RECENT COURT CASES OF INTEREST TO SURVEYORS

I. FIRST SOME LEGISLATIVE ACTIVITIES OF INTEREST:

A. An Act to amend 443.02 (3) and 443.02 (4); and to create 443.015 (1m) of the statutes; relating to: retired credential status for certain professionals holding credentials granted by the Examining Board of Architects, Landscape Architects, Professional Engineers, Designers, and Professional Land Surveyors; extending the time limit for emergency rule procedures; providing an exemption from emergency rule procedures; and requiring the exercise of rule-making authority. The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

Section 1. 443.015 (1m) of the statutes is created to read:

443.015 (1m) (a)

1. Each section of the examining board shall promulgate rules to do all of the following:

a. Allow the holder of a credential under this chapter who is at least 65 years of age or has actively maintained that credential for at least 20 years, which need not be consecutive, and who certifies that he or she has retired from and no longer engages in the practice for which he or she holds the credential to apply to the board to classify that credential as retired status.

b. Allow an individual who previously held a credential under this chapter, and failed to renew that credential prior to the renewal date, to apply to the board to renew the credential with retired status if the individual is at least 65 years of age or had actively maintained that credential for at least 20 years, which need not be consecutive, certifies that he or she has retired from and no longer engages in the practice for which he or she previously held the credential, and pays the fee under par. (d). Section 440.08 (3) (a) and (b) does not apply to the renewal of such a credential.

c. Allow the holder of a credential classified as retired status as described under subd. 1. a. or b. to apply to the appropriate section of the examining board to remove the retired status classification if he or she satisfies reinstatement requirements established by the appropriate section of the examining board by rule.

2. Rules promulgated under subd. 1. may not require a certification to be notarized.

(b) Any rules a section of the examining board promulgates under sub. (1) shall exempt a credential holder whose credential is classified as retired status under par. (a) from continuing education requirements.

(c) 1. A credential holder whose credential is classified as retired status under par. (a) may not engage in the practice for which he or she holds that credential.

2. A credential holder whose credential is classified as retired status under par. (a) may continue to use a title in connection with that credential if he or she clearly indicates to the public that he or she is retired, including by placing the abbreviation "Ret." or similar appellation after his or her title.

(d) The renewal fee for a credential holder whose credential is classified as retired status under par. (a) shall be one-half of the usual renewal fee that otherwise applies.

Section 2. 443.02 (3) of the statutes is amended to read:

443.02 (3) No Except as provided under s. 443.015 (1m) (c), no person may offer to practice architecture, landscape architecture, or professional engineering or use in connection with the person's name or otherwise assume, use or advertise any title or description tending to convey the impression that he or she is an architect, landscape architect, or professional engineer or advertise to furnish architectural, landscape architectural, or professional engineering services unless the person has been duly registered or has in effect a permit under s. 443.10 (1) (d).

Section 3. 443.02 (4) of the statutes is amended to read:

443.02 (4) No Except as provided under s. 443.015 (1m) (c), no person may engage in or offer to engage in the practice of professional land surveying in this state or use or advertise any title or description tending to convey the impression that the person is a professional land surveyor unless the person has been granted a license under this chapter to engage in the practice of professional land surveying.

Section 4 . Nonstatutory provisions.

(1) The examining board of architects, landscape architects, professional engineers, designers, and professional land surveyors may promulgate emergency rules under s. 227.24 necessary to implement this act. Notwithstanding s. 227.24 (1) (c) and (2), emergency rules promulgated under this subsection remain in effect until May 1, 2021, or the date on which permanent rules take effect, whichever is sooner. Notwithstanding s. 227.24 (1) (a) and (3), the examining board is not required to provide evidence that promulgating a rule under this subsection as an emergency rule is necessary for the preservation of the public peace, health, safety, or welfare and is not required to provide a finding of emergency for a rule promulgated under this subsection.

Section 5. Effective dates. This act takes effect on the first day of the 10th month beginning after publication, except as follows:

(1) Section 4 (1) of this act takes effect on the day after publication.

B. W.S.A. 893.89- . Action for injury resulting from improvements to real property

(1) In this section, “exposure period” means the 7 years immediately following the date of substantial completion of the improvement to real property.

(2) Except as provided in sub. (3), no cause of action may accrue and no action may be commenced, including an action for contribution or indemnity, against the owner or occupier of the property or against any person involved in the improvement to real property after the end of the exposure period, to recover damages for any injury to property, for any injury to the person, or for wrongful death, arising out of any deficiency or defect in the design, land surveying, planning, supervision or observation of construction of, the construction of, or the furnishing of materials for, the improvement to real property. This subsection does not affect the rights of any person injured as the result of any defect in any material used in an improvement to real property to commence an action for damages against the manufacturer or producer of the material.

(3)

(a) Except as provided in pars. (b) and (c), if a person sustains damages as the result of a deficiency or defect in an improvement to real property, and the statute of limitations applicable to the damages bars commencement of the cause of action before the end of the exposure period, the statute of limitations applicable to the damages applies.

(b) If, as the result of a deficiency or defect in an improvement to real property, a person sustains damages during the period beginning on the first day of the 5th year and ending on the last day of the 7th year after the substantial completion of the improvement to real property, the time for commencing the action for the damages is extended for 3 years after the date on which the damages occurred.

(c) An action for contribution is not barred due to the accrual of the cause of action for contribution beyond the end of the exposure period if the underlying action that the contribution action is based on is extended under par. (b).

(4) This section does not apply to any of the following:

(a) A person who commits fraud, concealment or misrepresentation related to a deficiency or defect in the improvement to real property.

(b) A person who expressly warrants or guarantees the improvement to real property, for the period of that warranty or guarantee.

(c) An owner or occupier of real property for damages resulting from negligence in the maintenance, operation or inspection of an improvement to real property.

(d) Damages that were sustained before April 29, 1994.

(5) Except as provided in sub. (4), this section applies to improvements to real property substantially completed before, on or after April 29, 1994.

(6) This section does not affect the rights of any person under ch. 102.

C. Vacant Land Mapping - This is under new scrutiny because of the increasing number of overlapping or conflicting vacant land surveys. The role for the Surveyor is being developed by the lobbyist for the WRA and the Homebuilders to advance land surveying and updated platting.

1. Vacant land offers are used when excited young families purchase the lot where they plan to build their ideal home, when the developer with plans for a major resort project puts his best business judgment to the test, when the avid hunter fulfills his dream of owning his own hunting land, or when a farmer has the opportunity to add another field to his farm. In each situation, there will be a WB-13 Vacant Land Offer to Purchase in play as these buyers pursue their objectives. One of the important considerations that may be addressed in the offer is whether the buyers want — or need — a map of the land they are buying, and if so, what kind of map and map features will address any pertinent concerns and requirements.

2. Unfortunately there seems to be a general perception that a survey is unnecessary in most real estate transactions. Buyers may ask why would they want or need to have a survey of the property they are purchasing. It is exponentially preferable to have a qualified land surveyor prepare a map that indicates the property boundaries and shows any potential encroachments or adverse possession concerns rather than have the real estate agent or seller attempt to show the buyer.

3. The next step could be legislation requiring updated surveys or plats. Banks and other lenders are requiring and the legislature sees a need to bring forth continuity.

4. As we know title insurance without the requisite ALTA survey will not protect the buyer from boundary line disputes and other encroachment problems is erroneous. Actually title policies exclude, as a standard coverage exception, all facts that would be disclosed by a current, comprehensive survey of the premises. In other words, title policies do not cover easements not shown in the public records, encroachments and boundary disputes unless a current map is provided.

5. In Wisconsin, all property surveys must be performed by a land surveyor registered with the Department of Safety and Professional Services (DSPS). The surveyor signs and seals the survey map and certifies that the survey is correct. There are numerous kinds of survey maps that a registered land surveyor can provide.

6. A surveyor can provide a property line survey, a site plan or a plat of survey. With a plat of survey, the owner can decide whether to include or exclude improvements such as buildings, driveways and fences. This map will show the exact boundary of the property per the legal description and any encroachments or discrepancies. Topographical surveys show elevations using spot elevations and contour lines and are useful to architects and engineers. Elevations also play a role in a Flood Plain

Map or FEMA Certification used to certify that a building or entire property is or is not located in the flood plain. Surveyors may also be able to provide a Wetland Location Survey to locate and mark the wetlands.

7. An ALTA/ACSM Survey is often required for commercial transactions but may be required for other properties as well. ALTA surveys follow the standards of the American Land Title Association and the American Congress of Surveying and Mapping, and may be necessary if the buyer wants to have certain coverage exceptions removed from the owner's title insurance policy.

D. Assembly Bill 551 and Senate Bill 501 which sought to create 30.132 of the statutes; Relating to: the presumption of riparian rights on navigable waterway never made it through the legislature. So the rule in the Supreme Court case of Movrich *v. Lobermeier*, 2018 WI 9, is still the law of Wisconsin.

1. In the case the Wisconsin Supreme Court considered how the public trust doctrine, riparian rights, and other private property rights apply to flowages.

2. The case involved a dispute between the owners of part of the bed of a flowage (the Lobermeiers) and the owners of land adjacent to the flowage (the Movriches). With respect to the Movriches' right to construct a pier, the Wisconsin Supreme Court held, in relevant part, that any rights the Movriches enjoy with respect to the flowage must be consistent with the Lobermeiers' private property rights. Relying on past cases holding that a shoreline owner's riparian rights may be limited by a deed, the Court examined the relevant deed and conveyance and found that neither instrument referred to the Movriches' riparian rights. Because the instruments were silent regarding the Movriches' riparian rights, the Court held that the Movriches had "failed to establish that they are entitled to those riparian rights that are incidental to property ownership along a naturally occurring body of water where the lakebed is held in trust by the state or that the public trust doctrine creates an exception to Lobermeiers property rights in the waterbed….

