COURT OF APPEALS
DECISION
DATED AND FILED

February 8, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP19 **Cir. Ct. No. 2014CV878**

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

NORTHERN TRUST COMPANY, TRUSTEE, HAROLD BYRON SMITH, JR., TRUST DATED FEBRUARY 10, 1970,

PLAINTIFF-APPELLANT,

V.

ERNEST C. STYBERG, JR., TRUST AND GENEVA LAKE CONSERVANCY, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Walworth County: PHILLIP A. KOSS, Judge. *Affirmed*.

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. In this quiet-title case, the Northern Trust Company, trustee of the Harold Byron Smith, Jr., Trust (Smith), claimed title by

adverse possession to a parcel of Walworth County land. The circuit court rendered a judgment in favor of the Ernest C. Styberg, Jr., Trust (Styberg; Ernest if Ernest personally) and Geneva Lake Conservancy, Inc. (the Conservancy). The court concluded that Smith failed to show that it adversely possessed the disputed area for twenty continuous years, a requirement to obtain title by adverse possession under WIS. STAT. § 893.25 (2015-16).[1] We affirm because Smith's predecessor in interest lacked the subjective intent to assert ownership to the parcel.

¶2 In 1984, Richard and Mary Jo Pfeil purchased a piece of Walworth County property. They did not obtain a survey and were uncertain of the precise boundary line between their property and Styberg's. Styberg owned land to the west of the Pfeil property since about 1950. "The claimed parcel," a long, narrow, approximately two-thirds-acre strip of land abutting the west side of the Pfeil property, lay within the legal description of the Styberg property. The Styberg property and the claimed parcel both are woody and brushy. In 1985, Styberg conveyed to the Conservancy a conservation easement over a portion of its property, including the claimed parcel, to preserve its natural beauty.

¶3 Over the years, the Pfeils made improvements to their property and, as it turned out, to the claimed parcel. They cut back weeds, mowed certain areas, put in some gardens and plantings, and installed a woodchip path, a greenhouse Ernest gave them, and a swimming pool. During excavation for the pool, the Pfeils asked Ernest for permission to deposit dirt onto a low, marshy part of the

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless noted.

claimed parcel they believed belonged to him. He consented. The greenhouse was relocated over the true property line, solely onto the Pfeils' side.

¶4 The Pfeils occupied their property continuously from 1984 until 1998, when they sold it to Smith, who also did not have it surveyed. No mention was made that use of the area where the dirt had been deposited was permissive.

¶5 Smith also made improvements to the property and, in 2014, commissioned a survey that showed that the claimed parcel was included in the legal description of the Styberg property. Smith filed this action asserting ownership to the claimed parcel by adverse possession through the Pfeils, its predecessors in interest.

¶6 Richard Pfeil testified that, with the exception of two willow "whips" planted in a marshy area that may or may not have been part of the claimed parcel, he would not have made improvements to the claimed parcel had he known Styberg owned it. He also testified that the improvements were not done with an intent to acquire an interest in it.

¶7 The circuit court found that Smith's claim failed because, as the Pfeils lacked the subjective intent to assert ownership of the claimed parcel, under ***Wilcox v. Estate of Hines***, 2014 WI 60, 355 Wis. 2d 1, 849 N.W.2d 280, they were not in possession of it "under claim of title." Smith appeals.

¶8 In reviewing a determination regarding adverse possession, we accept the circuit court's factual findings unless they are clearly erroneous but review the legal significance of those facts de novo. *See* ***Klinefelter v. Dutch***, 161 Wis. 2d 28, 33, 467 N.W.2d 192 (Ct. App. 1991). Whether the adverse claimant's possession of the disputed land was open, continuous, notorious, hostile, and

exclusive are questions of fact. ***Allie v. Russo***, 88 Wis. 2d 334, 343, 276 N.W.2d 730 (1979).

