COURT OF APPEALS
DECISION
DATED AND FILED

October 20, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP557 **Cir. Ct. No. 2006CV350**

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

BRUCE G. PHELPS,

PLAINTIFF-APPELLANT,

V.

HARVEY PHELPS, JR. AND KAREN PHELPS,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Chippewa County: TIMOTHY M. DOYLE, Judge. *Reversed and cause remanded with directions.*

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

¶1 PER CURIAM. Bruce Phelps appeals a judgment dismissing his adverse possession claim against Harvey and Karen Phelps. Bruce argues the circuit court erred when it concluded he did not prove he adversely occupied the

disputed land. We agree. We therefore reverse and remand with directions for the circuit court to grant judgment in Bruce's favor.

BACKGROUND

¶2 Bruce and Harvey Phelps are brothers. Each of them owns two forty-acre parcels of farmland in the Town of Colburn. Each brother's parcels adjoin the other brother's parcels. Bruce's parcels lie immediately south of Harvey's. All of this land originally belonged to Bruce and Harvey's parents, but their parents divided it when they divorced in the early 1980s. Their mother took the land now belonging to Bruce and their father took the land now belonging to Harvey.

¶3 Since at least the early 1960s, there has been a fence between the parcels now owned by Bruce and those owned by Harvey. By all accounts, the fence was in poor repair by the time Bruce and Harvey acquired the properties. However, Harvey wanted to pasture cattle on his land, so in 2000 he asked town fence viewers to inspect the fence because he thought Bruce's share was inadequately maintained.[1] After examining the fence, the fence viewers agreed

[1] Under WIS. STAT. § 90.03, partition fences are required when adjoining lands are used for farming or grazing. The owners of the adjoining land must maintain the fences in equal shares and keep them in good repair unless they mutually agree to do otherwise. In this case, Harvey maintained the western halves of each parcel and Bruce maintained the eastern halves. WISCONSIN STAT. § 90.10 provides that if one of the landowners neglects to repair or rebuild the part of a fence for which he or she is responsible, the other party "may complain to 2 or more fence viewers of the town, who … shall examine the fence." By law, town supervisors, city alderpersons, and village trustees are fence viewers. WIS. STAT. § 90.01. If the fence viewers agree the fence is insufficient, they must then direct the delinquent party to either repair or rebuild the fence or cover the expense of repairing or rebuilding the fence. WIS. STAT. §§ 90.10, 90.11.

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

Bruce's section was insufficient and instructed him to make the necessary repairs. As a result, Harvey and Bruce tore down the old fence and rebuilt their respective sections.

¶4 In 2006, Harvey commissioned a survey of his land and discovered the fence he and Bruce had constructed six years earlier was not on the true boundary line between the properties. The survey showed the fence lay approximately sixty feet north of the true boundary, allowing Bruce to use land deeded to Harvey. Harvey then tore down the fence and reconstructed parts of it on the surveyed boundary.

¶5 Bruce sued to quiet title to the land between the surveyed boundary and the historical fence line. He argued the fence he and Harvey had constructed in 2000 was in essentially the same place as the original fence, and that he and his predecessor in interest—his mother—had adversely possessed the land up to these fences for the statutory period of time.

¶6 The circuit court denied Bruce's claim. It concluded the original fence could not delineate the boundaries of an adverse possession claim because it was not a "substantial enclosure." The court also concluded that even if the fence was a substantial enclosure, it could not determine where it had been because the fence built in 2000 "was not necessarily constructed along the same line as the earlier fence."

DISCUSSION

¶7 A circuit court's adverse possession determination presents a mixed question of fact and law. ***Perpignani v. Vonasek***, 139 Wis. 2d 695, 728, 408 N.W.2d 1 (1987). We defer to the circuit court's findings of fact unless clearly

erroneous. WIS. STAT. § 805.17(2). Whether the facts proven are sufficient to amount to adverse possession, however, is a question of law we review independently." ***Id.***

¶8 WISCONSIN STAT. § 893.25 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 (a) protected by a substantial enclosure or (b) usually cultivated or improved. WIS. STAT. § 893.25(2). Further, 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 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).

¶9 The parties do not dispute that Bruce actually occupied the contested land. Instead, their disagreement on appeal focuses on whether the pre-2000 fence constituted a substantial enclosure and, if so, whether its location could be determined. Bruce argues the circuit court's conclusion the fence was not a substantial enclosure was based on an incorrect standard of law. He also argues the court's conclusion it could not determine the location of the original fence is contrary to the evidence presented at trial. We agree with Bruce on both issues.

1. Substantial Enclosure

¶10 The circuit court concluded the original fence was not a substantial enclosure because it "was in bad repair and incapable of holding cattle." 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).

¶11 Here, the testimony showed the original fence indicated the borders of the claimed territory. Several members of the Phelps family testified the fence had long been regarded as the boundary between the north and south parcels, and that they treated it as such when Bruce and Harvey's parents partitioned their property after divorcing. Equally telling are Harvey's actions. Although Harvey refused to acknowledge he regarded the historical fence line as the boundary, his conduct shows otherwise. The record is clear that Harvey requested fence viewings in 2000 because he wanted the town to require Bruce to shoulder his share of the fence reconstruction. Harvey's insistence on Bruce's responsibility for the fence is an unambiguous acknowledgement that he considered the fence the boundary, and that he therefore knew Bruce considered the land south of the fence to be Bruce's.