3. Current law generally requires an owner of residential real estate to provide a disclosure form, entitled a "real estate condition report," to a prospective purchaser within 10 days of acceptance of a contract of sale of the property. The real estate condition report must disclose known defects, including certain items specified in statute, and any other "condition that would have a significant adverse effect on the value of the property." A seller of vacant land must also provide a similar disclosure report to a prospective buyer. [ss. 709.02, 709.03, and 709.033, Stats.] Under current law, those real estate disclosure forms do not include a specific disclosure requirement relating to the ownership of beds of adjacent waters.

E. Shoreland zoning is the issue in a case that will soon be before the Supreme Court. The case is out of Oneida County and is known as *Anderson v. Town of Newbold* 2018 Wis AP 547

Facts: Anderson owns a lot in the town of Newbold. The lot has approximately 358 feet of shoreland frontage on Lake Mildred. In 2016, Anderson submitted a proposed certified survey map to the town, which detailed dividing the lot into two lots with widths of 195 and 163 feet, respectively. The town board rejected Anderson's proposed land division because it did not comply with the town's subdivision ordinance, which requires a minimum lot width of 225 feet at the ordinary high water mark on Lake Mildred.

Issue: Whether a town has the authority, under Wis. Stat. § 236.45, to regulate lot sizes in shoreland areas through its subdivision regulations, despite the fact that the legislature has prohibited towns from enacting shoreland zoning regulations.

Why this case is important because it will resolve the issue of whether local municipalities specifically towns can regulate development density in shoreland areas through their land division authority would be in direct conflict with the legislature's enactments that include (a) prohibiting towns from engaging in shoreland zoning, and (b) establishing uniform lot size requirements in unincorporated shoreland areas. Moreover, this case could open the flood gates to towns and counties ignoring the lot-size requirements in shoreland zoning, establishing their own lot size requirements in shoreland areas through their subdivision regulations.

F. Recent cases of interest:

2017 WI App 14

DR. RAMANANDA SHETTY, Plaintiff-Respondent, v. DR. GANESH PULLA, Defendant-Appellant.

Appeal No. 2015AP2203.

Court of Appeals of Wisconsin, District II.

January 11, 2017.

Robert I. DuMez, for Ramananda Shetty, Plaintiff-Respondent.

John Michael McTernan, for Ramananda Shetty, Plaintiff-Respondent.

Piermario Bertolotto, for Ganesh Pulla, Defendant-Appellant.

APPEAL from a judgment of the circuit court for Kenosha County, Cir. Ct. No. 2014CV250, DAVID M. BASTIANELLI, Judge. *Affirmed.*

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).

PER CURIAM.

¶1 Dr. Ganesh Pulla tore down a fence erected by his neighbor, Dr. Ramananda Shetty. Shetty sued Pulla seeking damages for destruction of the fence along with exemplary damages under WIS. STAT. § 895.446(3) (2013-14).[1] Shetty prevailed in the trial to the circuit court on his property damage claim. The court dismissed Pulla's counterclaim for damage to his pool drain pipe and other damages under § 895.446. We conclude that the evidence was sufficient and affirm the judgment awarding Shetty damages under § 895.446(3)

¶2 WISCONSIN STAT. § 895.446 creates a civil remedy for damage to property including conduct that would also be deemed criminal damage to property under WIS. STAT. § 943.01. Section 943.01 bars intentionally damaging another's property. The burden is on the party claiming the property damage to prove a violation of § 943.01 "by a preponderance of the credible evidence." Sec. 895.466(2).[2]

¶3 After a court trial, the court made the following findings. In May 2013, relying upon a 1992 survey, Shetty procured a permit from the Village of Pleasant Prairie to erect a fence. The fence was erected in June. Pulla demanded that Shetty cease building the fence until legal issues could be resolved. The court found that Pulla's demand was not clear on the question of whether Pulla was claiming that Shetty was erecting the fence on Pulla's property. Shetty testified that he did not receive Pulla's demand. Shetty procured a new survey of the property in July 2013, and that survey confirmed that Shetty's new fence was located on his property. In August, Pulla demanded that Shetty remove the fence. Shetty testified that he did not receive this demand until the middle of September when he returned from abroad. When he returned to his property, Shetty found that Pulla had torn down the fence and piled the pieces in Shetty's yard.

¶4 With regard to his counterclaim for property damage, Pulla testified that his pool drainage pipe was cut when the fence was erected. However, Pulla offered no evidence about the cost of repairing the pipe. Shetty testified that the fence workers encountered the pipe, but, believing it was an old pipe, cut and removed portions of the pipe to erect the fence. There was no evidence that Shetty directed or requested any activity relating to the pipe or knew at the time that the workers had decided to cut and remove portions of the pipe. The court concluded that Pulla did not meet his burden to show that Shetty intentionally damaged his property.

¶5 The circuit court concluded that Shetty met his burden to show that Pulla was aware that Shetty owned the fence and Pulla intentionally removed and destroyed the fence. In so concluding, the court considered the evidence in light of the elements of criminal damage to property, WIS JI—CRIMINAL 1400: Pulla intentionally caused damage to property belonging to Shetty without Shetty's consent and with the knowledge that the property belonged to Shetty and that Shetty did not consent to the damage.

¶6 The court also addressed the location of the fence. Each party presented testimony from a surveyor. The court found that Shetty's surveyor was more credible than Pulla's surveyor, and that Pulla's surveyor used a flawed survey technique that relied upon misplaced boundary monuments. Shetty's surveyor testified that based on his survey, the fence was located on Shetty's property. The court found that Shetty's fence and Pulla's damaged pool drainage pipe were both on Shetty's property.

¶7 Because Pulla did not meet his burden of proof, the court dismissed his property damage counterclaim. Because Shetty met his burden of proof, the court awarded Shetty damages.[3]

¶8 On appeal, Pulla challenges the sufficiency of the evidence that he knew the fence belonged to Shetty and that Shetty did not consent to having his fence damaged. Pulla procured a survey before he had the fence removed. The survey revealed that portions of the fence were on Pulla's property.[4] Therefore, Pulla argues that he made an honest mistake of fact and law when he hired workers to remove the fence he believed was on his property. Pulla further believed that portions of the allegedly encroaching fence belonged to him, which permitted him to remove those encroaching portions.

¶9 We accept the findings of fact made by a circuit court sitting as the trier of fact unless those findings are clearly erroneous. WIS. STAT. § 805.17(2). The circuit court assesses the credibility of the witnesses, weighs the evidence, and draws inferences from the evidence. *Rivera v. Eisenberg*, 95 Wis. 2d 384, 388, 290 N.W.2d 539 (Ct. App. 1980).

¶10 At trial, Pulla admitted that he knew the fence belonged to Shetty. Even if Pulla relied upon his surveyor in deciding to remove the fence, that survey only showed that portions of the fence, not the entire fence, encroached upon Pulla's property.[5] While Pulla claims he acted mistakenly because he believed that the fence was on his property, the circuit court was not required to accept Pulla's characterization of his state of mind or his conduct, particularly in light of the fact that Pulla's own surveyor indicated that only part of the fence encroached on Pulla's property.[6]

¶11 The court's finding that Pulla knew the fence belonged to Shetty and that Pulla intentionally removed and destroyed the fence are not clearly erroneous based on this record. The court's determination that Pulla did not prove his property damage counterclaim is also supported by the record before us.

By the Court.—Judgment affirmed.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] On appeal, Pulla does not dispute the award of treble damages under WIS. STAT. § 895.446(3)(c).

[3] Pulla does not contest the calculation of the damages.

[4] At trial, the court deemed Pulla's surveyor's opinion regarding the property boundary not credible and accepted the opinion of Shetty's surveyor that Shetty's fence was entirely on Shetty's property.

[5] The legal significance of this information, if any, is not before us.

[6] Pulla argues that because portions of the fence were on his property, he had a right to claim those portions and exercise control over them. We need not address this argument because we have affirmed the circuit court's finding that the fence was entirely on Shetty's property.

2019 WI App 33

HAROLD EICK, JANICE EICK, ROBERT KUENZI, VICKY KUENZI, SCOTT STROBEL, STACY STROBEL, FRANCIS SULLIVAN, MARY SULLIVAN, BARBARA A. WINTER AND PHILIP ZIMMER, Plaintiffs-Respondents, MARK MAYER AND KATHY MAYER, Intervening Plaintiffs-Respondents, v. CHRISTOPHER GORECKI AND PATRICIA LYNN GORECKI, Defendants-Appellants.

Appeal No. 2018AP142.

Court of Appeals of Wisconsin, District II.

May 8, 2019.

Timothy H. Posnanski, for Harold Eick, Janice Eick, Robert Kuenzi, Vicky Kuenzi, Scott Strobel, Stacy Strobel, Francis Sullivan, Mary Sullivan, Barbara A. Winter and Philip Zimmer, Plaintiffs-Respondents.

Matthew R. Jelenchick, for Mark Mayer and Kathy Mayer, Intervening Plaintiffs-Respondents.

Donald J. Murn, Michelle E. Martin, Tracy J. Murn, for Christopher Gorecki and Patricia Lynn Gorecki, Defendants-Appellants.

APPEAL from a judgment of the circuit court for Washington County: Cir. Ct. No. 2015CV541. JAMES G. POUROS, Judge. *Affirmed.*

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

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).

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

PER CURIAM.

