COURT OF APPEALS
DECISION
DATED AND FILED

August 1, 2017

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. 2016AP674 **Cir. Ct. No. 2014CV269**

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

SCOTT W. FROLIK AND RICHARD E. BUSCH, JR.,

PLAINTIFFS-APPELLANTS,

V.

DALE P. SCHUEBEL,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Barron County: MAUREEN D. BOYLE, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Scott Frolik and Richard Busch, Jr., appeal a judgment in favor of Dale Schuebel entered upon a jury verdict finding Schuebel adversely possessed a disputed portion of Frolik's and Busch's properties. Frolik and Busch argue the circuit court erroneously exercised its discretion when it allowed Schuebel to present evidence they contend they first had notice of a week before trial, and when the court failed to grant a continuance to allow for additional discovery. We reject their arguments and affirm the judgment.

BACKGROUND

¶2 In 1987, Schuebel acquired title to two twenty-acre parcels adjacent east to west.[1] Frolik and Busch each subsequently acquired property adjacent to the southern boundary of Schuebel's parcels.

¶3 A 2014 survey disclosed that a fence located south of the southern boundary of Schuebel's parcels encroached upon both Frolik's and Busch's properties (the "disputed property"). On September 11, 2014, Frolik and Busch jointly brought an action against Schuebel for a declaration of interests claiming title ownership of the disputed property. On October 8, 2014, Schuebel answered and counterclaimed, pursuant to WIS. STAT. § 893.25 (2015-16),[2] alleging he owned the disputed property because he and "his predecessors in title" adversely possessed that parcel for "a period exceeding [twenty] years."

[1] Schuebel's former wife also had title to these parcels but in 1998 deeded her ownership interests to Schuebel as part of their divorce.

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

¶4 On February 2, 2015, Frolik and Busch served interrogatories and document requests upon Schuebel in which they inquired into Schuebel's alleged fencing and use of the disputed property. Schuebel answered that discovery on February 20, 2015, stating the fence in question "was already erected when [he] purchased the property in 1987," the fence "had been in continuous existence since at least 1987," and he had "continuously maintained the fence in its current position" while conducting agricultural activities upon the disputed property. Schuebel disclosed that Edward Brunner was a person with "information about how long the fence has been in place between the properties and about how long [Schuebel] has used the land to the north of the fence." Brunner acquired part of what is now Busch's property in 1982, before conveying it to Busch's predecessors in interest in 2000. In response to an interrogatory regarding persons whom Schuebel intended to testify at trial, Schuebel stated that "discovery is continuing" and that "other witnesses may include … Ed Brunner."

¶5 On March 6, 2015, Schuebel moved for summary judgment. He argued that he adversely possessed the disputed property over a twenty-year period due to a substantial enclosure on the properties. Specifically, Schuebel attached an affidavit to his motion in which he averred that when he "purchased the property in 1987[,] the fence separated his parcels from [Busch's and Frolik's] parcels" and that this fence was maintained until Frolik and Busch damaged it in 2014. Schuebel later withdrew his motion for summary judgment after Frolik and Busch filed a brief in opposition to summary judgment, to which they attached affidavits stating that in 2005 the fencing "was not maintained as portions were missing, lying on the ground, and were overgrown."

¶6 In a final scheduling order dated July 20, 2015, the circuit court set the trial for October 20, 2015, and set a discovery deadline of October 16, 2015.

The parties filed a joint pretrial report on September 17, 2015. The report included both Brunner and Carl Jalowitz, who formerly owned part of what was then Busch's property, on the potential witness list. The report also indicated that no depositions of any witness had yet been conducted.

¶7 Schuebel conducted depositions of Brunner on October 12, 2015, and Jalowitz on October 17, 2015. Brunner and Jalowitz testified that fencing similar to the type now on the property existed as early as 1983 and 1980, respectively.[3] They also testified to their observations concerning uses of the disputed property by Schuebel's predecessor in interest prior to 1987, such as hunting and timber harvesting.

¶8 Frolik and Busch subsequently filed a motion in limine to exclude admission of any evidence of Schuebel's alleged adverse possession prior to 1987, specifically referencing Brunner's and Jalowitz's deposition testimony.[4] At a hearing on the day of trial, the circuit court denied both Frolik and Busch's motion in limine and their alternative motion to adjourn the trial to allow further discovery

[3] While the parties fail to explain the import of this evidence in their briefing, we assume the evidence was potentially problematic to Frolik and Busch's defense because they were preparing to present evidence that, before 2007, the fence was in disrepair and no longer stood the entire length of the disputed property. If the evidence of adverse possession by the fence enclosure did not begin until Schuebel bought the property in 1987 and the fence enclosure was interrupted before 2007, then Frolik and Busch could argue Schuebel did not adversely possess the disputed property for the requisite twenty years. *See* WIS. STAT. § 893.25(2).

