

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 26, 2012

Diane M. Fremgen
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. 2010AP3084

Cir. Ct. No. 2009CV177

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

BRAD GEHRING, JAMES GEHRING, TOM OMHOLT AND PHILIP SCOTT,

PLAINTIFFS-RESPONDENTS,

V.

ROBERT SINGLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: PHILIP M. KIRK, Judge. *Affirmed.*

Before Lundsten, P.J., Vergeront and Higginbotham, JJ.

¶1 HIGGINBOTHAM, J. This is an adverse possession case. This appeal arises out of a property line dispute between Robert Singler and neighboring property owners James and Bradley Gehring, Thomas Omholt, and Philip Scott (the property owners). The property owners brought this quiet title

action against Singler alleging he installed an electrical deer fence¹ on his property that encroached on their respective properties, without their consent or permission. In turn, Singler counterclaimed that he owned title to the disputed parcels² by adverse possession based on tacking.³ A trial was held to the court. Singler and the property owners stipulated at trial to the boundary lines of each party's property. As for Singler's adverse possession claim, the court found that the evidence was insufficient to prove that Singler adversely possessed the disputed parcels and that he was not entitled to the benefit of tacking his time in possession of the parcels to the time his predecessors in interest possessed the same parcels. Singler appeals.

¶2 On appeal, Singler appears to argue that the trial court's findings were against the great weight and clear preponderance of the evidence, citing only to facts that he contends support his counterclaim that he obtained ownership of the disputed parcels either through adverse possession by tacking his predecessors-in-interest's activities to his own or by owning in fee simple property to which his predecessors in interest were successful in establishing title through adverse possession.⁴ We disagree and affirm.

¹ In his pleadings, Singler refers to this fence as a "wildlife abatement fence" or as a "deer damage abatement fence." In this opinion we refer to this fence as a "deer fence."

² The disputed parcels referred to in Singler's counterclaim are the areas that abut the three property owners' lands that lie to the north and west of the barbed wire fence that runs parallel to the property owners' property lines. We will refer to these areas as the "disputed parcels."

³ An "adverse claimant may 'tack' or add his time of possession to that of a prior adverse possession in order to establish a continuous possession for the requisite statutory period." *Perpignani v. Vonasek*, 139 Wis. 2d 695, 724-25, 408 N.W.2d 1 (1987).

⁴ Singler also argues that he owns the disputed parcels by acquiescence and requests that we exercise our discretion under WIS. STAT. § 752.35 and order a new trial in the interest of
(continued)

Background

¶3 This case involves four parcels of land in Outagamie County. Singler owns an 80-acre section which shares the western half of its southern border with Scott, the eastern half of its southern border with Omholt, and its eastern border with property owned jointly by brothers Bradley and James Gehring. Singler purchased his 80-acre section in August 1989 from Ruben Young and recorded the title with the register of deeds on October 3, 1989 (the Singler 80). Scott purchased his 20-acre section in 1989 from a different owner (the Scott 20). Brad and James Gehring's father gifted the 80-acre parcel to them in 1988 (the Gehring 80). Ralph Gehring is the father-in-law of Omholt and gifted his parcel to Omholt and his wife in 1988 (the Omholt 40).

¶4 The Gehring 80 and the Omholt 40 had been in the Gehring family for seventy to eighty years. Ruben Young owned the Singler 80 from 1973 through August 1989. Robert Postel owned the Singler 80 from approximately 1964 until he sold it to Young in July 1973. Postel, Young, and Singler all farmed some portion of the Singler 80 during their period of ownership.

¶5 Sometime prior to 1949, a barbed wire fence (hereinafter the remnant fence) was constructed on the Scott 20, the Omholt 40 and the Gehring 80 that ran along the title lines at issue here. Ralph Gehring and the then owners of the Singler 80 and the Scott 20 properties had a survey done of all the subject properties (the 1949 Survey). The 1949 Survey showed that on the entire southern border of the Singler 80, the remnant fence did not mark the actual title line, but

justice. Neither argument is sufficiently developed, and therefore we do not consider them. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

rather ran south of that line. As to Singler's eastern border with the Gehring 80, the remnant fence appeared on the 1949 Survey to fall on the title line. The remnant fence is now in pieces, missing in certain areas and has grown through trees in other areas. Singler commissioned a survey in 2009 to set the dimensions of the land between the remnant fence and the 1949 Survey's title lines (the disputed parcels).