¶9 "A person who, in connection with his or her predecessors in interest, is in uninterrupted adverse possession of real estate for 20 years … may commence an action to establish title under [WIS. STAT.] ch. 841." WIS. STAT. § 893.25(1). Property is possessed adversely "[o]nly 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 only to the extent it is actually occupied and either enclosed, cultivated, or improved. Sec. 893.25(2)(a), (b). Section 893.25 "codifies the common law elements of adverse possession, which require physical possession that is 'hostile, open and notorious, exclusive[,] and continuous.'" ***Wilcox***, 355 Wis. 2d 1, ¶20 (citation omitted). A possessor may "tack" the time of possession to that of his or her predecessor in interest. ***Id.***, ¶21.

¶10 "Hostility" for purposes of showing adverse possession means that one in possession claims exclusive right to the land possessed. ***Burkhardt v. Smith***, 17 Wis. 2d 132, 139-40, 115 N.W.2d 540 (1962). "[T]he 'claim of title' requirement in WIS. STAT. § 893.25 … corresponds to the common law 'hostility' element." ***Wilcox***, 355 Wis. 2d 1, ¶22. When all other elements of adverse possession are satisfied, the law presumes the element of hostile intent. ***Burkhardt***, 17 Wis. 2d at 139. "[T]his presumption may be rebutted by evidence demonstrating that a possessor lacked the subjective intent to claim title to the property." ***Wilcox***, 355 Wis. 2d 1, ¶22. The burden of proof is on the party asserting the claim of adverse possession. ***Allie***, 88 Wis. 2d at 343. "The evidence of possession must be clear and positive and strictly construed against

the claimant," with all reasonable presumptions made in favor of the true owner. ***Id.***

¶11 The supreme court's decision in ***Wilcox*** guides our analysis here. As noted above, property is adversely possessed "[o]nly 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." WIS. STAT. § 893.25(2)(a). The "claim of title" requirement—i.e., hostility—is presumed when the other elements of adverse possession are established, but "this presumption must be rebuttable for the requirement to have meaning." ***Wilcox***, 355 Wis. 2d 1, ¶27.

¶12 "The plain meaning of 'claim of title' is that the possessor intends to claim ownership of the disputed property." ***Id.***, ¶26. Here, the Pfeils did not. Without a survey, the Pfeils had a notion, but not a precise awareness, of where the property boundaries were. Being on good terms, neither they nor Styberg seemed especially concerned about them. As noted, the Pfeils would not have made improvements on property known to belong to Styberg and had no intention of claiming it as their own.

¶13 Smith vigorously argues that subjective intent is irrelevant to a determination of a claim of adverse possession and that the physical character of

possession is the sole test.[2] *See, e.g.*, ***Allie***, 88 Wis. 2d at 343, 347, and ***Ovig v. Morrison***, 142 Wis. 243, 247-48, 125 N.W. 449 (1910). Smith contends the rule is especially true in cases where the possessor of the property—here, the Pfeils—operated under the mistaken notion that they owned the claimed parcel: "It is logical that subjective intent is irrelevant in cases of mistake[,] as a possessor cannot intend to acquire an interest in another's land if the possessor does not know that he himself is not the true owner."

¶14 As to subjective intent, we agree that many Wisconsin cases say as much. *See, e.g.*, ***Ovig***, 142 Wis. at 247, ***Allie***, 88 Wis. 2d at 347, and ***Steuck Living Trust v. Easley***, 2010 WI App 74, ¶17 n.7, 325 Wis. 2d 455, 785 N.W.2d 631. The ***Wilcox*** court explained why that is only a general rule:

> In most adverse possession cases, a court's inquiry is primarily focused on the observable physical characteristics of the claimant's occupation, including whether the elements of open, notorious, continuous, and exclusive use are established. If they are, hostility is presumed…. There [rarely is] a dispute about whether possession is hostile, for the simple reason that the party bringing the claim usually intends to possess the property in question. In such cases, a possessor need only present evidence regarding a property's observable physical characteristics, making it the "sole test" for adverse possession. Nevertheless, while the presumption of hostility allows adverse possession to be established on the basis of the physical characteristics of possession alone, evidence [still can] be admitted to show that an essential element has not been satisfied. This evidence is not part of the "sole test" for adverse

