were grown along the side of the workshop until she and Leonard moved away in 1997. Frisch testified that Grace Jacobitz still lived at the house when he moved in to his current residence in 2001. There is no evidence that anyone other than Grace or another person at her direction maintained the flower bed. A reasonable inference could be drawn from these facts that Grace maintained the flower bed from 1969 until at least 1997, if not 2001. Accordingly, we conclude the evidence supports the trial court's finding that Grace Jacobitz maintained the flower garden until at least 1997, which is in excess of twenty years from when the garden was first cultivated in 1969.

¶24 Frisch next argues that, if we affirm the trial court's adverse possession determination, we should reverse the court's drawing of the new property line. Specifically, Frisch asserts that, according to the record, the boundary line runs from the curb break on the street, along the concrete slab/garage, and up to the hedge or bushes. He argues that the flower bed should not be considered in determining the boundary line because "it is unclear how long [the flower bed] was in existence," and certainly not for twenty years or more, and that the flower bed had been removed "long before any adverse possession could have been attributed." As we have explained, however, the evidence supports the court's finding that the Jacobitzes planted and maintained the flower bed for more than twenty years.

[5] The record is inconclusive as to the exact year when the flower bed was first planted. However, because Frisch appears to not challenge the trial court's finding that the garden was planted in 1969, we will use that date.

¶25 Frisch also points to an affidavit by Pamela Schultz in which she averred that Frisch mowed the disputed area since Schultz took possession of their property in 2004. He further notes that Schultz complied with Frisch's demand to move the garbage containers from the east side of their garage. The fact that Frisch had mowed the east side of the bushes and possibly up to the garage in front since 2001 does not defeat the title taken in adverse possession by the Jacobitzes long before Frisch took possession of his property. Moreover, we fail to see how Schultz's complying with Frisch's demand to remove the garbage containers impacts on the location of the new property line.

¶26 Frisch further argues that the record does not support using the utility pole as a boundary line or establishing the new property line at a distance of thirty inches from the edge of the garage concrete slab. We disagree. Leonard Hebert testified that he considered the utility pole, located east of the workshop, to be the boundary line. As for Frisch's argument regarding setting the new property line at thirty inches from the garage, he fails to present a fully developed argument as to why the court erred in establishing this line. We therefore do not consider it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals may decline to address inadequately developed arguments).

¶27 Frisch raises the possibility that Schultz may be trespassing on Frisch's property because the eaves of Schultz's garage extend over the edge of what Frisch views as the proper boundary line. The problem with this argument, however, is that the trial court set the new property line outside of the area where the garage eaves hang. Thus, there is no possibility that Schultz is trespassing on Frisch's property.

¶28 Finally, Frisch argues that case law required the trial court to order Schultz to pay Frisch consideration for the property once the court vested title in the property to Schultz. In response, Schultz asserts that Frisch raises this issue for the first time on appeal. Frisch does not respond to this argument in his reply brief. We therefore do not consider Frisch's argument. *See* ***State v. Mata***, 230 Wis. 2d 567, 576 n.4, 602 N.W.2d 158 (Ct. App. 1999) (we do not address issues raised for the first time on appeal); ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (A proposition asserted by a respondent on appeal and not disputed by the appellant's reply is taken as admitted.).

B. TRESPASS

¶29 Frisch contends that the trial court improperly found them to have intentionally trespassed the Schultz property because: (1) Schultz never pled a trespass claim;[6] (2) they had no notice that Schultz or his predecessors in interest claimed title to the disputed area by adverse possession; and (3) "Frisch had a good faith belief that they had a right to access the property based upon the survey, regardless of whether Schultz'[sic] believed the survey or not." They again raise their claim that possibly Schultz is actually the trespasser here because the eaves of his new garage project over the boundary line. Frisch's assertions are conclusory and unsupported by any argument in either his brief-in-chief or in his reply brief. To the extent we have not addressed any of these arguments earlier in this opinion, we do not address them here. *See* ***Pettit***, 171 Wis. 2d at 646-47.

[6] We note that where "issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." WIS. STAT. § 802.09(2). Our review of the record reveals that the issue whether Frisch had trespassed on Schultz's property was fully litigated. Thus, the trial court properly considered the issue.

¶30 Frisch complains about the lack of evidence regarding the costs to replace the bushes or to install them. This argument is a red herring. Frisch stipulated to damages done to the bushes in the amount of $575. We say nothing more about this argument.

¶31 Frisch next maintains that a legitimate dispute continues to exist regarding who owns the bushes and the property. This argument is simply a repetition of his adverse possession argument, which we have rejected.

¶32 Finally, Frisch asserts that punitive damages are available only in cases of intentional trespass, citing to ***Jacque v. Steenberg Homes, Inc.***, 209 Wis. 2d 605, 617-21, 563 N.W.2d 154 (1997). While this is a correct statement of the law, Frisch does not explain why this is significant here. The trial court awarded only compensatory damages in the amount stipulated by the parties, along with court costs. We will not address undeveloped arguments. *See* ***Techworks, LLC v. Wille***, 2009 WI App 101, ¶28, 318 Wis. 2d 488, 770 N.W.2d 727.

C. ATTORNEY FEES AND COSTS

¶33 Frisch argues that the trial court erred in awarding Schultz $500 in attorney's fees and costs. Frisch argues that attorney fees and costs incurred in equitable actions and special proceedings are limited to $100, citing WIS. STAT. §§ 814.02(2), 814.04 and 893.25. Schultz does not respond to this argument. We review the court's application of a statute relating to attorney's fees de novo. *See, e.g.*, ***Klinefelter v. Dutch***, 161 Wis. 2d 28, 33, 37-38, 467 N.W.2d 192 (Ct. App. 1991). Frisch is correct that Schultz's complaint was an action to quiet title and therefore falls within § 814.02(2). ***Id.*** at 37-38. We therefore reverse that portion

of the judgment awarding Schultz $500 in attorney's fees and remand to the trial court for a determination of fees, if any, pursuant to § 814.02(2).

CONCLUSION

¶34 Based on the foregoing reasons, we conclude the record supports the trial court's findings of fact, conclusions of law, and judgment declaring title in the disputed area to James and Pamela Schultz as successors in interest to property adversely possessed by Clyde and Grace Jacobitz and the designation of the new property lines. We further conclude the trial court properly found that Frisch had trespassed on Schultz's property. We reverse, however, the court's award of attorney fees and costs and remand for the court to determine such fees and costs consistent with WIS. STAT. § 814.02(2).

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.