¶6 In 1997, Singler constructed an electrical deer fence along the southern and eastern borders of the Singler 80 under an agreement with the federal and state governments for deer damage abatement. According to a survey commissioned by Omholt in 2007, the fence appears to run on parts of each property owners' property. As part of his agreement for constructing the deer fence, Singler also maintains a two-foot area between the south and east sides of the deer fence and the remnant fence.

¶7 The property owners commenced this declaratory judgment action to quiet title on January 27, 2009, less than twenty years after Singler purchased his property. Singler filed a motion for summary judgment seeking a declaration that he owned each of the disputed parcels by adverse possession. The court denied the motion on the ground that material facts remained in dispute.

¶8 The court held a one-day trial. At the conclusion of the property owners' case, the parties stipulated that the property owners had "shown the title lines to be as [they] claim" them to be, i.e., "the property lines for the real estate parcels at issue have been established by the plaintiff[s]." Accordingly, the balance of the trial focused on Singler's counterclaim for adverse possession.

¶9 After Singler, his brother and father testified, the parties stipulated that the court receive the affidavits of Young's daughter, Theresa Hawley, and

Postel's son, William Postel, as "agreed offers of proof in lieu of the testimony of these witnesses ... [to] expedite the conclusion of this case." Singler also admitted a video evidentiary deposition of Young in support of his counterclaim.

¶10 At the conclusion of the trial, the court dismissed Singler's adverse possession claim on three grounds, only two of which are relevant to our decision. The first ground was that Singler was unable to establish adverse possession of the disputed parcels because he had not possessed his own property for the statutorily required twenty years. The second ground was that Singler failed to prove his predecessors in interest took title to the disputed parcels by adverse possession, and therefore Singler could not establish adverse possession by tacking.

¶11 The court entered judgment in favor of the property owners in an amended judgment dated November 5, 2010. Singler appeals only the November 5, 2010 judgment. Additional facts, as necessary, are set forth in the discussion section.

Standard of Review

¶12 Singler appeals the circuit court's judgment after a trial to the court, granting to the property owners fee simple title to the disputed parcels on their respective properties and dismissing Singler's counterclaim alleging adverse possession. We review a trial court's decision on adverse possession under a mixed standard of review. *Perpignani v. Vonasek*, 139 Wis. 2d 692, 728, 408 N.W.2d 1 (1987). The trial court's factual findings will be sustained unless they are clearly erroneous. *Steuck Living Trust v. Easley*, 2010 WI App 74, ¶11, 325 Wis. 2d 455, 785 N.W.2d 631, *review denied*, 2010 WI 114, 329 Wis. 2d 64, 791 N.W.2d 66 (WI Aug. 18, 2010) (No. 2009AP757); *see also* WIS. STAT. § 805.17(2). A trial court's findings of fact are clearly erroneous only if they are

contrary to the great weight and clear preponderance of the evidence. *Leciejewski v. Sedlak*, 110 Wis. 2d 337, 343, 329 N.W.2d 233 (Ct. App. 1982). Whether those facts fulfill the legal standard for adverse possession we review de novo. *Steuck Living Trust*, 325 Wis. 2d 455, ¶11.

¶13 Where the trial court acts as the fact finder, we give deference to the court's credibility determinations. *Cogswell v. Robertshaw Controls Co.*, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979). If more than one reasonable inference can be drawn from the evidence, we must accept the inference drawn by the circuit court. *Id.* We will not reverse a trial court's findings simply because there is evidence to support a contrary finding. *Id.* at 249. "[T]o command a reversal, such evidence in support of a contrary finding must itself constitute the great weight and clear preponderance of the evidence." *Id.* at 249-50.

Discussion

¶14 We understand Singler to argue that the trial court's finding that he did not adversely possess the disputed parcels was against the great weight and clear preponderance of the evidence. Singler appears to argue at the same time that there was sufficient evidence to support his position that he and his predecessors in interest adversely possessed the disputed parcels. We reject both arguments.

