COURT OF APPEALS
DECISION
DATED AND FILED

June 3, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2410 **Cir. Ct. No. 2006CV331**

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

PETER C. FORSTNER AND ROBIN A. FORSTNER,

PLAINTIFFS-RESPONDENTS,

V.

RANDY PINGEL,

DEFENDANT-APPELLANT,

KILEY PINGEL AND AMERICA'S WHOLESALE LENDER,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Shawano County: JAMES R. HABECK, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Randy Pingel appeals a judgment awarding a portion of his property to Peter and Robin Forstner by adverse possession. He also

contests the award of damages that resulted from his actions in moving a shed from the disputed property. Pingel asserts the testimony did not establish adverse possession and the evidence did not support the court's award of damages. We disagree and affirm the judgment.

BACKGROUND

¶2 In September 2006, the Forstners brought an action seeking adverse possession of a portion of land that belonged to Pingel and compensation for items Pingel damaged or removed from that land. The Forstners and Pingel own adjoining lots, with Pingel's property located immediately north of the Forstners. The Forstners purchased their property from Robert Maas, Jr., in 2005. The disputed property is approximately 3,600 square feet and lies south of a line marked by a 1943 survey but north of the record title line as established by a 2005 survey.

¶3 The Maas family has been in the chain of title since at least 1951. Maas was the record title owner of the Forstner lot from 1995 to 2005, and before that other members of his family owned the land. Maas' recollection of the land goes back to 1968. Maas recalled tearing down garages, piling wood, cutting trees and mowing the lawn on the disputed parcel. Maas also recalled that there used to be a fence on the 1943 survey line. Maas examined a 1986 photo of the neighborhood and stated a woodpile, a small camper, and two buildings that he tore down were all located on the disputed area. Robert Maas Sr., Maas' father, also testified. He stated that wood was always piled next to the fence in the disputed area. He also recalled buildings that were built in the disputed area. He testified that his three uncles owned the Forstner lot for a period of time and before that his grandparents owned that lot. He stated he visited his family on that

land for a sixty-year period. Maas Sr. said years ago there had been a horse barn on the land in question.

¶4 According to the Forstners, Pingel moved a small storage shed from the disputed land, causing the tin roof to fall off and removed some personal items belonging to the Forstners. The court examined pictures of the shed, the roof, and the personal property.

¶5 The court awarded the disputed parcel to the Forstners, finding:

> In a sense, the defendants want the court to find there was no active use of the land to the exclusion of others because there were trees in an area. …
>
> While the court cannot find that there was a substantial enclosure during the period of ownership by the defendants, since the fence had deteriorated, the remaining signs of the fence, combined with active mowing and use by the plaintiffs and their predecessors in title, convince this court that the open, notorious and continuous possession did continue to exist.
>
> Due to the family nature of this neighborhood for generations, the facts in this case are stronger than the average history. [M]ultiple people knew the history of the area for decades. … In essence, the defendants in this case seek to acquire land used for about half a century or more by the owners of the south side.
>
> … This court does find [Maas] to be credible. He indicated that other structures had previously been located on a strip of land in issue. A fence was nailed onto the two remaining buildings and previously had other portions. At one point, a garden ... and a wood shed ... existed on the land. Also, a barn previously existed .... All these structures had been torn down by [Maas] or his family that occupied the lot on the south end. Some demolition occurred as recently as 2001. In addition to the tearing down, land was converted into lawn use in this area. Over many years, cords of wood were stacked and stored in the area. They were also sold for income. Christmas trees were grown in the area and sold at times.

> [Maas] Sr. testified in line with [Maas], adding to the credibility.

The court also awarded the Forstners $1,050 in damages and costs of the action.

DISCUSSION

¶6 Pingel argues there were inconsistencies in the witnesses' testimony and the evidence presented did not establish "occupancy of the land in question." Determinations of witness credibility are left to the trial court. *See* ***In re Estate of Dejmal***, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980). Whether an element of adverse possession is met is a question of fact we do not overturn unless clearly erroneous. ***Harwick v. Black***, 217 Wis. 2d 691, 703, 580 N.W.2d 354 (Ct. App. 1998). As long as the facts could be reached by a reasonable factfinder, we are required to accept them. ***Lellman v. Mott***, 204 Wis. 2d 166, 170-71, 554 N.W.2d 525 (Ct. App. 1996). We review the record for evidence to support the trial court's findings, not for evidence to support findings the court did not make. ***Dejmal***, 95 Wis. 2d at 154.

¶7 Adverse possession requires a showing that the disputed property was used for twenty years in an open, notorious, exclusive, hostile, and continuous manner that would apprise a reasonably diligent landowner and the public that the possessor claimed the land as their own. ***Pierz v. Gorski***, 88 Wis. 2d 131, 136-37, 276 N.W.2d 352 (Ct. App. 1979); WIS. STAT. § 893.25.[1] Subsection 893.25(2) requires the land be actually occupied and either protected by a substantial enclosure or usually cultivated and improved. "'Usually improved' means to put

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

to the exclusive use of the occupant as the true owner might use such land in the usual course of events." ***Burkhardt v. Smith***, 17 Wis. 2d 132, 137-38, 115 N.W.2d 540 (1962).

¶8 In this case, the trial court found the Forstners' witnesses credible. Multiple witnesses testified about the use of the disputed parcel of land over a long period of time. The trial court found that multiple structures had existed on the land and the land had been put to many uses by the owners of the Forstners' parcel for "about half a century." The trial court's findings establish that the disputed parcel was actually occupied. Its findings are supported by the record and not clearly erroneous.

¶9 Pingel next argues that the trial court erred in assessing the amount of damages.[2] When reviewing the amount of damages awarded, we do not substitute our judgment for the trial court's; rather, we view the evidence in the light most favorable to the verdict and affirm if reasonable. ***Teff v. Unity Health Plans Ins. Corp.***, 2003 WI App 115, ¶41, 265 Wis. 2d 703, 666 N.W.2d 38. We accept the court's findings of fact unless clearly erroneous. *See* WIS. STAT. § 805.17(2).

¶10 In this case, the court reviewed an estimate of the Forstners' damages prepared by Maas Construction. Additionally, the court reviewed photos of the damage to the shed and of the personal property the Forstners lost. After

[2] Pingel also argues the parties agreed to move the shed. The plaintiffs submitted a report from the sheriff's department stating the shed was not to be moved until the resolution of the agreement. The court found the plaintiffs credible and stated their story was supported by the sheriff's report. This is a valid finding of fact and credibility determination we will not overturn. *See* WIS. STAT. § 805.17(2); *see also* ***In re Estate of Dejmal***, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980).

viewing the photos, the court stated, "[T]his court has to keep in mind that the damages should not produce an improved structure but instead one comparable to what previously existed. The gaps in the ceiling … were there prior to the move. Also the pictures of the contents … show heavily used items." We conclude the court made a reasonable determination of damages.[3]

By the Court.—Judgment affirmed.

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

[3] Pingel also argues the Forstners were not entitled to costs. Because the Forstners prevailed, they qualify for costs under WIS. STAT. §§ 814.01(1) and 814.04.