[4] The minutes of the trial indicate that Brunner and Jalowitz were "called by deposition" and did not testify in person. Frolik and Busch have not included a complete transcript of the trial in the record, so we do not know exactly what parts of the deposition testimony were not read into the record or why the deposition testimony was presented at trial in lieu of live testimony. We assume the depositions were introduced pursuant to WIS. STAT. § 804.07(1)(c), governing use at trial of depositions of witnesses. Nevertheless, aside from their "surprise" arguments, Frolik and Busch raise no objections to admission of the deposition transcripts at trial.

of evidence of Schuebel's pre-1987 adverse possession. The court determined that Schuebel's pretrial materials put Frolik and Busch on notice of potential evidence of fencing prior to 1987. The court, however, concluded the pretrial materials provided no notice that Schuebel intended to show any use or cultivation of the disputed property by his predecessors in interest prior to 1987. It therefore limited the use of Brunner's and Jalowitz's depositions to their testimony regarding the existence of fencing, precluding use of those portions addressing "what the previous parties did in the use of that property" prior to 1987. The court also determined further discovery was unnecessary because Brunner's and Jalowitz's depositions on pre-1987 fencing were "rebuttable and able to be addressed" by Frolik and Busch "without the need for adjournment of this trial."

¶9 The jury found Schuebel and his predecessors in title adversely possessed the disputed property for more than twenty years. Frolik and Busch filed motions to set aside the jury's verdict. Neither a hearing nor a decision on the motions occurred within ninety days of the verdict, and therefore the motions were deemed denied. *See* WIS. STAT. § 805.16(3). Frolik and Busch now appeal.

DISCUSSION

¶10 Real property is possessed adversely if, for at least twenty years without interruption, it is: (a) actually occupied and protected by a substantial enclosure; or (b) usually cultivated and improved. WIS. STAT. § 893.25(2). The time of adverse possession includes the time of uninterrupted possession by the claimant "in connection with his or her predecessors in interest." *See* WIS. STAT. § 893.25(1). Frolik and Busch argue the court erred in admitting Brunner's and Jalowitz's deposition testimony concerning pre-1987 fencing because Schuebel's pretrial materials provided them with no notice they had to prepare to defend

against Schuebel's adverse possession claim prior to 1987. Once the court admitted that evidence, Frolik and Busch argue their pretrial preparation was rendered irrelevant and they required additional discovery so they could reassess their trial strategy.

¶11 Pretrial discovery is intended to "establish a procedure which results in an informed resolution of a controversy" and is thus "designed to eliminate surprise." ***Meunier v. Ogurek***, 140 Wis. 2d 782, 790, 412 N.W.2d 155 (Ct. App. 1987). "[A] witness whose testimony results in surprise to the opposing counsel may be excluded if the surprise would require a continuance causing undue delay or if surprise is coupled with the danger of prejudice and confusion of issues." ***Magyar v. Wisconsin Health Care Liab. Ins. Plan***, 211 Wis. 2d 296, 303, 564 N.W.2d 766 (1997); *see also* ***State v. Ronald L.M.***, 185 Wis. 2d 452, 463, 518 N.W.2d 270 (Ct. App. 1994) (exclusion of evidence due to unfair surprise is proper when party does not have "reasonable grounds to anticipate that such evidence would be offered" and the evidence's probative value is low). However, "the drastic measure of excluding a witness should be avoided by giving the surprised party more time to prepare, if possible." ***Magyar***, 211 Wis. 2d at 303-04. A continuance is usually the more appropriate option regarding "surprise" evidence, save for when any related delay is expected to be "unduly long." ***State v. O'Connor***, 77 Wis. 2d 261, 287-88, 252 N.W.2d 671 (1977).

¶12 A circuit court's decisions to admit or exclude evidence and to grant or deny a continuance are reviewed for erroneous exercise of discretion. ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698; ***State v. Leighton***, 2000 WI App 156, ¶27, 237 Wis. 2d 709, 616 N.W.2d 126. A court properly exercised its discretion when it "examined the relevant facts, applied a proper legal standard, and, using a demonstrated rational process, reached a

reasonable conclusion." ***Martindale***, 246 Wis. 2d 67, ¶28. If the court does not set forth an adequate basis for its decision on the record, we independently review the record to determine whether the court's discretion was properly exercised. ***Id.***, ¶29.

¶13 Here, the circuit court's determination that Schuebel's pretrial materials put Frolik and Busch on notice of potential evidence of fencing prior to 1987 is supported by the record. Schuebel's counterclaim immediately put Frolik and Busch on notice that Schuebel and his "predecessors in title" adversely possessed the disputed property for over twenty years. *See* ***Ronald L.M.***, 185 Wis. 2d at 463. In his responses to Frolik's and Busch's interrogatories and in his affidavit attached to his motion for summary judgment, Schuebel also asserted that fencing enclosed the disputed property when he acquired his property in 1987. *See supra* ¶¶5-6. The court reasonably concluded these pretrial disclosures should have suggested to Frolik and Busch that evidence of fencing may have existed prior to 1987, which evidence could be presented at trial and discovered by them at any time long before trial.[5]

