

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**September 3, 2008**

David R. Schanker  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2006AP2548**

**Cir. Ct. No. 2003CV122**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

---

**MARK D. PERCY AND DEBBIE A. PERCY,**

**PLAINTIFFS-RESPONDENTS,**

**V.**

**HARLAN HERRMANN AND BRENDA HERRMANN,**

**DEFENDANTS-APPELLANTS.**

---

APPEAL from an order of the circuit court for Manitowoc County:  
DARRYL W. DEETS, Judge. *Affirmed.*

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

¶1 PER CURIAM. Harlan and Brenda Herrmann appeal pro se from an order granting summary judgment in favor of Mark and Debbie Percy. The Percys sought a declaration of interest in a parcel of land to which, by

counterclaim, the Herrmanns asserted an adverse interest, among other allegations. The circuit court ruled that the Herrmanns' affidavits did not establish at least twenty years' uninterrupted adverse possession, and dismissed the Herrmanns' remaining claims for failure to file supporting affidavits. We affirm.

¶2 The Herrmanns and the Percys own adjoining parcels of land. The Percys' rectangular parcel abuts the inside right angle of the Herrmanns' L-shaped parcel. The two tracts once were part of a larger tract of farmland owned by Genevieve Schmitt. In 1973, Schmitt divided the property into two parcels pursuant to a certified survey. She sold one parcel to Fred and Marilyn Mutter and the other to Robert and Lynn Hippert. The Hipperts later divided their property into three parcels and sold one to Michael Pockat. The Mutters sold their property to Christopher Schmitt, Genevieve's nephew, and his wife, Jacque, in 1985.

¶3 Harlan Herrmann rented a house on the Hipperts' property from the fall of 1983 to July of 1985. In 1987 he began renting with an option to purchase from Pockat.<sup>1</sup> In 1991, Herrmann's wife, Brenda, purchased the property on land contract from Pockat's estate. The Percys bought the Schmitts' property in 2002 aware of a boundary dispute with the Herrmanns to the south.

¶4 The property at issue is an approximately one-half-acre slice of uncultivated land on the Percys' southern border and the Herrmanns' northern border. The triangular parcel was created by an old fence that runs slightly diagonally northwest to southeast approximately sixty-five feet north of what the 1973 certified survey map shows to be the Percys' southern lot line. According to

---

<sup>1</sup> We have searched the record but cannot account for an apparent interruption in Harlan's occupancy between 1985 and 1987.

Christopher Schmitt, the Percys' predecessor, his aunt Genevieve and uncle Sylvester erected the fence years before along a line of apple trees to keep livestock from eating the fruit. Subsequent surveys, including one commissioned by the Herrmanns, correspond to the 1973 survey.

¶5 In March 2003 the Percys commenced a declaratory judgment action against the Herrmanns seeking to quiet title to the disputed parcel. The Herrmanns responded with an adverse possession claim and counterclaims alleging abuse of process, civil conspiracy, conversion, trespass, defamation and intentional infliction of emotional distress. The Percys then moved for summary judgment on the Herrmanns' adverse possession claim and to dismiss all counterclaims. The trial court concluded that the Percys successfully put at issue all of the counterclaims raised and that the Herrmanns failed to respond to them, save for the adverse possession claim. As to that claim, the court found that the Percys are record title holders by virtue of a warranty deed and that the Herrmanns' affidavits failed to sufficiently establish twenty years of uninterrupted possession. The Herrmanns appeal the grant of summary judgment to the Percys.

¶6 We independently review an order granting summary judgment using the same methodology as the circuit court. *O'Kon v. Laude*, 2004 WI App 200, ¶9, 276 Wis. 2d 666, 688 N.W.2d 747. If the movant makes a prima facie case for summary judgment, the court examines the pleadings, affidavits, depositions, answers to interrogatories, and admissions on file to determine whether a genuine issue exists as to any material fact, or whether reasonable conflicting inferences may be drawn from undisputed facts, thus requiring a trial. *Van Erden v. Sobczak*, 2004 WI App 40, ¶9, 271 Wis. 2d 163, 677 N.W.2d 718. Any doubt as to the existence of a genuine issue of material fact should be resolved against the party seeking summary judgment. *O'Kon*, 276 Wis. 2d 666,