[2] Smith argues that the circuit court erred by finding that Richard Pfeil's testimony regarding his subjective intent was relevant. Oddly, Smith did not object to its relevance either during Richard's video deposition or when it was shown at trial. Moreover, Smith itself presented the videotape at trial. The failure to object constitutes a waiver—or, more accurately, forfeiture—of any possible objection. *See* ***Holmes v. State***, 76 Wis. 2d 259, 272, 251 N.W.2d 56 (1977). We nonetheless will address the issue, as "the rules of forfeiture and waiver are rules of 'administration and not of power.'" ***State v. Beamon***, 2013 WI 47, ¶49, 347 Wis. 2d 559, 830 N.W.2d 681 (citation omitted).

> possession, however, because it is not required for a successful claim.

Wilcox, 355 Wis. 2d 1, ¶30 (citations omitted). As the ***Wilcox*** court stated, "***Allie*** does not stand for the principle that subjective intent is never relevant." ***Wilcox***, 355 Wis. 2d 1, ¶31. "[T]o gain title by adverse possession, the adverse claimant and all predecessors in interest must have the actual intent to possess the property under a claim of ownership." ***Id.***, ¶35. Accordingly, the circuit court properly considered evidence that the Pfeils sought permission from Ernest for use of property they knew to be his and disclaimed an intent to claim ownership of any part of the property that turned out to belong to Styberg, despite the improvements they made.

¶15 The circuit court made two site visits. It found that certain improved parts of the claimed parcel met the requisite conditions for adverse possession but others were in a wild state without sufficiently visible improvements and that the pampas grass and trees the Pfeils planted and the invasive weeds they removed were activities consistent with "sporadic, trivial[,] and frequently benign trespass" on wooded lands that do not support an adverse possession claim. *See* ***Pierz v. Gorski***, 88 Wis. 2d 131, 139, 276 N.W.2d 352 (Ct. App. 1979).[3] Even with regard to the areas that were sufficiently improved, the court concluded that what the case really turned on was the Pfeils' lack of subjective intent.

[3] In ***Pierz***, the court concluded that use of wooded lands by creating a worm bed, spraying for army worms and poison ivy, planting clover and trees, cutting down windfall, using a "logging road," and making a rock pile either were not sufficiently visible or were consistent with trespassing or an easement. ***Pierz v. Gorski***, 88 Wis. 2d 131, 138-39, 276 N.W.2d 352 (Ct. App. 1979).

¶16 The court also found that the Pfeils sought Ernest's permission for certain activities: dumping excavated dirt from the pool installation; cutting a wide path through the woods, as a crane was needed to move the greenhouse; replanting the numerous felled pine trees; and revegetating the path. "[I]f possession was pursuant to permission of the true owner, there could not be the hostile intent necessary to constitute adverse possession." ***Northwoods Dev. Corp. v. Klement***, 24 Wis. 2d 387, 392, 129 N.W.2d 121 (1964).

¶17 The circuit court found that the Pfeils' use of the claimed parcel was not open, continuous, notorious, hostile, and exclusive and that they lacked the subjective intent to assert ownership of the claimed parcel, and so were not in possession of it "under claim of title." Their period of ownership thus could not be tacked onto Smith's. These findings are not clearly erroneous. We affirm the denial of Smith's adverse possession claim.

¶18 Finally, the Conservancy asserts that Smith "fails to raise or brief the issue of extinguishing the conservation easement burdening the Claimed Parcel," and therefore has abandoned the issue. It asks that we issue a declaratory judgment affirming that the burden of the easement survives should Trust prevail and title be conveyed through adverse possession.

¶19 Smith never sought to extinguish the easement. As it told the court at closing arguments: "There's no testimony or evidence that we wished to lift the easement here…. We've never said that, we've never asked for that, we've never alleged it, we've never pled it." The Conservancy's point strikes us as an abundance-of-caution argument. We need address it no further.

By the Court.—Judgment affirmed.

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