COURT OF APPEALS
DECISION
DATED AND FILED

November 17, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2351 **Cir. Ct. No. 2007CV22**

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

KEVIN C. KOSOK, CYNTHIA A. KOSOK, ALBERT W. KOSOK AND VICKI L. KOSOK,

PLAINTIFFS-RESPONDENTS,

V.

MICHAEL P. FITZPATRICK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Pepin County: JAMES J. DUVALL, Judge. *Affirmed.*

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

¶1 PER CURIAM. Michael Fitzpatrick appeals a judgment declaring that Kevin, Cynthia, Albert and Vicki Kosok acquired by adverse possession land previously titled to him. Fitzpatrick argues the evidence does not establish that the

Kosoks adversely possessed the subject land. We reject Fitzpatrick's arguments and affirm the judgment.

BACKGROUND

¶2 The Kosoks' land comprises the northwest quarter of the northeast quarter of section 21 in the town of Pepin. This case arises from an ownership dispute over an approximately 3.13-acre, L-shaped parcel located along the Kosoks' southern and eastern boundaries with Fitzgerald's property. The Kosoks claimed ownership of the subject land up to a boundary demarcated by the remnants of what they believed to be a "line fence." Because the line fence departs from the true boundary lines, the Kosoks commenced the underlying action to establish ownership of the disputed property by adverse possession. After a bench trial, the court entered judgment declaring the Kosoks to be adverse possessors. This appeal follows.

DISCUSSION

¶3 WISCONSIN STAT. § 893.25[1] permits a person to acquire title to real property if he or she, in connection with predecessors in interest, adversely occupies the land for an uninterrupted period of twenty years. The land must be: (1) actually occupied; and (2) either protected by a substantial enclosure or usually cultivated or improved. WIS. STAT. § 893.25(2). For the possession to be adverse, "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

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

that the possessor claims the land as his own." ***Pierz v. Gorski***, 88 Wis. 2d 131, 137, 276 N.W.2d 352 (Ct. App. 1979). Further, the requisite twenty-year time period need not occur immediately before the filing of a court action. ***Harwick v. Black***, 217 Wis. 2d 691, 699, 580 N.W.2d 354 (Ct. App. 1998). "Adverse possession for any twenty-year time period is sufficient to establish title in the adverse possessor." ***Id.*** at 701.

¶4 We will affirm the trial court's findings of fact on an adverse possession claim unless they are clearly erroneous. ***Otto v. Cornell***, 119 Wis. 2d 4, 8, 349 N.W.2d 703 (Ct. App. 1984). Whether the findings support the court's decision on an adverse possession claim, however, is a question of law we review independently. *See* ***Perpignani v. Vonasek***, 139 Wis. 2d 695, 728, 408 N.W.2d 1 (1987).

¶5 At trial, surveyors Lee Villenueve and Marcus Johnson each verified the true boundaries between the parties' property. The surveyors also testified they encountered fence remnants departing from the true boundaries, situated along the east and south lines of the Kosok property.

¶6 Richard N. Jahnke, one of Fitzpatrick's predecessors in interest, testified his father bought the property in 1902. Jahnke believed the fence was there at that time, and as early as 1925, he assisted his father in repairing the fence along the east boundary of what is now the Kosok property by placing metal posts and hanging wire. Although Jahnke had no memory of fence remnants along the south boundary, he recalled a tree with wire in it, and he last saw the wired tree in the 1940s. Jahnke explained that his family pastured cows in the northeast and southwest quarters, thus necessitating a fence along the subject boundaries. When the family ceased pasturing cattle in the early 1930s, the Jahnkes no longer made

repairs to the fence. Jahnke testified that the fence would no longer have held cattle by approximately 1935, as some of the wire was on the ground. However, he believed the fence constituted "the line" between the properties.

¶7 Jahnke's son, Richard A. Jahnke, testified that he first remembered seeing the "old fence line" along the Kosoks' eastern boundary in the 1950s. At that time, he saw a little wire in trees and some steel posts. With respect to the southern boundary, Richard remembered "a little wire" and "some fence in there," though it was "a lot worse than the east boundary." In the mid 1970s, Richard attempted to locate the southern boundary for logging purposes and found old wires in a few trees. Richard assumed the wire remnants in the trees along that boundary constituted "the line."