¶9. Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2005-06).<sup>2</sup>

¶7 The Percys' affidavits presented a prima facie case of ownership by virtue of a warranty deed from the Schmitts and a certified survey map. The Herrmanns sought to overcome that presumption of ownership by showing they possessed the property adversely. WISCONSIN STAT. § 893.25 recognizes actions to establish title to real estate based on a claim of adverse possession. Possession is adverse only if the claimant is in actual uninterrupted occupation under claim of title, exclusive of any other right, and only to the extent that it is actually occupied and is either protected by a substantial enclosure or is usually cultivated or improved. *Id.* The physical possession must be hostile, open and notorious, exclusive and continuous for at least twenty years. *Leciejewski v. Sedlak*, 110 Wis. 2d 337, 343, 329 N.W.2d 233 (Ct. App. 1982). In calculating the twenty-year period, the adverse possession of predecessors in title may be "tacked on" to the present claimant's. *Keller v. Morfeld*, 222 Wis. 2d 413, 417, 588 N.W.2d 79 (Ct. App. 1998). The burden of proof is on the one asserting the claim. *Allie v. Russo*, 88 Wis. 2d 334, 343, 276 N.W.2d 730 (1979).

¶8 The Herrmanns' adverse possession claim fails. They have not made the threshold showing of twenty years of actual uninterrupted occupation under a claim of title, exclusive of any other rights. The Percys filed their lawsuit

---

<sup>2</sup> All references to the Wisconsin Statutes are to the 2005-06 version.

on March 4, 2003.<sup>3</sup> The Herrmanns' affidavits establish their earliest personal contact with the property to be the fall of 1983 when Harlan rented a house on a portion of the land. Even liberally considering fall to begin on September 1, the actual uninterrupted occupation still is six months shy of the requisite twenty years. This nineteen-and-a-half-year period is even shorter if we consider the possible two-year hiatus between 1985 and 1987 and that the Herrmanns' ownership was disputed when the Percys bought the property in 2002.

¶9 The Herrmanns urge this court to tack on the tenure of their predecessors in interest to achieve the twenty years of actual uninterrupted occupation under a claim of title, exclusive of any other rights. Their supporting proofs do not allow it, however. At the time of the August 11, 2006, summary judgment motion hearing, they had submitted no affidavits from prior owners.<sup>4</sup> The affidavit of Fred Ahrens, the owner of a nearby property, attested that the old fence has stood for thirty to thirty-five years and to his best knowledge divides the Herrmann property from the Percy property. Ahrens' affidavit is insufficient because affidavits must be made on personal knowledge. WIS. STAT. § 802.08(3).

---

<sup>3</sup> Counsel for the Herrmanns admitted service on March 12, 2003.

<sup>4</sup> Nearly two months after the court granted summary judgment in the Percys' favor, the Herrmanns filed a request for a hearing date for a motion for reconsideration supported by an affidavit of prior owner Lynn Hippert. A party's affidavits must be served at least five days before the summary judgment hearing. *See* WIS. STAT. § 802.08(2). The Herrmanns cite no authority allowing the requirement to be circumvented by serving a supplementary affidavit at a later date under the guise of a reconsideration motion. Newly discovered evidence might justify relief from judgment under WIS. STAT. § 806.07(1)(b), but that argument was not made here. In any event, Lynn Hippert's subjective intent is irrelevant to the adverse possession determination, and her affidavit fails to assist the Herrmanns to meet their burden of establishing actual uninterrupted occupation under a claim of title, exclusive of any other rights.

¶10 The record supports a conclusion that the old fence has stood for many decades. Its mere existence, however, proves nothing on summary judgment to establish actual uninterrupted occupation under a claim of title, exclusive of any other rights for twenty years. The now-Percy property has been surveyed and resurveyed. The boundaries are the same as described in the warranty deed and in the certified survey map recorded in 1973. The Herrmanns' affidavits are not sufficient to create or establish the existence of a genuine issue of material fact about the length of their claimed occupation. Most generously viewed, the Herrmanns' affidavits and submissions establish only nineteen and a half years of actual occupation. We need not consider further whether the alleged occupation was hostile, open, notorious and exclusive.

*By the Court.*—Order affirmed.

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

