

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 3, 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. 2008AP2371-FT

Cir. Ct. No. 2007CV144

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**PETER MYLES HOWE, JENNIFER MEGAN HOWE BENNETT, MELANIE
JOELLEN HOWE ZIMMER, TORI JO WILLIAMS WIBLE, TRACEY JAY
WILLIAMS BECK AND TIFFANY (TIFF) JOHNS WILLIAMS, JR.,**

PLAINTIFFS-RESPONDENTS,

v.

PATRICIA BOYLE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sawyer County:
NORMAN L. YACKEL, Judge. *Reversed.*

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

¶1 PER CURIAM.¹ Patricia Boyle appeals a judgment granting Peter Myles Howe, Jennifer Megan Howe Bennett, Melanie Joellen Howe Zimmer, Tori Jo Williams Wible, Tracy Jay Williams Beck and Tiffany Johns Williams, Jr. (collectively the Howes) title to a portion of her property by adverse possession. Boyle contends the circuit court's findings did not support a judgment for adverse possession. She also contends there is insufficient evidence to make the necessary findings. We agree and reverse the judgment.

BACKGROUND

¶2 Boyle and the Howes own adjoining forty-acre parcels of property, with Boyle's lying north of the Howes'.² Boyle's property is bisected by an east-west road, Kadlec Road. A strip of her parcel, approximately 2.4 acres, lies south of Kadlec Road and borders the Howes' property. In an action commenced August 9, 2007, the Howes claimed title to this strip of land by adverse possession.

¶3 Boyle, along with her late husband, obtained her parcel from John and Wilma Boyle in 1969. The Howes obtained their parcel from their grandparents, Peter and Vera Duehr, in 1991. In 1996, the Howes enrolled their property in the Department of Natural Resources' managed forest program. Significant portions of both parcels are covered with tall pine trees. Recent photographs from Kadlec Road show both sides of the road lined with pines.

¹ This is an expedited appeal under WIS. STAT. RULE 809.17. All statutory references are to the 2007-08 version unless otherwise noted.

² Boyle's property is slightly smaller than forty acres because some small lots have been carved out of it.

¶4 To establish adverse possession, the Howes relied heavily on the presence of the trees south of Kadlec Road, both on their property and the disputed property. At trial, none of the witnesses had any personal knowledge of the circumstances surrounding the planting of trees on either side of Kadlec Road. Boyle testified, based on her knowledge of the historical relationship between the Boyle and Duehr families, that she believed the trees were planted as part of a cooperative effort between the families. A forester testified the trees south of Kadlec Road were planted around 1950. He did not ascertain the age of the trees north of Kadlec Road and had no knowledge of whether the trees on both sides of the road were planted at the same time. The Howes relied on aerial photographs showing that the trees south of Kadlec Road, both on their parcel and the disputed land, were planted in north-south rows, while some of the trees north of Kadlec Road were planted in east-west rows.

¶5 Aside from the presence of the trees, the Howes presented limited evidence on their actual use of the disputed property. They relied on two timber harvestings—one in late 1994 into 1995 and another in 1998—which resulted in some trees being taken from the disputed property. They also relied on testimony from a forester involved in the harvestings stating that he assumed, based on available maps, that Kadlec Road was the north boundary of the Howes' property.³

¶6 Additionally, sometime after obtaining the property in 1991, the Howes posted no-trespassing signs, some of them near Kadlec Road. These signs were an attempt to exclude members of the public who were camping on the

³ The Howes did not, however, dispute the accuracy of a 2006 survey showing the boundary south of Kadlec Road.

Howes' property. However, the signs promptly disappeared. Finally, Peter Duehr's son-in-law, Dr. Tiff Williams, testified he went grouse hunting with Peter Duehr on Kadlec Road "from 1965 on," "back in the days when road hunting was legal." He did not specify when "road hunting" became illegal.

¶7 The circuit court concluded the Howes had proved adverse possession. However, the court relied on the presence of Kadlec Road instead of the Howes' and their predecessors' use of the property:

[T]he one thing that hasn't been brought up is that there is a road. ... And everyone that drove down that road thought the Duehr property was on the south side of [the road] and that the Boyle property was on the north side of [the road]. Whether there was any kind of farming, whether there was any kind of construction of trees, or planting of trees, or harvesting, or things that the Duehrs did to claim adverse possession of the property, it was on the south side of the road....

