COURT OF APPEALS DECISION DATED AND FILED

November 16, 2010

A. John Voelker
Acting 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. 2009AP528

Cir. Ct. No. 2005CV348

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

RANDALL J. WILSON,

PLAINTIFF-APPELLANT,

V.

HUNT FOREST PRODUCTS, INC.,

DEFENDANT-RESPONDENT,

ROBERT E. KARLEN AND SUSAN KARLEN,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Chippewa County: FREDERICK A. HENDERSON, Judge. *Affirmed*.

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

¶1 PER CURIAM. Randall Wilson appeals from a judgment dismissing his action for timber theft against Hunt Forest Products, Inc. Wilson argues the circuit court erred by denying him summary judgment. Wilson also claims evidence at trial proved he was entitled to judgment. We affirm.

¶2 Wilson owned a farm north of the Yellow River near Cadott. Wilson's neighbor, Robert Karlen, hired Hunt to harvest timber. Wilson alleged Hunt harvested timber on his land and sued both Karlen and Hunt for timber theft under WIS. STAT. § 26.09.[1]

¶3 A two-day bench trial commenced in June 2007. Wilson put in his case and the defendants put in part of their defense but did not rest when the circuit court adjourned the trial after the first day.[2] Hunt filed a motion for summary judgment on the grounds that Wilson failed to meet his burden of proof as to ownership of the disputed property. The circuit court denied the motion, concluding a genuine issue of material fact existed as to the ownership of the disputed area. On December 2, 2008, the court conducted the second day of trial. The court subsequently granted judgment for Hunt, dismissing the case on its merits. Wilson now appeals.

¶4 Wilson first argues the circuit court erred by failing to grant him summary judgment. The methodology for determining whether a genuine issue of material fact exists has been stated many times and we need not repeat it here. *See*

[1] References to the Wisconsin Statutes are to the 2005-06 version unless noted.

[2] In September 2007, Wilson and Karlen settled their disputes. Wilson represented in his brief in opposition to summary judgment that the settlement with Karlen involved an exchange of quit claim deeds to various parcels of land, "some of which were disputed and some of which were not disputed." Karlen is not involved in this appeal.

Grams v. Boss, 97 Wis. 2d 332, 337-39, 294 N.W.2d 473 (1980). We apply the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987).

¶5 Here, the circuit court observed that a claim for timber theft requires proof of ownership of the land where the trespass occurred. Wilson conceded at the summary judgment hearing that his deed was ambiguous. The deed could grant Wilson title to the entire forty-acre tract on which the disputed acreage sat, or it could grant him that portion of the disputed forty acres "lying north of the Yellow River."[3]

¶6 Wilson also conceded in his brief in opposition to the motion for summary judgment that the evidence at trial demonstrated "there may be 3 branches to the Yellow River …." In this case, the land between the northernmost and the southernmost branches of the Yellow River comprised the disputed area. Karlen believed the main branch of the Yellow River was the northernmost branch, which would give him title to the land Hunt logged.[4] A prior owner of Wilson's property stated in an affidavit that the middle branch was the main branch. Further complicating matters was uncertainty where the Yellow River flowed at the time the deeds were conveyed.

---

[3] On appeal, Wilson does not renew his argument that his deed conveys the entire disputed forty-acre parcel. We therefore deem this argument conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

[4] Wilson argues in his reply brief the circuit court "should not have considered trial evidence or lack thereof in making its summary judgment decision." In this regard, we note Wilson relied upon trial evidence in his brief in opposition to summary judgment. Wilson will not now be heard to complain the circuit court improperly relied upon evidence adduced during the first day of trial.

¶7 In its decision on summary judgment, the circuit court emphasized the deed's ambiguities and concluded Wilson had not established the absence of a genuine issue of material fact pertaining to which branch of the river his deed referenced. The court stated:

> [T]he burden of proof is on the plaintiff to prove that at the time of the timber trespass that he owned the land, and I don't think that's been done, I think it's a dispute of material fact.
>
> So I'm not going to grant summary judgment. As the record stands, I don't know how you are going to do that unless you get some surveyors. And maybe this dispute isn't economically feasible in light of the land swap, but that is something you are going to have to do. So we set it for trial I guess.

¶8 Wilson also argues conclusive ownership was established by the fact that he paid taxes on twenty-five of the disputed forty acres. Wilson reasons that Karlen therefore paid taxes on fifteen acres, yet Hunt cut 22.2 acres, more than Karlen could have owned. Wilson provides no citation to legal authority supporting the conclusion that payment of taxes establishes ownership or boundaries, and we will therefore not consider the argument. *See* ***Kruczek v. DWD***, 2005 WI App 12, ¶32, 278 Wis. 2d 563, 692 N.W.2d 286.

¶9 Wilson further argues he established ownership by adverse possession. Wilson's argument in this regard is underdeveloped and we will not abandon our neutrality to develop it further.[5] *See* ***M.C.I., Inc. v. Elbin***, 146

[5] Wilson's argument is contained in one and one-half pages of his brief. It relies upon an affidavit averring the prior owner's family built a fence to contain cattle on the south side of "a strip of land" when the affiant was ten years old in 1946 and the family grazed cattle and cut timber in "the strip of land" north of the Yellow River through the 1960s. Wilson insists the family's "use of the land was exactly the open, notorious and continuous use required by either the 10 year statute or the 20 year statute." Attached to the affidavit was a blurry photocopy of a drawing purporting to show the course of the Yellow River.

Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988). Moreover, Wilson does not refute Hunt's arguments concerning adverse possession and we therefore deem the issue conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶10 We conclude the circuit court correctly determined that a genuine dispute of material fact existed regarding the ownership of the land upon which the trespass allegedly occurred. Summary judgment was therefore inappropriate.

¶11 Wilson next insists evidence at trial proved he was entitled to judgment and the circuit court thus erred by dismissing the case on the merits. We disagree. The court concluded Wilson failed to prove he owned the disputed parcel and sufficient evidence in the record supports the court's determination. Significantly, Wilson did not introduce evidence of a survey during trial, despite the court's urging. Hunt's forester, Kenneth McIntyre, testified Karlen gave him a hand-drawn map and an aerial photograph of the land. McIntyre checked the plat book "which indicated that [Karlen] did own the piece in question." McIntyre also testified he obtained a cutting permit from the county clerk.

¶12 Karlen testified his family moved onto their property in 1963. He stated he never saw a fence along the disputed area of the Yellow River, the remnants of a fence, or cattle grazing there. Karlen also testified he never saw anyone other than himself harvest trees from the disputed area. Karlen testified he previously had timber logged from the disputed area pursuant to permits in 1994 and 1995.

¶13 The court specifically found McIntryre and Karlen credible. The circuit court as fact finder is the arbiter of credibility. ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 249-50, 274 N.W.2d 647 (1979). Ultimately, the

court concluded, "The whole case here I think rests on burden of proof of the plaintiff. The plaintiff had to prove that it was the owner of this land, and I don't think the plaintiff has done that."

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).