¶8 Brian Peters testified that he grew up on what is now the Kosok property, and in the late 1960s or early 1970s, helped his father clear brush from a small field that lies within the disputed area along the northern section of the eastern boundary.[2] When pulling brush from the field into the woods, Peters noticed fence remnants consisting of a metal post and barbed wire. In approximately 1989, around the time the Kosoks purchased the property from Peters' mother, Peters walked the property with the Kosoks and again saw the fence remnants. Peters testified that the presence of the fence remnants "confirmed in [his] mind that [he] was correctly marking the boundary line between the two ownerships." With respect to the southern boundary, Peters

[2] Based on the continuous cultivation of the small field by the Kosoks and their predecessors in interest, Fitzpatrick concedes that the Kosoks have acquired the field by adverse possession.

indicated he was "not real familiar with what [was] on the south line as far as fence remnants go."

¶9 Based on the testimony at trial, the court found there was a fence or fence remnants on both the east and south sides of the Kosok property from at least 1925 to 1945 and, as an alternative finding, for a period up to 1966. The court further determined that the fence was sufficient to raise a flag of hostility and was, in fact, treated as the line between the properties by the Kosoks' and Fitzgerald's respective predecessors in interest. Fitzgerald challenges the court's conclusions, arguing that once the fence fell into disrepair, it was no longer a substantial enclosure sufficient to raise a flag of hostility for the requisite twenty-year period. We are not persuaded.

¶10 Fitzgerald emphasizes the fence would no longer have held cattle by approximately 1935. An enclosure, however, need not be in any particular state of repair or capable of "exclu[ding] outside interferences" to be substantial. ***Illinois Steel Co. v. Bilot***, 109 Wis. 418, 446, 85 N.W. 402 (1901). Rather, the purpose of the substantial enclosure requirement is simply to indicate the boundaries of the adverse claim. ***Id.*** It can be "a mere furrow turned with a plow around the land, or a line marked by cutting away the brush, or a fence opened so as to admit outside disturbers." ***Id.*** (citations omitted). The key is that it be "sufficient to attract the attention of the true owner [of the adverse claim]." ***Id.***; *see also* ***Klinefelter v. Dutch***, 161 Wis. 2d 28, 34, 467 N.W.2d 192 (Ct. App. 1991) (reaffirming the above explanation of substantial enclosure). Here, the evidence established that Fitzgerald's predecessors in interest, the Jahnkes, were aware of the fence's existence.

¶11 Based on his contention that the subject property constituted "wild lands," Fitzgerald nevertheless argues the existence of the fence alone was not sufficient to demonstrate open, notorious, visible, exclusive, hostile and continuous use because it did not change the character of the land. This court has held that "improvements sufficient to apprise the true owner of adverse possession of wild lands must substantially change the character of the land." ***Pierz***, 88 Wis. 2d at 137. Even were we to assume the subject property could be characterized as "wild lands," the evidence established that the true owner was apprised of the fence's existence. Fitzgerald's predecessors in interest actually maintained the fence for a portion of the twenty-year period and regarded its location as "the line" between the properties for well beyond the requisite time period. Moreover, "[w]hen long continued possession of land up to a line has been acquiesced in by all interested in the ownership of a contiguous piece of land, the boundary thereby established becomes the proper boundary irrespective of the operation of the principles which would otherwise fix and determine their location."[3] ***Grell v. Ganser***, 255 Wis. 381, 383-84, 39 N.W.2d 397 (1949).

¶12 From the testimony adduced at trial, the court could reasonably conclude the Kosoks' and Fitzgerald's predecessors in interest acquiesced to the fence as the boundary line for the requisite twenty-year time period. In fact, there was no dispute that the fence constituted the line until the true lines were located by survey in 2005. Because sufficient evidence exists to support the trial court's

[3] The doctrine of acquiescence is a supplement to the rule of adverse possession and permits land to be acquired if the true owner acquiesced in the possession for a period of twenty years. ***Chandelle Enters., LLC v. XLNT Dairy Farm, Inc.***, 2005 WI App 110, ¶8, 282 Wis. 2d 806, 699 N.W.2d 241.

conclusion that the Kosoks met their burden of proving adverse possession, we affirm the judgment.

By the Court.—Judgment affirmed.

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