COURT OF APPEALS DECISION DATED AND FILED

March 4, 2009

David R. Schanker
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. 2008AP1732

Cir. Ct. No. 2007CV684

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

JOSEPH J. HALL,

PLAINTIFF-APPELLANT,

V.

RANDOLPH J. WILSMAN, JOAN P. WILSMAN, MICHAEL J. WILSMAN, ELIZABETH A. WILSMAN, RANDOLPH R. WILSMAN, AND GAIL A. WILSMAN,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Winnebago County: KAREN L. SEIFERT, Judge. *Affirmed.*

Before Brown, C.J., Anderson, P.J., and Snyder, J.

¶1 PER CURIAM. Joseph Hall appeals from a judgment dismissing his action to declare his ownership of a certain parcel of land by adverse

possession. He argues he proved adverse possession based on a recorded instrument and by twenty years of actual use and possession of the land. We conclude that the trial court's finding that there was not continuous adverse possession is not clearly erroneous and affirm the judgment.

¶2 In 1988, Hall and his wife purchased property known as the Triangle Farm from Ralph and Loretta Barnes. His property includes land located across Riverview Drive and with frontage on the Wolf River. The disputed parcel of land is an irregularly four-sided piece of land approximately 90 feet by 115 feet that lies north of the Triangle Farm's river frontage and sits between the river and Riverview Drive. The parcel runs along the shore approximately 28 feet. The parcel was surveyed and its legal description was first recorded in 1983 in quit claim deeds to Barnes from the two previous owners of the Triangle Farm, Ernest Kueffner and Edward Sukowski.[1] Through family ownership since 1949, the Wilsman defendants own property, the legal description of which encompasses the disputed parcel.

¶3 Hall operates a campground and fishing resort on his property and has utilized the disputed parcel for parking and camp sites. It is Hall's position that the disputed parcel was utilized, improved, and maintained by his predecessors in title and those owners who also operated a business at the Triangle Farm.

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[1] Barnes purchased the Triangle Farm from Ernest Kueffner in 1977. Kueffner purchased the farm from Edward Sukowski in1976.

¶4 Hall first argues that under WIS. STAT. § 893.26 (2007-08),[2] he need only prove adverse possession for a ten-year period because he has possession of the disputed parcel by a record instrument. Under the statute, the first question is whether the land in dispute is included in the description in the adverse possessor's deed. *See* ***Perpignani v. Vonasek***, 139 Wis. 2d 695, 720, 408 N.W.2d 1 (1987).

¶5 Hall's complaint did not allege that he held title to the property. It set forth that his predecessors in the title occupied the disputed parcel and that the Wilsmans have title to it. Hall claims that the warranty deed from Barnes encompasses the disputed parcel because it excepts from the conveyance the property lying north of the disputed parcel by reference to the Kueffner quit claim deed to Barnes. However, Hall did not offer evidence that the legal description in

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[2] WISCONSIN STAT. § 893.26 provides in part:

> **Adverse possession, founded on recorded written instrument. (1)** An action for the recovery or the possession of real estate and a defense or counterclaim based upon title to real estate are barred by uninterrupted adverse possession of 10 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 10 years, except as provided by s. 893.29, may commence an action to establish title under ch. 841.
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> **(2)** Real estate is held adversely under this section or s. 893.27 only if:
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> (a) The person possessing the real estate or his or her predecessor in interest, originally entered into possession of the real estate under a good faith claim of title, exclusive of any other right, founded upon a written instrument as a conveyance of the real estate or upon a judgment of a competent court; …

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

his deed of "[a]ll that part of the Southwest Quarter of the Southeast Quarter and the fractional Lot 2 lying between the center line of State Trunk Highway 110 as now located and the Wolf River," includes the disputed parcel. The record does not include a survey of this legal description or any testimony that it includes the disputed parcel.[3] Hall's claim of color of title rests on the inference that because land north of the disputed parcel was specifically excluded that the disputed parcel must be included. It also rests on the inference that because Barnes and Hall believed they owned the property actually occupied, the legal description in the deed to Hall includes the occupied disputed parcel. These are not the only reasonable inferences from the evidence. Where more than one reasonable inference can be drawn from the evidence, we must accept the inference drawn by the trier of fact. ***Bank of Sun Prairie v. Opstein***, 86 Wis. 2d 669, 676, 273 N.W.2d 279 (1979).