¶1 Christopher and Patricia Gorecki (hereafter Gorecki) appeal from a declaratory judgment. The case arises from a dispute about piers serving adjoining lakefront properties and whether the circuit court erred in using the coterminous method to apportion the parties'

riparian boundaries for purposes of placing their piers. We conclude that the circuit court properly exercised its discretion. We affirm.

¶2 The properties at issue adjoin each other along the shoreline of Big Cedar Lake in West Bend, Wisconsin. Gorecki owns the property to the south. The property to the north, Outlot 1, is owned by a group of owners (the Outlot 1 owners) who have the right to access the lake and Outlot 1's associated pier. The Outlot 1 owners claimed that Gorecki's pier encroached upon their riparian rights and interfered with the use of their own pier. In the circuit court, each party advocated for a different method of determining the riparian boundaries and placement of their respective piers. The Outlot 1 owners urged the circuit court to use the coterminous method; Gorecki urged the circuit court to use the extended-lot-line method.[1] After a court trial, the circuit court made credibility determinations and findings of fact and selected the coterminous method. Gorecki appeals.

¶3 Lakefront property owners have riparian rights that extend from the property line to the line of navigability.[2] *Manlick v. Loppnow,* 2011 WI App 132, ¶13, 337 Wis. 2d 92, 804 N.W.2d 712. Riparian rights confer "exclusive possession [of the waterfront] to the extent necessary to reach navigable water, to have reasonable ingress and egress to navigable water and to have reasonable access for bathing and swimming." *Id.* (alteration in original; citation omitted). The method "for establishing the extension of boundaries into a lake between contiguous shoreline properties," is determined by the circuit court based upon "what is fair and equitable under the circumstances." *Id.,* ¶¶14, 16. The decision about which method to use is within the circuit court's discretion. *Id.,* ¶¶19, 23.

¶4 In its decision, the circuit court considered testimony from four witnesses: Scott Strobel and Mark Mayer, two of the Outlot 1 owners, Keith Kindred, the surveyor retained by the Outlot 1 owners, and Christopher Gorecki. Exercising its role as "the ultimate arbiter of the credibility of the witnesses and the weight to be given to each witness's testimony," *State v. Peppertree Resort Villas, Inc.,* 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345, the circuit court found that Strobel was more credible than Gorecki. The court found that Strobel provided "concrete information" to the court, and he was more familiar with the history of Big Cedar Lake, the two properties at issue, and the area near the two properties. Strobel's familiarity predated by many years his purchase of the property that made him one of the Outlot 1 owners and also predated the disputes that arose in connection with the placement of Gorecki's pier in 2013, the year Gorecki purchased lakefront property. In contrast, the circuit court found that Gorecki gave either evasive answers or stated that he did not know or could not recall.

¶5 The circuit court observed that surveyor Kindred had also provided expert opinion in *Manlick.* Here, the surveyor testified that the coterminous method should be used when the shoreline is curved or irregular. He testified that other property owners in the area were using the coterminous method to place their piers. For an explanation of the coterminous and extended-lot-line methods, the circuit court relied upon the surveyor's testimony and resources compiled by the Wisconsin Department of Natural Resources, which were exhibits at the court trial.

¶6 The circuit court selected the coterminous method for the following reasons: Big Cedar Lake's shoreline is curved and irregular; the surveyor's testimony was credible; "the history

of the subject properties is that the coterminous method has basically been used for the piers serving them," based on the surveyor's testimony and exhibit 26 (a map of the parties' riparian zones created by surveyor Kindred); the other property owners in the area are using the coterminous method; the coterminous method gives the "property owners their fair share in order to be able to use the lake and to reach the navigable waters;" and Gorecki "will have ample ability to place [a] pier within [Gorecki's] riparian zone by shortening [the] pier and locating it further south."

¶7 On appeal, Gorecki argues that the circuit court misused its discretion when it selected the coterminous method. We disagree. The circuit court considered many of the same factors considered in *Manlick.* In *Manlick,* the circuit court considered "`the historical use of the various lots, the layout of the land, the layout of the riparian areas that historically have been in place,' the [uncontradicted] experts' testimony, and a DNR handout on pier placement." *Manlick,* 337 Wis. 2d 92, ¶¶24-25. The circuit court in *Manlick* selected the coterminous method after considering "the curves that are involved, [that is,] the shape of the shore line, the best approach to maintain fairness among all property owners ... is the coterminous method." *Id.,* ¶24 (alteration in original). On appeal, the *Manlick* court deemed the circuit court's decision making a proper exercise of discretion. *Id.* Here, in a proper exercise of its discretion, the circuit court considered the same factors in selecting the coterminous method.

¶8 Gorecki argues that the surveyor used an inaccurate map to lay out the riparian boundaries under the coterminous method. Gorecki did not offer any expert testimony to contradict either the surveyor's map or the surveyor's opinions. WIS. STAT. § 907.02(1) (2017-18).[3] The circuit court found the surveyor's uncontradicted testimony credible. This determination was for the circuit court. *Peppertree Resort Villas,* 257 Wis. 2d 421, ¶19.

¶9 Gorecki argues that the circuit court mistakenly found Strobel's testimony credible. The credibility determination was for the circuit court to make, and we do not ignore that determination on appeal. *Id.*

¶10 Gorecki argues that the circuit court erroneously considered Strobel's longer association with Big Cedar Lake in selecting a method for determining riparian boundaries. The court considered numerous appropriate factors before selecting the coterminous method. We reject Gorecki's attempt to cast Strobel's testimony as determinative.

¶11 Gorecki complains that the circuit court erroneously considered the size of Big Cedar Lake and that his property is occasionally rented to others. The record does not convince us that in connection with selecting the coterminous method, the circuit court placed any weight on either of these points.[4]

¶12 The rest of Gorecki's arguments are premised upon challenging the uncontradicted surveyor's testimony, including his methodology,[5] and the circuit court's credibility determinations. We have already rejected all of these grounds for challenging the circuit court's ruling. Therefore, we do not address the balance of Gorecki's arguments.

¶13 Gorecki argues that the circuit court's riparian boundary determination cannot be implemented. For that reason, Gorecki asks us to remand to the circuit court for further

determination. We decline to remand as the court's ruling on the coterminous method appropriately addressed the issue of Gorecki's placement of the pier.

¶14 We affirm the circuit court's selection of the coterminous method as the means by which the parties' riparian rights, including pier placement, should be determined. For that reason, we need not consider Gorecki's arguments that the circuit court should have chosen the extended-lot-line method. Our function is to review the circuit court's exercise of discretion, not to exercise that discretion on the circuit court's behalf. *Vlies v. Brookman,* 2005 WI App 158, ¶33, 285 Wis. 2d 411, 701 N.W.2d 642.

By the Court.—Judgment affirmed.

[1] *Manlick v. Loppnow,* 2011 WI App 132, ¶¶14-15, 19, 337 Wis. 2d 92, 804 N.W.2d 712 (methods for establishing riparian boundaries discussed).

[2] The line of navigability separates "the parties' riparian area from navigable waters." *See Manlick,* 337 Wis. 2d 92, ¶13 n.2.

[3] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

[4] Gorecki does not argue that he objected on relevance or other grounds to evidence adduced at the court trial. We will not search the record for any such objections. *Keplin v. Hardware Mut. Cas. Co.,* 24 Wis. 2d 319, 324, 129 N.W.2d 321 (1964).

[5] Gorecki does not establish that he was qualified as an expert to opine regarding the accuracy of the surveyor's map or the application of the coterminous or extension methods to determine the parties' riparian rights. The circuit court's determination that the surveyor was credible controls. *State v. Peppertree Resort Villas, Inc.,* 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345.

2019 WI App 21

LEITH HOLDINGS, LLC, Plaintiff-Appellant,
v.
WISCONSIN POWER AND LIGHT COMPANY, Defendant-Respondent.

Appeal No. 2017AP1740.

Court of Appeals of Wisconsin, District II.

March 20, 2019.

Erik Samuel Olsen, for Leith Holdings, LLC, Plaintiff-Appellant.

Erik H. Monson, for Wisconsin Power and Light Company, Defendant-Respondent.

APPEAL from an order of the circuit court for Walworth County, Cir. Ct. No. 2016CV242, DAVID M. REDDY, Judge. *Affirmed.*

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

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

PER CURIAM.

¶1 Leith Holdings, LLC appeals from a circuit court order granting summary judgment to Wisconsin Power & Light Company (WP&L). Leith claimed that WP&L inversely condemned its property by placing utility infrastructure (electric transformers and power lines) on what Leith claimed were private roads on its property. We agree with the circuit court that WP&L's utility infrastructure was placed on public roads as shown in an 1894 recorded plat because that plat made a statutory dedication to the public of the roads at issue. We affirm.

¶2 The facts are essentially undisputed. Leith's property is located in the Village of Williams Bay. In 2013, Leith recorded a deed to eight of fourteen lots in Hanson's Addition to Williams Bay. Hanson's Addition was created by a plat recorded on March 26, 1894 (the 1894 Plat). Leith's deed also purported to convey areas on the plat identified as Bay View Avenue, the eastern thirty-three feet of Hanson Street, and an alley (collectively "the roads"). In March 2014, Leith discovered that WP&L had placed electric transformers and power lines on the roads. The dispute focuses on whether the roads were dedicated to the public by the 1894 plat or were private property included within the 2013 conveyance to Leith and upon which WP&L could not place utility infrastructure without recognizing Leith's private property rights.

¶3 On summary judgment, the circuit court agreed with WP&L that the 1894 plat dedicated the roads to the public. The court concluded that the 1894 plat substantially complied with the applicable statutes and demonstrated the requisite intent to dedicate the roads to the public. Leith appeals.