¶15 Singler claims title to the three disputed parcels through adverse possession pursuant to WIS. STAT. § 893.25, which provides:

Adverse possession, not founded on written instrument.

(1) An action for the recovery or the possession of real estate and a defense or counterclaim based on title to real estate are barred by uninterrupted adverse possession of 20 years, except as provided by s. 893.14 and 893.29. A person who, in connection with his or her predecessors in

interest, is in uninterrupted adverse possession of real estate for 20 years, except as provided by s. 893.29, may commence an action to establish title under ch. 841.

(2) Real estate is possessed adversely under this section:

(a) Only if the person possessing it, in connection with his or her predecessors in interest, is in actual continued occupation under claim of title, exclusive of any other right; and

(b) Only to the extent that it is actually occupied and:

1. Protected by a substantial enclosure; or
2. Usually cultivated or improved.

¶16 The trial court made two findings in support of its conclusion that Singler did not take title to any of the three disputed parcels by adverse possession. The first is that Singler did not possess the property by adverse possession for the statutorily required period of twenty years. The court found that Singler owned his property for approximately nineteen years and three and one-half months, calculated from the date he recorded his deed, October 3, 1989, to the date on which this action was filed, January 27, 2009. Thus, because Singler did not own his own property for twenty years, it followed that he did not adversely possess the disputed parcels for twenty years. We conclude this finding is supported by the record. Singler does not make a serious challenge to this finding.

¶17 The court also found that Singler failed to prove by clear and convincing evidence that his predecessors in interest adversely possessed the disputed parcels, and thus Singler did not have the benefit of “tacking” his alleged adverse possession with any time his predecessors in interest possessed the Singler 80. We conclude this finding is also supported by the record.

¶18 In support of his tacking claim, Singler introduced a video evidentiary deposition of Ruben Young, Singler's immediate predecessor in interest. Singler also admitted into evidence the affidavits of Hawley and William Postel. According to our review of the record, this is the full extent of the evidence that Singler presented in support of his tacking claim.

¶19 We conclude that the trial court's finding that Singler and his predecessors in interest did not meet the criteria for taking the disputed parcels by adverse possession under WIS. STAT. § 893.25 is supported by the great weight and clear preponderance of the evidence.⁵ In rejecting Singler's tacking claim, the trial court apparently was not persuaded by Singler's evidence admitted in support of his claim. Specifically, the court gave little weight to the Hawley and William Postel affidavits and to Young's video evidentiary deposition. The court evidently did not credit this testimony, and Singler does not argue on appeal that the court could not properly make this credibility determination. Indeed, that is the proper role of the circuit court. *See Cogswell*, 87 Wis. 2d at 250. Singler also does not argue that other evidence before the court did not support the court's determination. Accordingly, we conclude that Singler failed to carry his burden of showing that the trial court's findings with respect to Singler's counterclaims were

⁵ We also reject Singler's argument that the record contains sufficient facts to support his adverse possession counterclaim. This argument is a non-starter. As we have indicated, we will not reverse a trial court's findings simply because there is evidence to support a contrary finding. *Cogswell v. Robertshaw Controls Co.*, 87 Wis. 2d 243, 249, 274 N.W.2d 647 (1979). "[T]o command a reversal, such evidence in support of a contrary finding must itself constitute the great weight and clear preponderance of the evidence." *Id.* at 249-50. Singler's arguments do not meet this test. In any event, as we have indicated, the applicable standard of review is not whether there are sufficient facts to support Singler's case, but rather whether the trial court's findings are against the great weight and clear preponderance of the evidence. *See Leciejewski v. Sedlak*, 110 Wis. 2d 337, 343, 329 N.W.2d 233 (Ct. App. 1982).

against the great weight and clear preponderance of the evidence.⁶ *See Leciejewski*, 110 Wis. 2d at 343.

¶20 In sum, we affirm the judgment entered in favor of the property owners and dismissing Singler's counterclaims.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

⁶ Because our conclusion—that Singler has failed to show that the trial court's findings that he did not adversely possess the disputed parcels were against the great weight and clear preponderance of the evidence—is dispositive, we need not address Singler's other arguments in support of his appeal of the dismissal of his counterclaim.