¶6 The trial court found that the disputed parcel was not "within the calls of the Barnes' deed." Hall does not challenge this finding of fact as clearly erroneous.[4] Although in October 1983 Barnes made and recorded an affidavit stating that he acquired the disputed parcel from Kueffner by land contract, the Barnes-Kueffner land contract is not in the record. Simply because Barnes recorded an affidavit saying so does not make it true. The quit claim deeds from

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[3] Hall's testimony that he had a surveyor stake out the land that he was going to purchase and that he was satisfied that it was accurate is not sufficiently definite to establish that the disputed parcel was included in the staked-out area or that the staked-out area was based on the legal description in the warranty deed.

[4] The finding is based on the 1979 survey reflecting only Barnes' property. That survey does not show the disputed parcel. The surveyor testified that he returned to the property in 1983 and revised the survey to also show that land that was being occupied beyond the title line. That is when a separate legal description for the disputed parcel was created.

Kueffner and Sukowski executed and recorded contemporaneously with the Barnes affidavit, and setting forth a separate legal description for the disputed parcel, give rise to an inference that Barnes did not previously acquire title to the disputed parcel. There was evidence at trial that when Barnes sought to convey the property to a land contract vendee, there was delay in the transaction because the legal description of Barnes's property did not match the river frontage that was represented to be part of the farm. The purchase transaction went forward on a "reworded" legal description. The Barnes affidavit does not provide evidence that the "reworded" legal description used in conveyances between Barnes and his land contract vendee and in the warranty deed to Hall includes the disputed parcel Barnes acquired from Kueffner. There is no link between the two legal descriptions. A reasonable inference exists that Hall's warranty deed did not give him title to the disputed parcel. It is not within our province to reject an inference drawn by a fact finder when the inference drawn is reasonable. *See* ***Onalaska Elec. Heating, Inc. v. Schaller***, 94 Wis. 2d 493, 501, 288 N.W.2d 829 (1980). Also, the Barnes affidavit does not constitute a written instrument of conveyance or a judgment establishing title as required by WIS. STAT. § 893.26(2)(a). We affirm the trial court's conclusion that the Barnes affidavit did not give Hall color of title and that the preliminary inquiry under § 893.26 was not satisfied.

¶7 We examine Hall's adverse possession claim under the twenty-year statute, WIS. STAT. § 893.25.[5]

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[5] WISCONSIN STAT. § 893.25 provides:

Adverse possession, not founded on written instrument.

(continued)

> Adverse possession under this section requires enclosure, cultivation, or improvement of the land. It requires physical possession that is hostile, open and notorious, exclusive and continuous for the statutory period. "Hostility" means only that the possessor claims exclusive right to the land possessed. The subjective intent of the parties is irrelevant to the determination of an adverse possession claim.

Otto v. Cornell, 119 Wis. 2d 4, 7, 349 N.W.2d 703 (Ct. App. 1984) (citations omitted). Whether an element of adverse possession is met is a question of fact, which we affirm unless clearly erroneous. *See* ***Harwick v. Black***, 217 Wis. 2d 691, 703, 580 N.W.2d 354 (Ct. App. 1998).

¶8 The trial court found that there was a gap in the continuous use of the disputed parcel from November 1986 until August 1988. That represents the period of time after Barnes reacquired the Triangle Farm from a prior land contract vendee and before the sale to Hall. During that time, Barnes did not operate a campground or fishing resort. Hall does not challenge the trial court's

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

finding that there was a gap in continuous use as clearly erroneous. Hall also does not challenge the trial court's finding that Hall's occupation of the disputed parcel was not "under claim of title, exclusive of any other right" because, in 1996, Hall discussed with the Wilsmans a lease purchase agreement to acquire the disputed parcel (and more). The trial court rejected Hall's testimony that he would never have sought to purchase property he already owned and treated the purchase negotiations as conceding no right to occupancy to the exclusion of others.