¶4 We review the circuit court's grant of summary judgment de novo, and we apply the same methodology employed by the circuit court. *Brownelli v. McCaughtry*, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). "We independently examine the record to determine whether any genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law." *Streff v. Town of Delafield*, 190 Wis. 2d 348, 353, 526 N.W.2d 822 (Ct. App. 1994).

¶5 As stated, the material facts are essentially undisputed. We turn to the legal significance of the 1894 plat. The interpretation of a written instrument presents a question of law that we decide independently of the circuit court. *Cohn v. Town of Randall*, 2001 WI App 176, ¶5, 247 Wis. 2d 118, 633 N.W.2d 674. As a threshold matter, we note that Leith concedes that the 1894 plat is not defective. Therefore, the issue is whether the recorded plat was sufficient to make a statutory dedication of the roads.

¶6 Roads can be dedicated for public purposes. *Id.,* ¶6. "`Dedication is defined to be the act of giving or devoting property to some proper object, *in such a way as to conclude the*

owner.'" *Id.* (citation omitted). "Statutory dedication consists in whatever conduct is prescribed by statute, which usually requires the execution and filing of a plat in accordance with local law." *Id.*

¶7 WISCONSIN STAT. § 2263 (1889)[1] applied to the 1894 plat. That statute provided:

When any map shall have been made, certified, signed, acknowledged and recorded as above in this chapter prescribed, every donation or grant to the public or any individual or individuals, religious society or societies, or to any corporation, marked or noted as such, on said plat or map, shall be deemed in law and in equity a sufficient conveyance to vest the fee simple of all such parcel or parcels of land as are therein expressed, and shall be considered to all intents and purposes, a general warranty against such donor or donors, their heirs and representatives, to the said donee or donees, grantee or grantees, for his, her or their use, for the uses and purposes therein expressed and intended, and no other use or purpose whatever; and the land intended to be for the streets, alleys, ways, commons or other public uses as designated on said plat, shall be held in the corporate name of the town, city or village in which such plat is situated, in trust to and for the uses and purposes set forth, expressed and intended. Such map or the record thereof, or a certified copy of such record, shall be presumptive evidence of the truth of the facts therein stated in accordance with the provisions of this chapter.

¶8 As stated, the parties agree that the 1894 plat complied with the statutes in effect at the time it was filed with regard to its required content and the manner in which it was recorded. WIS. STAT. §§ 2260-2261. The plat was accompanied by the required certificate of the surveyor. Section 2261. The 1894 plat identifies what is now Geneva Street as a public highway.[2] The plat does not further describe as either public or private the other roads appearing upon the plat. Leith argues that the foregoing was insufficient to work a statutory dedication of the roads. We agree with the circuit court and WP&L that the foregoing was sufficient to work a statutory dedication.

¶9 We have considered the extensive briefing in this appeal.[3] The following cases lead us to conclude that the roads appearing on the 1894 plat were statutorily dedicated to the public: *McKenzie v. Haines,* 123 Wis. 557, 102 N.W. 33 (1905), *City of Superior v. Northwestern Fuel Co.,* 164 Wis. 631, 161 N.W. 9 (1917), and *Cohn.*

¶10 In *McKenzie,* the issue was whether the property owner demonstrated via a deed an intent to dedicate a street for public use. *McKenzie,* 123 Wis. at 560-61. No plat was involved. Nevertheless, in discussing the manner in which a public highway can be created, the court observed that "[a] public highway may be created by the making and recording of a plat, in conformity with ch. 101, Stats. 1898, with the highway or street indicated thereon, and when this is done no act on the part of the public is necessary to make it a public highway." *Id.* at 560 (citing WIS. STAT. § 2263).

¶11 In *Superior,* the court determined that the plat and surveyor's certificate, taken together, constituted compliance with the statute governing statutory dedication. *Superior,* 164 Wis. at 639-40 (discussing WIS. STAT. §§ 2260-61).

¶12 The 1894 plat complied with the statutes in effect at the time it was filed. *Id.* The recorded 1894 plat indicated the plat creator's intent or "animus dedicandi"[4] to dedicate public roads and signifies the Village of Williams Bay's acceptance of the dedicated roads. *Cohn*, 247 Wis. 2d 118, ¶6 ("Intent to dedicate to the public use is an essential component of . . . statutory . . . dedication, since the municipality cannot accept that which is not offered in the first instance."). The plat, having been made and recorded with the roads indicated, worked a statutory dedication of the roads. *McKenzie*, 123 Wis. at 560.

¶13 We find further support for our conclusion that the 1894 plat worked a statutory dedication in the fact that the plat was recorded in the register of deeds. Recording the plat gave notice to the public of matters affecting the land. *See* *Pulera v. Town of Richmond*, 2017 WI 61, ¶25, 375 Wis. 2d 676, 896 N.W.2d 342.

¶14 Leith argues that the unlabeled roads on the plat cannot be deemed dedicated to the public.[5] The presence or absence of a label on the roads is not dispositive. The statutory dedication only required compliance with WIS. STAT. §§ 2260-2263. *Superior*, 164 Wis. at 639-40; *McKenzie*, 123 Wis. at 560. By designating roads on the 1894 plat and recording the plat and the surveyor's certificate, the plat maker made a statutory dedication of the roads.

¶15 Leith claims that its deed included the eastern thirty-three feet of Hanson Street. Hanson Street appears on the 1894 plat. Our holding that the 1894 plat worked a statutory dedication of the roads appearing on the plat disposes of this claim.

¶16 The status of the 1894 plat has not changed since it was filed. The plat worked a statutory dedication to the public of the roads identified on it. We affirm the circuit court's dismissal of Leith's claims against WP&L arising out of Leith's erroneous view that the roads were private property subject to a conveyance by deed.

By the Court.—Order affirmed.

[1] All references to the Wisconsin Statutes are to the 1889 version unless otherwise noted.

[2] In the plat, the public highway is denominated "Williams Bay and Lake Geneva Public Highway."

[3] We have considered all of the arguments in the briefs. However, we only discuss those arguments necessary to our decision. *See* *State v. Waste Mgmt. of Wis., Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) (we are not bound to the manner in which the parties have structured or framed the issues). Arguments not mentioned or discussed are deemed rejected. *Id.*

[4] *Eastland v. Fogo*, 66 Wis. 133, 135, 27 N.W.2d 159 (1886).

[5] As stated in footnote 2, one road on the 1894 plat is labeled a public highway. The other roads are not labeled either private or public on the plat.

2019 WI App 65

JOSEPH EBERT, DALE EBERT, ARLIS EBERT AND RONALD C. EBERT, Plaintiffs-Appellants, v. INNSWOOD WHITETAILS, LLC AND FRANK B. RASCH, Defendants-Respondents.

Appeal No. 2018AP2459.

Court of Appeals of Wisconsin, District IV.

October 31, 2019.

Daniel C. Arndt, for Joseph Ebert, Dale Ebert, Arlis Ebert and Ronald C. Ebert, Plaintiffs-Appellants.

James A. Quartemont, for Innswood Whitetails, LLC and Frank B. Rasch, Defendants-Respondents.

APPEAL from a judgment of the circuit court for Monroe County, Cir. Ct. No. 2016CV76, MARK L. GOODMAN, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Blanchard, Kloppenburg and Graham, JJ.

Not recommended for publication in the official reports.

GRAHAM, J.

¶1 This is an appeal of a final judgment resolving property disputes between the owners of two adjacent parcels of land in Monroe County. The parties dispute the location of a portion of an easement, as well as the width of the entire easement. They also dispute the boundary line between their parcels.

¶2 Joseph, Dale, Arlis, and Ronald Ebert (the "Eberts") contend that the circuit court erred by "relocating" the southern terminus of the eastern fork of the easement (which we refer to as the "disputed portion"), and by "limiting" the entire easement's width. We conclude that the court did not erroneously exercise its discretion when it established the location of the disputed portion of the easement and the entire easement's width.

¶3 The Eberts also contend that the circuit court erred by relieving Innswood Whitetails, LLC and Frank Rasch (collectively, "Rasch") of their unambiguous stipulation that the "historic fence line" would be the property boundary. We agree that the court erred by diverging from the unambiguous stipulation between the parties when it set the boundary line between the parcels.

¶4 Accordingly, we affirm in part, reverse in part, and remand to the circuit court for proceedings consistent with this opinion.

Background

¶5 This case has a lengthy and involved procedural history. There were two separate trials, issues that appeared to have been resolved were later revived, key witnesses testified on multiple occasions, and the circuit court ultimately issued three sets of findings of fact and conclusions of law. For ease of reading, we summarize the most pertinent facts here and then present additional evidence, testimony, and findings as needed in the discussion section below.

¶6 This dispute concerns two adjacent parcels of land in Monroe County. Innswood owns the parcel to the north (the "Rasch Property"), and Innswood's sole members, Frank Rasch and his wife, live on the property. The Eberts own the wooded parcel to the south (the "Ebert Property"), and the Ebert family has used it for grazing cattle, hunting, picnics, and, most pertinent to this appeal, logging.

¶7 Both properties were originally part of a single parcel. In 1944, the Eberts' predecessors-in-title divided the property in two and sold the northern parcel to Rasch's predecessors-in-title. As part of the sale, the Eberts' predecessors forever reserved "the right of ingress and egress over and across the [Rasch Property] by vehicle, on foot, team and otherwise" for themselves and "their heirs, administrators, and assigns."

