COURT OF APPEALS
DECISION
DATED AND FILED

August 28, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2153 **Cir. Ct. No. 2004CV395**

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

CARROLL O. DORSHA AND FRANK G. DORSHA,

PLAINTIFFS-RESPONDENTS,

V.

DALE E. WIESNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Portage County: FREDERIC FLEISHAUER, Judge. *Affirmed*.

Before Dykman, Lundsten and Bridge, JJ.

¶1 PER CURIAM. Dale Wiesner appeals from a judgment in favor of Carroll and Frank Dorsha in this adverse possession case. Wiesner argues: (1) the Dorshas did not carry their burden of proving the elements of adverse possession;

(2) Wiesner himself adversely possessed the land as to the Dorshas; and (3) the circuit court erred in denying his motion to reopen the judgment. We affirm.

¶2 Carroll and Frank Dorsha brought this action claiming ownership of a piece of land that lies between their property and Dale Wiesner's property. After a trial to the court, the court ruled that the Dorshas had proved their claim of adverse possession for the period between 1923 and 1971, so title vested in them. The circuit court also found that after 1971 the Dorshas had not proved that their use of the land was exclusive, but concluded that this did not alter its ruling that the Dorshas had proved their adverse possession claim for the prior period and thus had gained title to the land.

¶3 Wiesner filed a timely motion for reconsideration arguing: (1) that the Dorshas had failed to prove the elements of adverse possession for the time period before 1971; and (2) that Wiesner himself adversely possessed the land as to the Dorshas after 1971. At hearing on the motion, the circuit court addressed both claims, denying them. The circuit court then entered judgment in favor of the Dorshas. Wiesner timely filed a notice of appeal.

¶4 While the appeal was pending, Wiesner moved for postjudgment relief pursuant to WIS. STAT. § 806.07 (2005-06).[1] He sought: (1) relief from the judgment; (2) leave to amend his answer to allege that the claims were barred by the statute of limitations because the Dorshas did not meet the criteria for adverse possession after 1971; and (3) to open the evidentiary record to show no notice was recorded as required by WIS. STAT. § 893.33(2). The circuit court denied the

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

motion as untimely. Later, the circuit court, acting on its own motion, reconsidered and ordered a hearing on the motion for postjudgment relief. We stayed transmittal of the record to our court pending the conclusion of circuit court proceedings. The circuit court heard and orally denied the postjudgment motion.

¶5 Wiesner first argues that the Dorshas did not carry their burden of proving the elements of adverse possession. "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." ***Pierz v. Gorski***, 88 Wis. 2d 131, 137, 276 N.W.2d 352. "Adverse possession issues are usually mixed questions of law and fact." ***Klinefelter v. Dutch***, 161 Wis. 2d 28, 37, 467 N.W.2d 192 (Ct. App. 1991). We will affirm the circuit court's findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2). "[D]ue regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." ***Id.*** Whether, based on the facts, a claimant has adversely possessed the land is a question of law. ***Klinefelter***, 161 Wis. 2d at 33.

¶6 The circuit court concluded that Carroll Dorsha's testimony, which dated back to his childhood in the 1930s, was credible and that there was no evidence contradicting his testimony about what had occurred. Dorsha testified that his family had enclosed the land with a fence, that they rotated crops on the land, including corn, hay and oats, they grazed cattle on the land, and they rented the land to others to use. He also testified that he never saw any other person plowing or farming the land except for tenants. Dorsha's testimony was corroborated by aerial photographs. Tracy Pelky, Assistant Zoning Administrator, Portage County Zoning Department, testified that aerial photos from 1948, 1978, 1992 and 2000 all show that the disputed strip of land, which is bordered on the

west by trees, was open farmland contiguous with and indistinguishable from the land the Dorshas owned to the east. We agree with the circuit court's legal conclusion that the Dorshas have proved their claim of adverse possession based on Carroll Dorsha's testimony as corroborated by the photos.

¶7 Wiesner argued on his motion for reconsideration that, if Dorsha had established a claim of adverse possession as of 1971, then Wiesner adversely possessed the land as to Dorsha after 1971. The circuit court rejected this argument because it concluded that the evidence showed that Wiesner did not have exclusive use of the land after 1971. *See* WIS. STAT. § 893.26(2)(c). The circuit court's finding that the land was not used exclusively by Wiesner is supported by the trial testimony. We reject this argument.

¶8 Wiesner has raised two arguments that pertain to the circuit court's oral ruling which denied his motion to reopen the judgment. He contends: (1) that the circuit court misused its discretion by not permitting him to amend his answer and by not opening the evidentiary record for litigation of the thirty-year limitations defense provided in WIS. STAT. § 893.33; and (2) that we should exercise our discretion under WIS. STAT. § 752.35 to reverse and remand for a trial on the limited issue of whether Dorsha's claim is barred by the thirty-year statute of limitations in § 893.33.

¶9 There are two problems with our jurisdiction to review issues pertaining to this oral ruling. First, the general rule is that an order denying a motion for relief from a judgment brought pursuant to WIS. STAT. § 806.07 may not be reviewed in the context of an appeal from the underlying judgment. *See* ***Chicago & N. W. R.R. v. LIRC***, 91 Wis. 2d 462, 472, 283 N.W.2d 603 (Ct. App. 1979) ("An appeal from a judgment does not embrace an order [denying a motion

to reopen under WIS. STAT. § 806.07] entered after the judgment.").[2] Second, the circuit court did not enter a written order based on its oral ruling. *See* ***Helmrick v. Helmrick***, 95 Wis. 2d 554, 556, 291 N.W.2d 582 (Ct. App. 1980) ("An oral ruling must be reduced to writing and entered before an appeal can be taken from it.").

¶10 Even if we had jurisdiction, however, we would reject Wiesner's arguments. WISCONSIN STAT. § 806.07 allows relief from a judgment in only very limited circumstances. Wiesner's realization that he should have raised certain defenses is not one of those circumstances. The circuit court noted that the defenses were "available during the time period of the trial" and that it would be prejudicial to the Dorshas to allow these late arguments, particularly because Carroll Dorsha has since died. The circuit court's ruling evinces a proper exercise of discretion in denying the motion to re-open the judgment.

By the Court.—Judgment affirmed.

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

[2] The statutes have been amended since ***Chicago & North Western Railroad v. LIRC***, 91 Wis. 2d 462, 283 N.W.2d 603 (Ct. App. 1979), was decided to provide that "[i]f the record discloses that the judgment or order appealed from was entered after the notice of appeal … was filed, the notice shall be treated as filed after that entry and on the day of the entry." WIS. STAT. § 808.04(8). However, that section does not apply here because the motion for relief pending appeal under WIS. STAT. § 806.07 had not even been brought at the time the notice of appeal was filed, so the order denying that motion could not be the "order appealed from" referred to in the notice of appeal.