¶9 Hall contends the gap or his concession is immaterial. He argues it was sufficient that the predecessors in title adversely possessed the land for twenty years and it was error for the trial court to look only to the twenty-year period immediately preceding the filing of this action.[6] The twenty-year period of adverse possession does not need to be the twenty years immediately preceding the filing of a court action. ***Harwick***, 217 Wis. 2d at 702.

¶10 Hall claims that before commencement of this action, there was a period of approximately thirty-eight years of occupation establishing adverse possession. The trial court found that Hall had not presented any evidence regarding the use of the disputed parcel prior to his purchase of the Triangle Farm or indicating that his predecessors in title used the property in the same fashion as Hall. Hall points to the recorded affidavit of Sukowski that, starting in 1969, he improved the shoreline of the disputed parcel by backfilling and constructing a retaining wall and thereafter he seeded the area to grass and "continued to exercise dominion over said premises through the mowing of the grass and general

[6] The trial court made a specific finding that a twenty-year period preceding the date of the filing of the lawsuit would begin May 11, 1987.

maintenance thereof." Even if Sukowski's occupation satisfied all the elements of adverse possession, he owned the farm only until 1976 when he sold it to Kueffner. The only evidence of Kueffner's or Barnes' occupation of the disputed parcel was their recorded affidavits. Kueffner's affidavit stated he "exercised dominion over said described property." The Barnes affidavit stated that he "exercised dominion over said described property through normal maintenance, including mowing the grass thereon and generally maintaining it." This falls short of evidence of open, notorious and exclusive possession. Barnes' land contract vendee testified about seasonal occupation of the disputed property in three and one-half years of ownership between April 1983 and the fall of 1986. The trial court's finding that Hall had not offered evidence of qualifying occupation prior to his purchase is not clearly erroneous.[7] Further, the continued existence of the retaining wall and that others mowed the grass is not enough to establish physical possession that is hostile, open and notorious, exclusive and continuous. *See* ***Perpignani***, 139 Wis. 2d at 728 (whether the facts proven are sufficient to amount to adverse possession is a question of law which we review without deference to the trial court).

¶11 The remaining issue is whether the trial court erroneously exercised its discretion when it excluded the testimony of Patsy Rosenstiel, a witness Hall failed to name in his witness list but who he wanted to testify about Sukowski's construction of the retaining wall and his use of the disputed parcel dating back to

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[7] Thus, it was not error for the court to focus on the years of occupancy to which Hall's proof was confined—at best, seasonally from April 1983 to the fall of 1986, and then forward from the date of Hall's purchase. The nearly two-year gap in continuous use precludes a finding of adverse possession.

1969.[8] *See* ***Gerrits v. Gerrits***, 167 Wis. 2d 429, 446, 482 N.W.2d 134 (Ct. App. 1992) (the trial court has both the inherent power and statutory authority to sanction parties for failure to comply with procedural statutes or rules and failure to obey court orders and exercises its discretion in imposing a sanction). Hall conceded that he had not named Rosenstiel as a witness since he only discovered her existence and availability six days before trial.

¶12 We first observe that Hall did not make an offer of proof as to Rosenstiel's testimony. An offer of proof is a precondition to a claim that there was an erroneous exclusion of evidence. *See* ***State v. Williams***, 198 Wis. 2d 516, 538, 544 N.W.2d 406 (1996); WIS. STAT. § 901.03(1)(b). In any event, the trial court properly exercised its discretion in refusing to allow the witness to testify in light of the failure to timely name her and the prejudice the Wilsmans would experience if an adjournment was granted because they had traveled from Florida to attend the trial. Additionally, there is no showing that Rosenstiel's testimony would have supplied the missing links to establishing adverse possession; that is, the nature of occupation by Kueffner and Barnes. The exclusion of her testimony was harmless error. WIS. STAT. § 805.18(2).

By the Court.—Judgment affirmed.

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

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[8] Rosenstiel was Sukowski's daughter.