¶8 The deed did not identify the location of this easement, but at some point after the sale, the Eberts' predecessors established its general location through use. For the reader's reference, we attach "Exhibit No. 3," an aerial photograph admitted during the first trial that contains (among other things) a rough sketch of the easement's location as established by use. The easement has the appearance of an upside-down Y. Starting at the north of the Rasch Property, there is a single route of travel that follows Rasch's driveway, passes between Rasch's home and outbuildings, and reaches a three-way junction, or Y intersection. One branch turns to the east, travels southeast through pastures and fields, and eventually reaches the eastern portion of the Ebert Property. (The precise location of the terminus of this eastern branch is one subject of this appeal.) The western branch travels west and southwest from the junction, eventually reaching the western portion of the Ebert Property.

¶9 The Eberts grew up using the Ebert Property and eventually inherited it. Rasch purchased the Rasch Property in 1987. Starting in 2005 or 2006, Rasch began to take actions that interfered with the Eberts' use of their easement. Among other things, Rasch put up a gate and attempted to change the path of the easement so that it would not pass near his house. The Eberts objected to Rasch's proposed change.

¶10 In addition to their dispute over the easement, the parties also disputed the boundary line between their parcels. According to the 1944 deed, the property line consists of straight lines. The line starts at the parties' shared western boundary, travels due east, takes a 90 degree turn to the north, and then takes a 90 degree turn to the east until it hits the shared eastern boundary. The parties have not, however, consistently recognized the deeded line

as their boundary. Historically, there was a fence between the parcels, and the parties and their predecessors treated at least some portions of that curving fence line as the boundary. Exhibit No. 3 depicts the straight lines from the deed and the curved line that the Eberts contend is the historical fence line.

¶11 The Eberts initiated this lawsuit in 2016. Just prior to a scheduled bench trial, the parties entered into a stipulation to resolve the boundary dispute. They stipulated that the "boundary will be placed in the location of the historic fence line," and that "in general," the location of the historic fence line was "as depicted on Exhibit No. 3." The parties further stipulated that a surveyor "will establish . . . the location of the historic fence line." Given their stipulation about the boundary, the parties agreed that the sole remaining disputes for trial related to the easement.

¶12 After the first trial, the circuit court determined that the location of the easement had been established by use "in the area described as the historic easement location on Exhibit #3" and that the court "cannot relocate the easement." It further determined that Rasch had intentionally interfered with the easement and ordered him to stop doing so. Finally, the court permitted the Eberts to "obtain a survey to obtain a description for the easement," and it retained jurisdiction of the matter "to amend this judgment to include such legal description." The court did not address the location of the boundary because the parties believed that this issue had been resolved by way of the stipulation quoted above.

¶13 After the first trial, the parties hired a surveyor, Gary Dechant, to provide legal descriptions of both the easement and the boundary. Dechant surveyed the established easement and the existing fence line (the "Dechant Survey"), and he prepared a legal description for quit claim deeds, which would establish ownership on both sides of the boundary. These deeds were never executed because the parties disputed the easement's width and Rasch refused to sign them. The circuit court scheduled a second trial to address the dispute about the easement's width.

¶14 At the outset of the second trial, Rasch informed the circuit court that two additional disputes needed to be addressed, one regarding the easement and the other regarding the boundary line. First, Rasch asked the court to address the location of the southern terminus of the eastern branch (the "disputed portion") of the easement, where, according to Dechant, there was no evidence of an existing traveled way. Second, Rasch asked the court to address the location of the property boundary on the western side of the parcels where, according to Rasch, there was no evidence of a historic fence line. The Eberts argued that these disputes had already been decided in the first trial or by stipulation, but the court agreed to hear the evidence.

¶15 Regarding the location of the disputed portion of the easement, the Eberts argued that the centerline should pass through the center of Rasch's alfalfa field. Rasch argued that the centerline should pass south of the field.

¶16 Regarding the boundary, the Eberts presented the Dechant Survey, which depicts a line labeled "EXISTING FENCING" that appears to essentially track the hand-sketched "location of historic fence line" depicted on Exhibit No. 3. Rasch disputed the existence of any historic fence line to the west of a corner post noted on the Dechant Survey on the

basis that the fencing that Dechant found west of the corner post differed in quality from the historic fence line to the east of the corner post. Rasch proposed that east of the corner post, the boundary should track the historic fence line, but that in the absence of a proven fence line west of the corner post, the boundary should track the line created by the deed.

¶17 The circuit court did not make any rulings at the close of the second trial. After the parties submitted written closing arguments, the court signed the proposed findings of fact, conclusions of law, and amended judgment submitted by Rasch without amendment or supplementation.[1]

¶18 The circuit court determined that, since there was no evidence of an existing traveled way at the disputed portion of the easement, it would place the disputed portion in the location that would not bisect Rasch's alfalfa field. It further determined that the entire easement would be 12 feet wide, consistent with the width of the widest portion of the existing traveled way, and that such width was sufficient for ingress and egress including for logging. Finally, turning to the boundary line, the court concluded that there was insufficient evidence of the historic fence line west of the corner post and adopted Rasch's proposal.

Discussion

¶19 The Eberts contend that the circuit court erred by "relocating" the disputed portion of the easement's eastern branch to Rasch's preferred route, by "limiting" the width of the easement to 12 feet (which they argue is too narrow to accommodate modern logging equipment), and by determining that the property boundary would follow the deed line on the west end of the property. We address the location and width of the Eberts' easement over the Rasch Property in Section I, and then in Section II, we turn to the boundary dispute.

I. The Easement

¶20 We now explain why we conclude that the circuit court did not err by "relocating" the disputed portion of the easement or by "limiting" the width of the entire easement to 12 feet. On the first issue, contrary to the Eberts' arguments, the court did not "relocate" the disputed portion of the easement; instead, having found that there was no evidence of an existing traveled way on the disputed portion of the easement, the court properly used its equitable authority to set its location. On the second issue, the court found that a 12 foot easement would be sufficient to accommodate logging (the historical use requiring the greatest width), and this finding is not clearly erroneous.

¶21 We begin our analysis by summarizing the applicable standards for determining the location and width of an express easement, and then we apply these principles in turn to the Eberts' arguments about location and width.

¶22 "An easement is an interest in property that is in another's possession." *Berg v. Ziel,* 2015 WI App 72, ¶13, 365 Wis. 2d 131, 870 N.W.2d 666. It creates two distinct property interests, the dominant estate and the servient estate. *Id.* The dominant estate

benefits from the privileges granted by the easement, and the servient estate must allow the dominant estate to exercise those privileges. *Id.*

¶23 The easement in this case is an "express easement," meaning that it was created by a written grant in a deed. *Id.,* ¶14. Courts resolve disputes about the location and width of an express easement by interpreting the terms of the deed. *Id.* As with the interpretation of most written instruments, a court's goal is to ascertain the parties' intent. *Id.*

¶24 The location and width may be expressly stated in the deed, and if the deed is unambiguous, the court will look no further. *Konneker v. Romano,* 2010 WI 65, ¶23, 326 Wis. 2d 268, 785 N.W.2d 432. "When an easement is granted without defined limits, the location may be subsequently fixed," either by "an express agreement of the parties or by an implied agreement arising out of the use of the easement by the grantee and acquiescence on the part of the grantor...." *Berg,* 365 Wis. 2d 131, ¶16 (quoting 25 Am. Jur. 2d *Easements and Licenses in Real Property* §§ 54-56 (2014)).

¶25 If the precise location or width of the easement is not expressly defined in the deed, then the court will look to extrinsic evidence, including the parties' subsequent agreements and conduct, as evidence of the parties' intent. *See id.* ¶16; *Spencer v. Kosir,* 2007 WI App 135, ¶¶13-14, 301 Wis. 2d 521, 733 N.W.2d 921 (affirming the circuit court's determination of location and width of an easement based on extrinsic evidence); *see also Berg,* 365 Wis. 2d 131, ¶14 ("[T]he practical construction given to it by the acts of the parties is of great force in determining its construction."). When the court looks to extrinsic evidence to interpret ambiguous language in a deed, "the intent behind the language presents a question of fact." *Konneker,* 326 Wis. 2d 268, ¶23. A circuit court's factual findings will be affirmed unless they are clearly erroneous. WIS. STAT. § 805.17(2) (2017-18).

A. Easement Location

¶26 We now address the location of the disputed portion of the easement. The Eberts argue that the circuit court erred by "relocating" the disputed portion of the easement. As the Eberts correctly point out, the general rule is that a court cannot relocate an established easement without the consent of all interested parties.[2] In *Berg,* for example, an existing access road had served as an easement's path for decades, and then the circuit court relocated the easement over the servient estate's objection. *Berg,* 365 Wis. 2d 131, ¶1. On appeal, we concluded that the court did not have authority to set a new location because "[u]nder any reasonable view of the evidence," the parties had already "selected the existing access road as the easement's location." *Id.,* ¶¶17-19.

¶27 However, in those instances where the location of an easement is not defined—either in the deed or by use or agreement—"a reasonably convenient and suitable way is presumed to [have been] intended." *Atkinson v. Mentzel,* 211 Wis. 2d 628, 641, 566 N.W.2d 158 (1997) (quoting *Werkowski v. Waterford Homes, Inc.,* 30 Wis. 2d 410, 417, 141 N.W.2d 306 (1966)). In such a situation, the court has the equitable power "to affirmatively and specifically determine its location, after considering the rights and interests of both parties." *Spencer,* 301 Wis. 2d 521, ¶13; *see also Atkinson,* 211 Wis. 2d at 641-42. "[T]he reasonable convenience of both parties is of prime importance, and the court "cannot act

arbitrarily and must proceed with due regard for the rights of the parties." *Atkinson,* 211 Wis. 2d at 642.

