COURT OF APPEALS
DECISION
DATED AND FILED

December 18, 2001

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1047-FT **Cir. Ct. No. 00-CV-24**

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

DANIEL MORSE AND KAREN MORSE,

PLAINTIFFS-APPELLANTS,

V.

ERNEST KLOSS AND JOYCE KLOSS,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Oneida County: MARK A. MANGERSON, Judge. *Affirmed.*

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

¶1 PER CURIAM. Daniel and Karen Morse appeal a judgment dismissing their adverse possession and prescriptive easement claims against Ernest and Joyce Kloss's adjoining lake lot.[1] The Morses raise three issues:

[1] This is an expedited appeal under WIS. STAT. RULE 809.17. All statutory references are to the 1999-2000 edition unless otherwise noted.

whether (1) the findings of fact support adverse possession or a prescriptive easement; (2) the evidence supports the court's determination that their possession and use were not notorious; and (3) the evidence supports the court's findings that these were wild lands, rather than seasonal recreational property. Because the evidence supports the trial court's ruling that the Morses' use of the shoreline did not entitle them to an award of adverse possession or a prescriptive easement, we affirm the judgment.

¶2 The Morses and the Klosses own adjoining lake lots that originally belonged to Morse's grandfather, who at one time owned eighty acres bordering approximately 1,300 feet of Long Lake shoreline. The lakeshore runs generally northwest to southeast, and Morse's lot lies north of the Klosses.

¶3 This is wooded recreational land used seasonally. The dispute involves a beach area that is on Klosses' property and lies adjacent to Morse's southern boundary. In the late 1950s and early 1960s, Daniel's father, Frank, started clearing this area that the family referred to as "Frank's beach." Frank explained:

> Before I had the property when it was still my dad's we would all swim down there and we used to take a boat from his place and use that to dive off of. And I was concerned about people hitting their head because these large rocks were down there, so I attempted to roll those rocks up to the shore, where they are at the present time.

¶4 Frank explained that the rocks are still where he put them and the shoreline looks no different than it was then, except that the water level has come up. Consequently, the rocks are to some degree submerged.

¶5 In 1971, Frank's father gave him five deeds to record that divided the property into lake lots for Frank's children, each lot having 264 feet of

shoreline. That year, Frank hired a bulldozer to "scrape" a way from his lot down to a natural clearing near the shore used as a boat landing, to make it smoother to haul boats in and out. The area that was scraped was referred to as the "old road." Frank used the boat landing regularly from spring to fall. Also, he used it in the winter to store a swimming raft. He always told his family that they were all welcome to use the beach at any time whether he was there or not.

¶6 In 1974, Frank built a seasonal cottage on his lot with a view of the beach. He also cleared out dead and downed trees between his cottage and the beach. He frequently raked the swimming and boat landing areas. Sometime during the last twelve to fourteen years, he added a dock and built a shed. The shed straddled Frank's southern property line.

¶7 Adjoining Frank's lot to the south was the lot belonging to his sister, Betty Haney, that was eventually sold to the Klosses. She built a cabin on her lot in 1978. In 1994 or 1995, before she sold it, she and Frank discussed where the boundary might be. Frank testified that he told her he had no idea, so he decided to take some measurements. He concluded that the boundary lay somewhat to the south of the boat landing. He testified: "[T]his wasn't an accurate measurement or anything. It was a guess."

¶8 Frank testified that he permitted the Haneys to use the "old road" as long as they wanted. Also, he stated: "I had just had a general understanding with everybody that they could use the beach any time that they wanted to whether I was there or not. I just didn't care. It was all family." He explained that it was the only sand beach on the whole eighty acres.

¶9 Haney described the boundary as follows: "We had 264 ft from the pipe on the south of the property and there was no agreement with Dan Morse to

alter that. We were aware that Morses were using part of our property but it didn't bother us since we were using their road …."

¶10 Frank testified that he never enclosed or cultivated the disputed area. He never marked boundaries or erected signs. In 1992, Frank conveyed his land to his son, Daniel Morse. In 1997, the Haneys sold their property to the Klosses. A subsequent survey showed that the beach area and boat landing are on the Klosses' property.

¶11 The Morses filed this action seeking a declaration of rights in the disputed area. They claimed that they are entitled to an award of adverse possession or a prescriptive easement. At the end of their case, the trial court granted the Klosses' dismissal motion. The trial court found that the shed and the dock were present for only twelve to fourteen years. It further found that earlier activities, such as trimming dead limbs, raking, moving rocks, swimming, and boating, were not sufficiently visible or notorious to support the Morses' claim. Consequently, the trial court dismissed the suit. The Morses appeal the judgment of dismissal.