¶14 The circuit court also reasonably concluded Frolik and Busch should have anticipated the identity of persons who may have provided testimony concerning pre-1987 fencing. Schuebel's February 2015 interrogatory answers

[5] At trial, Frolik and Busch objected to inclusion of the phrase "predecessors in interest" in the standard adverse possession jury instruction, WIS JI—CIVIL 8060 (2015), on the basis that pretrial discovery only "spoke to Mr. Schuebel and what he has personally done" after 1987. On appeal, Frolik and Busch suggest the circuit court erred in giving the standard instruction to the jury because Schuebel failed to put Frolik and Busch on notice that any pre-1987 evidence would be presented at trial. However, we have already determined that the circuit court reasonably concluded the pretrial materials did provide them with that notice.

plainly disclosed that Brunner, among others, had "information about how long the fence has been in place between the properties." Under the July 20, 2015 scheduling order, Frolik and Busch had almost three months to conduct discovery before the October 16, 2015 deadline. In addition, Brunner and Jalowitz were included on the September 17, 2015 pretrial witness list, and discovery of their potential testimony could have been conducted earlier than a few days before trial.

¶15 Frolik and Busch observe that the circuit court excluded any evidence of use of the disputed property prior to 1987 based upon surprise and argue it therefore should have done the same with evidence about the fence existence. However, the presence of a fenced enclosure is a distinct adverse possession ground from the cultivation or other use of a property. *See* WIS. STAT. § 893.25(2)(a)-(b). Either one, independently, provides evidence of adverse possession. The record supports the court's conclusion Frolik and Busch had no prior notice of Schuebel's intent to present evidence of the uses of the disputed property prior to 1987. That does not mean the court erred in permitting evidence about the fence's pre-1987 existence for which Frolik and Busch had ample notice.

¶16 The circuit court also properly exercised its discretion in declining to grant a trial continuance. The only reason Frolik and Busch advanced in support of their request to delay the trial was the admission of the alleged "surprise" pre-1987 evidence regarding the fence. They cite ***Dietz v. Hardware Dealers Mutual Fire Insurance Co.***, 88 Wis. 2d 496, 276 N.W.2d 808 (1979), in support of their argument in that respect. In ***Dietz***, the insured in a car accident case made statements to the police and his insurer that an oncoming vehicle caused the accident, which caused injury to the plaintiff, a passenger in his car. ***Id.*** at 498-99. Six days before trial, the insured provided plaintiff's counsel with a written

statement recanting his earlier account of the accident and conceding his own negligence. ***Id.*** at 499-500. The insurer moved for a continuance so it could amend its pleadings to address a new issue of the insured's breach of his duty to notify and cooperate with his insurer. ***Id.*** at 505. The circuit court denied the motion for a continuance. ***Id.*** at 500. Our supreme court reversed, concluding the insured's recantation of the past statements "constituted surprise of a prejudicial nature leaving the insurer in a precarious position as to a proper trial defense of the claim." ***Id.*** at 507.

¶17 Frolik and Busch observe that the insured's recantation in ***Dietz*** and Brunner's and Jalowitz's depositions both occurred about a week prior to trial, leaving them little time to account for the evidence. However, ***Dietz*** is distinguishable because, unlike ***Dietz***, the circuit court here properly concluded Frolik and Busch were not presented with "surprise evidence." Frolik and Busch were placed on notice of the issue of whether the fence existed before 1987 at the time Schuebel's counterclaim was filed. Frolik and Busch had far more than six days to investigate that claim, and they should have been aware long before trial that Schuebel might attempt to "tack" his own time of adverse possession on to that of his predecessors in interest. As such, the circuit court reasonably exercised its discretion in denying a continuance.

¶18 Schuebel has also moved for costs and attorney's fees. *See* WIS. STAT. RULE 809.25(3). He argues Frolik and Busch's appeal was frivolous and "designed to harass and maliciously injure." We disagree. Although Frolik and Busch's arguments were indeed unsuccessful, they were not without any

reasonable basis in law or equity and do not objectively appear to have been made in bad faith. *See* ***Howell v. Denomie***, 2005 WI 81, ¶8, 282 Wis. 2d 130, 698 N.W.2d 621. Accordingly, we deny Schuebel's motion for attorney fees.[6]

By the Court.—Judgment affirmed.

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

[6] Nevertheless, we offer Frolik and Busch a cautionary reminder. On appeal, a party must include appropriate factual references to the record in its briefing. WIS. STAT. RULE 809.19(1)(d)-(e). The vast majority of Frolik and Busch's citations in support of their factual assertions are instead to their appendix. The appendix is not the record. ***United Rentals, Inc. v. City of Madison***, 2007 WI App 131, ¶1 n.2, 302 Wis. 2d 245, 733 N.W.2d 322. Frolik and Busch compound this error by failing to identify the record numbers to which their appendix corresponds in their appendix's table of contents. We warn Frolik and Busch that future violations of the Rules of Appellate Procedure may result in sanctions. *See* WIS. STAT. RULE 809.83(2).