¶28 We conclude that *Berg*'s rule against relocating an easement does not govern the outcome in this case because the circuit court did not "relocate" any portion of an easement path that had been identified in the deed or established by use. Since the deed was silent as to the easement's location, the court properly looked to extrinsic evidence, and where there was evidence of an existing traveled way, the court followed that path. For the disputed portion of the easement, however, the court found that there was "no evidence of an existing traveled way," and we conclude that this finding is not clearly erroneous. It is consistent with the testimony of the surveyor, Dechant, who testified that "[o]n that southerly, very southerly end of the easement, it wasn't very clear. There was no clear cut path that anyone was using." And the finding of fact is also consistent with the testimony of Ron Ebert, who testified that the location of the disputed portion had changed over the years.[3]

¶29 Since there was no evidence of an existing traveled way at the disputed portion, there was nothing for the circuit court to move or relocate. Instead, in the absence of evidence of an existing traveled way, the court properly used its equitable authority to set the location of the disputed portion of the easement. *See* *Berg,* 365 Wis. 2d 131, ¶17-19 (declining to relocate an easement when conclusive evidence established its location); *Atkinson,* 211 Wis. 2d at 641-42 (noting that in the absence of a defined location, a court may determine an easement's location upon consideration of the equities). The court considered the alternative paths proposed by Rasch and the Eberts and their relative rights and interests, and it ultimately selected the location proposed by Rasch.

¶30 The Eberts contend that Rasch's preferred path "could not have been the historical location of the easement" because there were trees in the path, but this argument goes nowhere for two reasons. First, the only testimony regarding these trees was that they were "younger pines maybe three feet high," and it is undisputed that the Eberts had not actually used the eastern path in the recent past. Accordingly, on this record, the circuit court was not obligated to find that Rasch's proposed path could never have been used to access the Eberts' property. Second and more importantly, absent evidence showing the location of an established path, the easement had to be placed somewhere, and the court did not err by selecting the location it did after considering the rights and interests of both parties. *See* *Berg,* 365 Wis. 2d 131, ¶17-19; *Atkinson,* 211 Wis. 2d at 641-42.

¶31 Finally, the Eberts argue that the circuit court should have given more weight to the fact that Rasch's proposal includes a sharper turn that makes travel more difficult. However, it was within the court's discretion to balance the rights and interests of the parties. *See* *Spencer,* 301 Wis. 2d 521, ¶13. Equitable remedies, such as the determination of the location or width of an easement, are reviewed for erroneous exercise of discretion. *Id.* A court properly exercises its discretion if it applies the appropriate law and the record shows that there is a reasonable factual basis for its decision. *Id.* Here, as shown above, the circuit court applied the appropriate law and the record shows a reasonable factual basis for its decision.

B. Easement Width

¶32 We now turn to the parties' dispute over the easement's width. As with the location of the Eberts' easement over the Rasch Property, the width of the easement was not defined in the deed. The Eberts argue that the easement should be 66 feet wide (which they contend is the width of a town road) or if not that, 40 feet wide, (which they contend is the minimum width necessary to accommodate modern logging equipment).

¶33 When an easement's width is not expressly set forth in a written instrument, the court has equitable power to determine the width necessary to accomplish the purpose for which it was granted. *Spencer,* 301 Wis. 2d 521, ¶¶13-14. That does not mean, however, that "all accommodations which serve the purpose of the easement must be allowed." *Atkinson,* 211 Wis. 2d at 645. The test is "whether the owner of the dominant estate can reasonably use the property as intended." *Id.* at 645-46. "Once this purpose is served, further expansion of the easement is neither necessary nor warranted," even if it would make the dominant estate holder's use "more convenient." *Id.* at 646.

¶34 The Eberts rely on *Atkinson,* which, they assert, stands for the proposition that the width of an easement should be expanded "to accommodate full use of the dominant estate" but cannot be restricted in a way that "inhibits full use of the dominant estate." Assuming but not deciding that this is an accurate summary of *Atkinson,* that case does not help the Eberts because the circuit court found, among other things, that a 12-foot easement would be sufficient for logging activity, the historical use calling for the greatest width. Specifically, the court found that the existing traveled way is no wider than 12 feet; that there was no evidence that it had ever been any wider; and that it had been used for ingress and egress for all intended uses of the Ebert Property, including logging, and has been sufficient for those purposes. These findings are supported by evidence in the record and are not clearly erroneous.

¶35 Although there was testimony suggesting that a wider easement would be "ideal" because it would permit two-way traffic and allow extra space for snow removal, that testimony did not persuade the circuit court that a wider easement was necessary to allow the Eberts to use the property as intended. *See* *Atkinson,* 211 Wis. 2d at 645-46.

¶36 We glean from the briefing that the Eberts' position may be motivated by concern that Rasch may consider placing obstacles just outside of the easement to prevent the Eberts from using the easement for logging purposes. The Eberts may find comfort in a concession made by Rasch's attorney during the course of the second trial that, under Wisconsin law, the owner of a servient estate cannot place obstacles outside of the easement that unreasonably obstruct the easement's use.[4]

¶37 In sum, we conclude that the circuit court did not erroneously exercise its discretion when it established the location of the disputed portion of the easement and the entire easement's width.

II. Boundary Line

¶38 We now turn to the parties' dispute about the boundary line. We conclude that the circuit court erred when it departed from the parties' unambiguous stipulation and used the

line established in the deed, rather than the historic fence line surveyed by Gary Dechant, as the boundary line to the west of the corner post.

¶39 A stipulation is a contract made in the course of a judicial proceeding. *Ceria M. Travis Acad., Inc. v. Evers*, 2016 WI App 86, ¶14, 372 Wis. 2d 423, 887 N.W.2d 904. As with the interpretation of other contracts, the interpretation of a stipulation is a question of law, which is reviewed without deference to the circuit court. *Keller v. Keller*, 214 Wis. 2d 32, 37, 571 N.W.2d 182 (Ct. App. 1997). The court should seek a construction which will effectuate what appears to have been the intention of the parties, as expressed by the words they chose to use when memorializing their agreement. *Duhame v. Duhame*, 154 Wis. 2d 258, 264, 453 N.W.2d 149 (Ct. App. 1989).

¶40 The pertinent portion of the stipulation provides as follows:

The parties stipulate that they have reached an agreement on the boundary issue. The parties agree that the boundary will be placed in the location of the historic fence line.

The parties further agree that they will split the cost of the survey to provide the description necessary to generate the quit claim deeds, which both parties agree they will sign to effectuate this agreement. The survey will establish the line in the location of the historic fence line. The parties agree that in general the location of the historic fence line is as depicted on Exhibit No. 3.

¶41 Although the parties disagree about whether aspects of the stipulation are ambiguous, the central agreement of the stipulation is unambiguous: the "historic fence line" will be the boundary line. The stipulation expressly provides that "the boundary will be placed in the location of the historic fence line" and that "[t]he survey will establish the line in the location of the historic fence line." Rasch argues that the stipulation is ambiguous regarding the location of the historic fence, but we reject this argument. According to the express language of the stipulation, there was no ambiguity about location because the precise location would be resolved by the surveyor, Gary Dechant.

¶42 The Dechant Survey, admitted as "Exhibit No. 4" during the second trial, did identify the location of the historic fence line. The survey includes a cross-hatched line noted in the legend as "EXISTING FENCING—FAIR TO POOR CONDITION." That cross-hatched line is Dechant's determination of the historic fence line, and it traverses the entire width of the boundary between the Rasch Property and the Ebert Property. During his testimony, Dechant specifically agreed that he was "able to find enough remnants of the fence that [he] could accurately survey the line."

¶43 Rasch argues that Dechant improperly drew the western portion of the historic fence line "simply ... based on the Eberts[`] direction," but that assertion is contradicted by Dechant's testimony and is not supported by any other evidence. Dechant testified that he personally inspected fencing in the location where he drew the fence line: "I met with Eberts again where they said they found some fencing and I brought my metal detector out there, and we did find some remnants of pieces of fencing, and that is what I show as the dark line with the X's on it showing where we did find the actual fencing."

¶44 Even so, the circuit court asserted as an unexplained "conclusion of law" that "there is insufficient evidence to establish the existence of a historic fence line heading west from the corner post." Ordinarily we would defer to such an assertion if it were presented as a finding of fact and there was supporting evidence. However, we conclude that this "conclusion of law" is unsupported and erroneous for two related reasons.

¶45 First, it is directly contradicted by the testimony of Dechant, who was charged by the stipulation to survey the fence line. The circuit court did not identify any deficit in the testimony, nor did it find that Dechant lacked credibility.

¶46 Second, it is also contradicted by the court's own findings of fact, which are supported by the record and not clearly erroneous. Specifically, the circuit court found that "Gary Dechant prepared his survey of the historic fence line"; that "[t]he parties have agreed upon the eastern portion of the historic fence line" up to the corner post; that west of the corner post, Dechant located "remnants of fencing pieces" "through the use of a metal detector"; and that, "[b]ased upon those remnants of pieces buried in the ground, is where the western portion of the historic fence line is shown" on Exhibit No. 4. The court specifically found that "[t]he historic fence line as shown on the survey, Exhibit 4, is the northern boundary of [the Ebert Property]."

¶47 To be sure, Rasch directs our attention to other facts found by the circuit court, which show that the historic fencing Dechant found west of the corner post was of a different quality than the historic fencing Dechant found to the east of the counter post. Specifically, the court found that the fencing on the western part of the property consisted of a single strand of barbed wire buried under mud or rock, and that the fencing on the eastern side of the property consisted of three to four strands of barbed wire that are standing and intact. However, these facts are not germane to our analysis because the parties stipulated to the "historic" fence line—not to any "current" or "standing" fence line. Similarly, without explaining why it matters, Rasch argues that there is no evidence that the Eberts ever logged the land north of the deed line. Again, this is not material because the parties stipulated to the historic fence line, not to any line where logging stopped.