LEGAL STANDARDS

¶12 Adverse possession is proven by showing that the claimants and their predecessors-in-title have used the disputed property in a "hostile, open and notorious, exclusive and continuous manner" for at least twenty years. *See* ***Keller v. Morfeld***, 222 Wis. 2d 413, 416-17, 588 N.W.2d 79 (Ct. App. 1998) (citing ***Leciejewski v. Sedlak***, 116 Wis. 2d 337, 343, 329 N.W.2d 233 (Ct. App. 1982)

(footnote omitted)); *see also* WIS. STAT. § 893.25.[2] For adverse possession, the use must be of a character as to apprise the reasonably diligent landowner and the public that the possessor claims the land as his or her own. ***Pierz v. Gorski***, 88 Wis. 2d 131, 137, 276 N.W.2d 352 (Ct. App. 1979). In calculating the twenty-year period, the adverse possession of the predecessors in title may be "tacked on" to that of the present claimant. ***Keller***, 222 Wis. 2d at 417.

¶13 In ***Shellow v. Hagen,*** 9 Wis. 2d 506, 511-12, 101 N.W.2d 694 (1960), our supreme court explained that a prescriptive easement may be acquired by a method analogous but not identical to adverse possession:

> Possession, or an intention to possess as one's own, is not a prerequisite to the creation of an easement. Claim of title is not necessary, and the use need not be to the exclusion of the owners. Hostile use is not an unfriendly intent and does not mean a controversy or a manifestation of ill will.

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[2] WISCONSIN STAT. § 893.25, entitled "Adverse possession, not founded on written Instrument" reads:

> (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.

> ….
>
> The use need not be exclusive or inconsistent with the rights of the owner so long as the particular use is made in disregard or nonrecognition of the true ownership.

¶14 "To establish a prescriptive easement, the evidence must be positive and every reasonable presumption must be made in favor of the landowner." ***Mushel v. Town of Molitor***, 123 Wis. 2d 136, 144-45, 365 N.W.2d 622 (Ct. App. 1985). "[O]pen and notorious use of unenclosed land that does not interfere with the landowner's use is still presumed to be permissive." ***Id.*** at 145. Permissive use cannot constitute foundation for prescriptive easement. ***Ludke v. Egan***, 87 Wis. 2d 221, 231-32, 274 N.W.2d 641 (1979).[3]

¶15 Adverse possession issues are usually mixed questions of law and fact. ***Perpignani v. Vonasek***, 139 Wis. 2d 695, 728, 408 N.W.2d 1 (1987). Whether the proven facts fulfill the legal standard of adverse possession presents a question of law. ***Id.*** "The burden of presenting the facts is, of course, on the adverse claimant." ***Id.***

DISCUSSION

¶16 We conclude that the trial court correctly determined that the Morses' evidence fell short of demonstrating adverse possession or a prescriptive easement. The court explained that while the shed and dock were adverse, open and notorious, they were not in existence for the requisite twenty years. The court

[3] An easement is "[a] right of use over the property of another." BLACK'S LAW DICTIONARY 509 (6th ed. 1990). Unlike adverse possession, under which the adverse user gains title, the adverse user of a prescriptive easement acquires only a right to use the property. *See* ***Ludke v. Egan***, 87 Wis. 2d 221, 231, 274 N.W.2d 641 (1979).

further concluded that the other activities of Morse and his predecessor-in-title were insufficient to support his claim.

¶17 For example, the court found that moving rocks was not open and notorious. The court found that the disputed area did not contain a cultivated yard, and moving stones and clearing the forest floor were not sufficiently notorious to put others on notice of a claim to the land. The court explained:

> [W]hen you go out there and you plant small trees or you trim branches off trees, or rake the forest floor, in my estimation you're not making such a significant change in the forest as to give notice to anybody that you're making a claim to that land.

Additionally, the court found that the storage of the swim raft in winter, and pulling boats in and out of the water, were too sporadic and friendly in character to indicate a hostile claim.

¶18 We agree with the trial court's analysis. The evidence is undisputed that the area in question is not cultivated or enclosed. *See* WIS. STAT. § 893.25. ***Burkhardt v. Smith***, 17 Wis. 2d 132, 136-37, 115 N.W.2d 540 (1962), observed:

> [A]dverse possession was not sustained on evidence that the members of a church cleaned up a lot, occasionally trimmed shade trees, and when weather permitted held Sunday-school services on the lot and occasionally used the lot for all-day meetings and as a parking space. These acts were too sporadic and too friendly in their character to indicate a hostile claim.

Id. (citing ***Miller v. Cumberland Petro. Co.***, 108 S.W.2d 514 (Ky. 1937)).

¶19 In addition, the court determined that the bulldozed "old road" and the footpaths were not sufficiently notorious. The record supports the court's determination. Frank testified that the bulldozed area was not an excavated road, but merely an area scraped smooth leading to a natural clearing. *See* ***Madsen v.***

Holmes, 57 Wis. 2d 148, 154, 203 N.W.2d 865 (1973) ("grubbing out" a road along with other activities failed to show adverse possession). The "old road" was not gated or marked. Similarly, the court noted that the footpaths existed for an undetermined number of years but, in any event, "everybody was using them with everybody else's permission." We agree with the court that these facts are insufficient to show hostile use.