¶12 We conclude this evidence established the original fence was sufficient to apprise Harvey that Bruce claimed it as a boundary. It was therefore a substantial enclosure. In any event, Harvey did not respond to Bruce's argument on this issue, and we may deem it conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

2. Location of the Fence

¶13 We also agree with Bruce that the circuit court erred when it concluded it could not determine the location of the original fence. The circuit court held "there was virtually no evidence as to location of the fence which existed prior to 2000" because the pre-2000 fence had been removed and the fence constructed in 2000 did not necessarily follow the same line as the old fence. However, Bruce was not required to prove the fences were in exactly the same location. The testimony at trial established the fence constructed in 2000 was in essentially the same place as the old fence. The location of the original fence can therefore be reasonably determined from Harvey's 2006 survey map, which plots the 2000 fence.

¶14 When establishing the lines of occupancy for an adverse possession claim, "absolute precision or utilization of a surveyor is not required." ***Droege v. Daymaker Cranberries, Inc.***, 88 Wis. 2d 140, 146, 276 N.W.2d 356 (Ct. App. 1979). All that is needed is "a reasonably accurate basis upon which the trial court can partition the land …." ***Id.***; *see also* ***Otto v. Cornell***, 119 Wis. 2d 4, 349 N.W.2d 703 (Ct. App. 1984) (row of maple trees the plaintiff planted in place of an old boundary fence to mark the boundary provided a reasonably accurate basis on which to fix the boundary); and ***Brockman v. Brandenburg***, 197 Wis. 51, 221 N.W. 397 (1928) (court fixed boundary at the centerline of an old worm fence even though most of the fence had already been destroyed).

¶15 The evidence at trial established that the fence Bruce and Harvey constructed in 2000 essentially followed the pre-2000 fence line.[2] When asked how long there had been a fence along the line on Harvey's survey map that charted the 2000 fence, Bruce replied there had been a fence there "as long as [he could] remember." He explained that in 2000, "Harvey put in a new fence on his portions, and then I put in new fence on my portions." Bruce's attorney then asked Bruce to clarify if "the new fence [was] put in the same spot as the old fence." Bruce responded that it was. Both fence viewers likewise testified that what they saw when they viewed the fence in 2000 was a fence being repaired so that it could hold cattle—not a fence being constructed in a new location.

¶16 Harvey, too, testified he followed the general lines of the original fence when constructing the new fence. When asked whether there was any "line fence, boundary fence, anything by which you went by to put in this fence in 2000," Harvey responded: "There was … basically a one-wire running through

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[2] The court's finding that the 2000 fence was not constructed on the same line as the earlier fence is puzzling in light of an exchange it had with both parties' attorneys clarifying this issue during the trial.

> THE COURT: … The line—the east-west line that's shown with the hatch marks and marked "existing fence," is that the fence that was constructed in 2000 or is that the fence that was there before 2000?
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> [BRUCE'S ATTORNEY]: It's the same fence, Your Honor.
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> ….
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> THE COURT: Okay, but my question is, was there a different fence on a different line prior to 2000?
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> [HARVEY'S ATTORNEY]: Not on a different line, as I understand, but there was an old fence, and that's the issue here.
>
> THE COURT: Okay. Thank you for clearing that up.

the woods there attached to some wood posts, trees and metal posts ….” He later claimed the 2000 fence was not “on the same direct line [as the original fence],” but acknowledged that “there was wire here … and … there” along the line he followed when he constructed his part of the fence. This was Harvey’s only testimony on the matter. Instead, he focused on the sturdiness and “cattle-worthiness” of the original fence, not its location. He offered no evidence the 2000 fence was in a substantially different place than the original fence.

¶17 The record, then, establishes that the 2000 fence was essentially, even though not necessarily precisely, constructed along the original fence line. The location of the 2000 fence is easily discernible because Harvey’s 2006 survey map charts it as “existing fence.” This is sufficient to establish “a reasonably accurate basis [to] partition the land ….” *See* ***Droege***, 88 Wis. 2d at 146.

CONCLUSION

¶18 It is undisputed that Bruce and his predecessor in interest actually occupied the land between the surveyed line and historical fence line continuously from at least 1981 until 2006, a period of time exceeding the twenty years necessary to establish adverse possession. It is also clear from the record that during this time, Bruce, Harvey, and their parents treated the fence as the boundary between their properties, and that Bruce and his mother used the land up to the fence as their own. Accordingly, Bruce’s use of this land was “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.” *See* ***Pierz***, 88 Wis. 2d at 137. On remand, the circuit court is directed to grant judgment in favor of Bruce. The court shall use the line plotted on the 2006 survey as “existing fence” to mark the boundaries of Bruce’s claim.

By the Court.—Judgment reversed and cause remanded with directions.

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