¶48 In light of this record, we interpret the court's "conclusion of law" to have been stated in error.

¶49 In sum, the stipulation unambiguously provides that the boundary would be placed on the historic fence line as established by the survey, and the survey identified the historic fence line. In setting a portion of the boundary on the deed line—a location where Rasch concedes that there was no historic fence line—the circuit court improperly diverged from the unambiguous agreement of the parties.

¶50 The court's diversion from the unambiguous language of the stipulation may have been based on a mistaken belief that Rasch had a right under the stipulation to withhold his approval of the survey's results. The stipulation does not require the parties' approval of the surveyor's conclusions, nor does it give either party a veto over any survey results. Instead, the stipulation provides that "the survey" would establish the location of the historic fence line, and the Dechant Survey has done so here. On this record, setting the boundary on the

line marked by the surveyor as "EXISTING FENCING" appears to be the only option for carrying out the unambiguous intent of the parties' stipulation.

¶51 We direct that, on remand, the circuit court conduct proceedings necessary to amend the legal descriptions of the parties' properties to conform the boundary line to that described in the Dechant Survey.

Conclusion

¶52 For all of these reasons, we conclude that the circuit court properly exercised its discretion when it established the location of the disputed portion of the easement and the entire easement's width. We further conclude that the court erred by diverging from the unambiguous stipulation of the parties when it set the boundary line between the parcels. Accordingly, we affirm in part, reverse in part, and remand for the court to hold proceedings to amend the legal descriptions of the parties' properties to conform with the Dechant Survey.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

2020 WI App 1

MICHAEL G. DeSOMBRE AND JIYOUNG C. DeSOMBRE, Plaintiffs-Respondents,
v.
JAMES I. BOLDEBUCK AND CHARITY A. BOLDEBUCK, Defendants-Appellants.

Appeal No. 2018AP2227.

Court of Appeals of Wisconsin, District III.

November 26, 2019.

Dennis M. Burgy, for Michael G. DeSombre and Jiyoung C. DeSombre, Plaintiffs-Respondents.

Kraig A. Byron, Joseph J. Rolling, for James I. Boldebuck and Charity A. Boldebuck, Defendants-Appellants.

APPEAL from a judgment of the circuit court for Vilas County, Cir. Ct. No. 2018CV2, NEAL A. NIELSEN III, Judge. *Reversed and cause remanded for further proceedings.*

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

¶1 This case concerns a dispute regarding the ownership of a pier and a "wet boathouse"—that is, a boathouse constructed beyond the ordinary high water mark (OHWM) of a

navigable waterway.[1] Michael and Jiyoung DeSombre sued their neighbors, James and Charity Boldebuck, seeking a declaration that the DeSombres own a permanent pier and wet boathouse extending into Otter Lake in Vilas County, as well as a declaration that the pier and wet boathouse do not interfere with the Boldebucks' riparian rights. The circuit court granted summary judgment in favor of the DeSombres on both of their claims.

¶2 We conclude the circuit court erred by granting the DeSombres summary judgment because they failed to make a prima facie showing that the pier and wet boathouse are not located at least partially within the Boldebucks' riparian zone. At the very least, there are disputed issues of material fact regarding the location of the pier and wet boathouse in relation to the parties' respective riparian zones. We therefore reverse the court's grant of summary judgment in favor of the DeSombres and remand for further proceedings on their claims.[2]

BACKGROUND

¶3 The DeSombres and the Boldebucks own neighboring properties on Otter Lake in Vilas County. The western boundary line of the DeSombres' property is the eastern boundary line of the Boldebucks' property. Both properties are part of Fred Morey's Subdivision, the plat for which was recorded in 1910.

¶4 Prior to 2004, both the Boldebucks' property—Lot 29—and the DeSombres' property—Lot 30—were owned by Jocelyn Blair. On October 11, 2004, Blair executed a warranty deed conveying Lot 30 to Jerome and Patricia Connery. Although identified in the deed as Lot 30, the property was described using a metes and bounds legal description. Below the legal description, the deed contained the notation: "Including the right to continue to use and maintain the existing boat house and pier located near the Northwest corner of this parcel."

¶5 Just over two weeks later, on October 29, 2004, Blair executed a warranty deed conveying Lot 29 to Jay Brentlinger. Again, although the deed identified the property as Lot 29, it was described using a metes and bounds legal description. Below the legal description, the deed stated: "Subject to the right of the grantor, their heirs and assigns to continue to use and maintain the existing boat house and pier located near the Northeast corner of this parcel, said grantor owning adjoining lands to the East of this parcel."[3]

¶6 On November 14, 2007, the Connerys sold Lot 30 to the DeSombres. Again, the deed contained a metes and bounds legal description and included the notation: "Including the right to continue to use and maintain the existing boat house and pier located near the Northwest corner of this parcel." The Boldebucks purchased Lot 29 on June 12, 2012. Their deed included a metes and bounds legal description and did not contain any reference to the pier or wet boathouse. It is undisputed that according to the metes and bounds legal descriptions contained in the parties' deeds, which were taken from a survey completed in 2003, the pier and wet boathouse extend into Otter Lake from the DeSombres' property.

¶7 At some point after the Boldebucks purchased their property, they began using the pier and wet boathouse when the DeSombres were absent, without the DeSombres' consent. On June 25, 2016, the Boldebucks wrote to the DeSombres asserting that they had a right to use the pier and wet boathouse because those structures were located "substantially

within [the Boldebucks'] riparian zone." The letter conceded that the DeSombres' deed granted them a "permissive right" to use and maintain the pier and boathouse, but it stated that right was "concurrent with [the Boldebucks'] rights of ownership and use."

¶8 The DeSombres subsequently commenced this lawsuit, which asserted two claims against the Boldebucks. First, the DeSombres asked the circuit court to declare that they were the sole owners of the pier and wet boathouse, and that the Boldebucks did not have any ownership interest in those structures. Second, they sought a declaration that the pier and boathouse did not interfere with the Boldebucks' riparian rights.

¶9 The DeSombres ultimately moved for summary judgment, which the circuit court granted. The court summarized its reasoning as follows:

The boathouse and pier are attached to the DeSombre Parcel according to the legal descriptions and surveys under which both parties took title. The DeSombres were marketed a property containing a boathouse, specifically contracted for it, and took title based on verification by survey and legal description that the boathouse was theirs. They have insured the boathouse for casualty and liability as part of their homeowner's policy since purchase, they have been assessed and have paid taxes on the structure as part of the improvements to their parcel since purchase. They have spent money and been responsible for maintenance of the pier and boathouse since purchase. Real or personal, and however situated, the boathouse and pier are the exclusive property of the DeSombres. The Boldebucks have no basis to claim ownership of the boathouse and pier, and no right to use based on any theory they have advanced. Any encroachment of the structure into the Boldebuck riparian zone under the facts of this case does not constitute an actionable violation of riparian rights. The situation was open and obvious to the Boldebucks at the time of their purchase, a purchase they elected to make despite the existence of the boathouse and the pier, and without any basis to believe at the date of purchase that they had any legal or equitable claim to its ownership or use.

The Boldebucks now appeal the court's summary judgment ruling.

DISCUSSION

I. Standard of review

¶10 We independently review a grant of summary judgment, using the same methodology as the circuit court. *Hardy v. Hoefferle,* 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. "Under that methodology, the court, trial or appellate, first examines the pleadings to determine whether claims have been stated and a material factual issue is presented." *Preloznik v. City of Madison,* 113 Wis. 2d 112, 116, 334 N.W.2d 580 (Ct. App. 1983). If so, we then examine the moving party's submissions to determine whether they establish a prima facie case for summary judgment. *Id.* If the moving party has made a prima facie showing, we examine the opposing party's affidavits to determine whether a genuine issue exists as to any material fact. *Id.*

¶11 Ultimately, summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2). "Summary judgment is a drastic remedy; therefore, the moving party must clearly be entitled to judgment as a matter of law." *CED Props., LLC v. City of Oshkosh,* 2018 WI 24, ¶19, 380 Wis. 2d 399, 909 N.W.2d 136 (citation omitted). Accordingly, when reviewing a grant of summary judgment, we view the facts in the light most favorable to the nonmoving party, and we resolve any doubts as to the existence of a genuine issue of material fact against the moving party. *Id.*

II. Riparian rights

¶12 The DeSombres moved for summary judgment on their claims for a declaration that: (1) they own the pier and wet boathouse; and (2) the pier and wet boathouse do not interfere with the Boldebucks' riparian rights. It is undisputed that both the DeSombres and the Boldebucks are riparian owners of property on Otter Lake. "Riparian owners are those who have title to the ownership of land on the bank of a body of water." *ABKA Ltd. P'ship v. DNR,* 2002 WI 106, ¶57, 255 Wis. 2d 486, 648 N.W.2d 854. A riparian owner is accorded certain rights based upon his or her ownership of shoreline property. *Id.* As relevant to this case, those rights include the right to "construct a pier or similar structure in aid of navigation." *Id.* In addition, a riparian owner has the exclusive right to use any such pier and may therefore "eject others" who attempt to use it. *See Anchor Point Condo. Owner's Ass'n v. Fish Tale Props., LLC,* 2008 WI App 133, ¶¶13-14, 313 Wis. 2d 592, 758 N.W.2d 144.

¶13 A property owner's riparian zone is comprised of "the area that extends from riparian land waterward to the line of navigation as determined by a method that establishes riparian zone lines between adjacent riparian owners in a manner that equitably apportions access to the line of navigation." WIS. STAT. § 30.01(5r). The line of navigation, in turn, means "the depth of a navigable water that is the greater of ... [t]hree feet, as measured at summer low levels" or "[t]he depth required to operate a boat on the navigable water." Sec. 30.01(3c).