¶20 The Morses argue that the trial court erred when it determined that the evidence fell short of proving open and notorious use. They contend that their activities should be grouped together, as in the case of ***Burkhardt***, 17 Wis. 2d at 138, a case that awarded adverse possession. In ***Burkhardt,*** the claimant built a cottage that extended a "distance of some 13 feet on the north side and five feet on the south" of the disputed lot. ***Id.*** at 135. "He spaded up the entire area which was covered with weeds, raked it and seeded it with blue grass." ***Id.*** at 135-36. He planted trees in the corner of the lot, and along its north boundary. ***Id.*** "He built a fence partly along the lawn on the north and on the east." ***Id.*** He planted trees in the area, added a terrace, built a fireplace, added fencing along the east boundary, a rock garden, clothes lines and swings for his children. ***Id.*** During part of the time, he had two cabins and a fishing shack on the lot used by relatives or rented. ***Id.***

¶21 The claimant's activities in ***Burkhardt*** were much more extensive than those of the Morses, particularly the presence of a portion of a cottage on part of the disputed area for the requisite twenty years. Also, the entire area in dispute was spaded and planted, and a significant portion fenced. ***Burkhardt*** does not hold that insufficient activities can be tacked on to later adverse and notorious activities to reach the requisite twenty years. We conclude that its result does not control. *See also* WIS. STAT. § 893.25.

¶22 Similarly, we conclude that the Morses' activities do not rise to the level required to confer a prescriptive easement. The Morses compare their activities to those described in ***Shellow***, 9 Wis. 2d at 509, where the adverse claimants owned lots on an island and made use of the property on the shore of the main land to store and park their cars and moor their boats. The court found that the claimants made

> actual, open, continued, and regular use of the parking lot for their automobiles and the automobiles of their guest during the summer, used the parking lot as a storage place for their boats during the winter and fall months, used the premises in mooring their boats thereto, and had constructed and installed piers, planted trees on the premises and spread some gravel over the parking lot, and such use was uninterrupted from 1928 to 1954 ….

Id.

¶23 ***Shellow*** must be distinguished by the extent of the adverse claimants' activities. Unlike the Morses, the claimants' piers had been in existence for the entire twenty-year span. *See* ***id.*** The spreading of gravel, together with the piers, parking of cars and storing of boats amounted to visible, open, and notorious activities, done in disregard of the owner's rights. Here, the Morses' actions of swimming, putting in their boat, clearing dead limbs, raking, and moving stones were not so visible or notorious or inconsistent with the owner's rights.

¶24 The Morses argue that their use of the beach is unexplained and therefore adverse. The record belies this contention. The evidence showed that the beach was considered a family beach and used by numerous family members. The Morses also argue that the surveyor testified that the disputed area showed

significant changes from a natural setting. However, the surveyor did not testify as to the length of time the visible changes were in place.

¶25 Finally, the Morses argue that the trial court erroneously applied a presumption that the mere use of a way over unenclosed land is permissive under WIS. STAT. § 893.27(3). They contend that this presumption applies only to unimproved, wild, unoccupied land that was of so little present use as to legitimately lead to the inference that the owner has no motive in excluding persons from passing over the land, citing ***Shepard v. Gilbert***, 212 Wis. 1, 6, 249 N.W. 54 (1933).[4]

¶26 The Morses argue that because the land is improved, the correct presumption is that "[a] use of an easement for twenty years, unexplained, is presumed to be adverse and under a claim of right, unless contradicted or explained." ***Ludke***, 87 Wis. 2d at 230-31.

¶27 We conclude that this argument fails to raise reversible error. While the presumption goes to the element of adversity, it does not address the remaining elements of visible or notorious, and fails to address the prescribed length of time. Additionally, whatever the presumption, it may be rebutted by adequate proof. WIS. STAT. § 903.01; *see also* ***Ludke***, 87 Wis. 2d at 230-31. Here, the trial court did not base its determination solely on the existence of a presumption. In more than ten pages of transcript, the court analyzed the evidence and determined that it

[4] ***Shepard v. Gilbert***, 212 Wis. 1, 249 N.W. 54 (1933), rejected the distinction based solely on whether the lands were or were not enclosed. "While such a distinction has the virtue of certainty, it seems unsatisfactory as a universal test." ***Id.*** at 5. ***Shepard*** concluded: "It may be difficult to state precisely the limits of the doctrine further than to suggest that it applies to lands that are wild, unoccupied, or of so little present use as to lead legitimately to the inference that an owner would have no motive in excluding persons from passing over the land." ***Id.*** at 6.

was insufficient to show visible, notorious or continuous adverse use for the full twenty years. Because the court arrived at its decision on grounds independent of a presumption, and the record supports its ruling, we sustain its determination.

By the Court.—Judgment affirmed.

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