The court entered a judgment declaring the Howes titleholders to the disputed land.

DISCUSSION

¶8 Boyle claims the court's findings do not support the judgment for adverse possession and that the evidence was insufficient to support the Howes' claim. When reviewing an adverse possession judgment, the issue on appeal is whether, resolving all conflicts in evidence in favor of the verdict, the trial court's findings are contrary to the clear preponderance of the evidence. *Pierz v. Gorski*, 88 Wis. 2d 131, 136, 276 N.W.2d 352 (Ct. App. 1979). We will affirm the court's findings "unless a finder of fact, properly applying the law, could not have reasonably concluded that the adverse possessor met his [or her] burden of proof." *Id.* Evidence must be strictly construed against the adverse possessor and in favor

of the true owner. *Id.* Adverse possession cannot be established by inference, but must instead be shown by clear and positive proof. *See Allie v. Russo*, 88 Wis. 2d 334, 343, 276 N.W.2d 730 (1979).

¶9 Under WIS. STAT. § 893.25(2), real estate is adversely possessed:

(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.

Here, the parties agree that there was no substantial enclosure. Therefore, the disputed property could only be adversely possessed to the extent it was usually cultivated or improved. *See* WIS. STAT. § 893.25(2).

¶10 “To constitute adverse possession, the use of the land must be open, notorious, visible, exclusive, hostile and continuous, such as would apprise a reasonably diligent landowner and the public that the possessor claims the land as his [or her] own.” *Pierz*, 88 Wis. 2d at 137. Actions consistent with sporadic trespass are insufficient to apprise a reasonably diligent landowner of an adverse claim. *Id.*

¶11 Here, the court did not specifically find that the Howes or their predecessors in interest made any open, notorious, visible, hostile, and continuous use of the disputed property. Further, our review of the record reveals insufficient evidence to make the necessary findings.

¶12 While the Howes refer to the trees on the disputed property as part of their tree farm, there is no residence or other buildings on the Howes' property or the disputed property, and there was no testimony about farming equipment or regular farming activities on either property. The Howes' actual activities on the property, including the two timber harvestings, past grouse hunting, and the temporary posting of trespassing signs, were insufficient to satisfy the elements of adverse possession. These activities, either alone or in combination, would not apprise a reasonably diligent owner that the Howes claimed title to Boyle's property. *See id.* They do not amount to continuous, visible occupation. *See* WIS. STAT. § 893.25(2). At best, these activities amounted to sporadic trespasses. *See Pierz*, 88 Wis. 2d at 137.

¶13 Thus, the Howes' case hinged on the circa 1950 planting and the continued presence of the trees on the disputed property to prove usual cultivation or improvement and to show continuous, open, notorious, visible, and hostile use of the property. The critical failure of the Howes' evidence was their lack of any proof that the planting of the trees was hostile to the true owner. Unless the trees were planted adversely to the true owner, their continued presence could not alone establish the elements of adverse possession. *See Lindokken v. Paulson*, 224 Wis. 470, 475, 272 N.W. 453 (1937).

¶14 Boyle testified that, based on the relationship between the Boyle and Duehr families, she believed the families cooperatively planted the trees on both families' properties. While Boyle's testimony does not prove the trees were planted cooperatively, she did not have the burden of proof. Moreover, her testimony highlights the failure of the Howes' proof.

¶15 Without knowing the circumstances surrounding the planting, one cannot determine whether the trees on the disputed property are, in essence, the Howes' trees or Boyle's trees. If they were planted as part of a cooperative effort, or pursuant to some other agreement between the property owners, the trees might simply be Boyle's trees on Boyle's property, with nothing hostile about them. On the other hand, if the Howes' predecessors in interest planted the trees without permission from, or any other agreement with, the true owners, then the trees might constitute usual cultivation hostile to the true owner.

¶16 Here, the evidence was insufficient to make a determination one way or the other. The evidence that the trees south of Kadlec Road were planted in a different direction than the trees north of the road does not clearly and positively prove the trees were planted adversely. *See Pierz*, 88 Wis. 2d at 343. It merely creates an inference that all the trees south of Kadlec Road were planted at the same time. This inference does not fill the void in the evidence discussed above.

By the Court.—Judgment reversed.

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