¶14 Wisconsin case law sets forth three general methods for determining the boundaries between neighboring property owners' riparian zones. *Nosek v. Stryker,* 103 Wis. 2d 633, 635, 309 N.W.2d 868 (Ct. App. 1981). First, "where the course of the shore approximates a straight line and the onshore property division lines are at right angles with the shore, the boundaries are determined by simply extending the onshore property division lines into the lake." *Id.* This method is typically referred to as the "extended lot line method." *See Borsellino v. Kole,* 168 Wis. 2d 611, 614, 484 N.W.2d 564 (Ct. App. 1992). Second, if "the boundary lines on land are not at right angles with the shore but approach the shore at obtuse or acute angles ... the division lines should be drawn in a straight line at a right angle to the shoreline without respect to the onshore boundaries." *Nosek,* 103 Wis. 2d at 636. Our case law refers to this method as both the "right angle method" and the "coterminous method." *See Borsellino,* 168 Wis. 2d at 614; *Manlick v. Loppnow,* 2011 WI App 132, ¶15, 337 Wis. 2d 92, 804 N.W.2d 712. Third, "where the shoreline is irregular ... the boundary line should be run in such a way as to divide the total navigable waterfront in proportion to the length of the actual shorelines of each owner taken according to the general trend of the shore." *Nosek,* 103 Wis. 2d at 637.

III. Application of the summary judgment methodology

¶15 The Boldebucks do not develop any argument that the DeSombres' complaint failed to state a claim upon which relief could be granted. We therefore proceed to the second and third steps of the summary judgment analysis and consider: (1) whether the DeSombres made a prima facie case for summary judgment on each of their claims; and (2) whether genuine issues of material fact precluded the circuit court from granting the DeSombres summary judgment.

A. Prima facie case for summary judgment

¶16 The Boldebucks first argue that the DeSombres failed to make a prima facie case for summary judgment on their claim for ownership of the pier and wet boathouse. That claim sought a declaration of interest in real property, pursuant to WIS. STAT. § 841.01(1). The Boldebucks contend that the DeSombres "failed to present a prima facie case that the boathouse and pier are real property," and that, as a result, they are not entitled to relief under that statute.

¶17 The term "real property" means "[l]and and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land." *Property,* BLACK'S LAW DICTIONARY (11th ed. 2019); *see also* *Stuart v. Weisflog's Showroom Gallery, Inc.*, 2008 WI 86, ¶58, 311 Wis. 2d 492, 753 N.W.2d 448. Here, it is undisputed that the pier and wet boathouse are "attached to" the bed of Otter Lake. It is further undisputed that the pier and boathouse are permanent, rather than temporary or removable, structures. Nonetheless, the Boldebucks argue that even permanent structures that are "attached to" the bed of a navigable waterway cannot be owned as real property by private individuals because title to the underlying land is held by the State, pursuant to the public trust doctrine.

¶18 We reject this argument because the Boldebucks cite no legal authority supporting their assertion that the public ownership of a lakebed means that any structures affixed to it cannot qualify as real property. "Arguments unsupported by references to legal authority will not be considered." *State v. Pettit,* 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

¶19 Furthermore, in support of their summary judgment motion, the DeSombres offered the affidavit of Michael Muelver, the tax assessor for the town where the parties' properties are located. Muelver averred that the DeSombres had paid real estate taxes on the wet boathouse since at least 2006, and he submitted documentation supporting that averment. For purposes of Wisconsin's tax statutes, the term "real property" is defined to include "not only the land itself but all buildings and improvements thereon, and all fixtures and rights and privileges appertaining thereto." WIS. STAT. § 70.03(1). "A benefit is appurtenant if the right to enjoy that benefit is tied to the ownership of a particular parcel of land." *Nature Conservancy of Wis., Inc. v. Altnau,* 2008 WI App 115, ¶7, 313 Wis. 2d 382, 756 N.W.2d 641. The rights to place and use structures in aid of navigation on the bed of a navigable lake are appurtenant to the ownership of riparian property. *See* *ABKA Ltd. P'ship,* 255 Wis. 2d 486, ¶57; *Anchor Point,* 313 Wis. 2d 592, ¶¶13-14. We therefore conclude that such structures may be owned by a private individual as real property, even though the underlying lakebed is owned by the State.

¶20 Nevertheless, we conclude for another reason that the DeSombres failed to make a prima facie case for summary judgment on both of their claims. Specifically, the DeSombres failed to introduce any evidence on summary judgment showing the location of the pier and wet boathouse in relation to the parties' respective riparian zones. That determination appears to be material both to whether the DeSombres own the pier and wet boathouse and to whether those structures interfere with the Boldebucks' riparian rights.[4]

¶21 As noted above, a party's riparian zone extends from the shoreline waterward to the line of navigation, and the boundaries between neighboring owners' riparian zones are typically determined using one of the three methods set forth in our case law. *See* WIS. STAT. § 30.01(5r); *Nosek*, 103 Wis. 2d at 635. The DeSombres submitted several survey maps in support of their summary judgment motion. Each of those maps shows the pier (to which the wet boathouse is attached) extending into Otter Lake from the corner of the DeSombres' property closest to the Boldebucks' property line. However, none of the maps that the DeSombres submitted on summary judgment purport to show the location of either the line of navigation or the boundary between the parties' riparian zones. Thus, those maps do not provide any evidence as to whether the pier and wet boathouse lie completely within the DeSombres' riparian zone, whether they extend partially into the Boldebucks' riparian zone, or to what extent the structures extend beyond the line of navigation and therefore lie outside both the DeSombres' and the Boldebucks' riparian zones.

¶22 The DeSombres also submitted an affidavit of surveyor Thomas Boettcher in support of their summary judgment motion. However, neither Boettcher's affidavit nor its attachments provide any evidence as to the location of the pier and wet boathouse in relation to the parties' respective riparian zones.

¶23 The DeSombres also submitted an affidavit of Brian Hug, who was employed as a caretaker for their property. Hug averred that Otter Lake is approximately three feet deep at the two corners of the wet boathouse closest to the shore and that "[i]n the area of the common boundary between the DeSombre and Boldebuck properties the depth of the water reaches 3 feet at 30 feet from the ordinary high water mark." Hug's affidavit therefore provides some evidence regarding the location of the line of navigation. Notably, however, the line of navigation is located at "*the greater of* ... [t]hree feet, as measured at summer low levels" or "[t]he depth required to operate a boat on the navigable water." WIS. STAT. § 30.01(3c) (emphasis added). The DeSombres did not introduce any evidence as to whether Hug's depth measurements were taken at summer low levels, nor did they introduce evidence regarding the depth of water required to operate a boat on Otter Lake.

¶24 In its summary judgment decision, the circuit court relied on an "Eagle Landmark Survey submitted by [the DeSombres]" as showing the boundary between the parties' respective riparian zones. However, the Eagle Landmark survey was not submitted by affidavit in support of the DeSombres' summary judgment motion. Instead, it was submitted as an attachment to the DeSombres' complaint. "On summary judgment, the allegations in the complaint are not evidence." *Oddsen v. Henry*, 2016 WI App 30, ¶26, 368 Wis. 2d 318, 878 N.W.2d 720. We therefore agree with the Boldebucks that the court could not rely on the Eagle Landmark survey when determining whether the DeSombres had established a prima facie case for summary judgment.[5]

¶25 As the foregoing summary shows, the DeSombres failed to submit sufficient evidence on summary judgment showing the location of the pier and wet boathouse in relation to the parties' respective riparian zones, including to the line of navigation. Accordingly, the DeSombres failed to establish a prima facie case for summary judgment on either of their claims, and the circuit court erred by granting their summary judgment motion.

B. Existence of genuine issues of material fact

¶26 Moving on to the third step of the summary judgment analysis, we conclude that even if the DeSombres did establish a prima facie case for summary judgment, the evidentiary materials submitted by the Boldebucks were sufficient to raise a genuine issue of material fact as to the location of the pier and wet boathouse in relation to the parties' respective riparian zones. In opposition to the DeSombres' summary judgment motion, the Boldebucks submitted an affidavit of surveyor Gregory Maines, attached to which was a survey map that Maines had prepared in June 2018. On that survey map, Maines depicted the location of the boundary line between the parties' riparian zones using both the extended lot line method and the coterminous method.[6]

¶27 Using the boundary line created by extending the lot line established by the parties' legal descriptions, the Maines survey shows that nearly the entire pier and boathouse are on the Boldebucks' side of the line. Using the boundary line established by the coterminous method, a small portion of the boathouse and a substantial portion of the pier are on the Boldebucks' side of the line.

¶28 The Maines survey does not purport to show the location of the line of navigation. However, it does include a line labeled "30' Offset From OHWM." Assuming that line is consistent with the line of navigation,[7] the Maines survey shows that portions of the pier and boathouse are located within the Boldebucks' riparian zone, regardless of whether the extended lot line method or the coterminous method is used to determine the boundary between the parties' riparian zones. Furthermore, Maines expressly averred in his affidavit that using either method, portions of the pier and wet boathouse are within the Boldebucks' riparian zone.

¶29 Maines' affidavit and survey therefore show that there is a factual dispute as to whether the pier and wet boathouse are located partially within the Boldebucks' riparian zone. This dispute appears to be material to determining both the ownership of the pier and wet boathouse and whether those structures interfere with the Boldebucks' riparian rights. *See supra* n.4. As a result, the circuit court erred by granting the DeSombres summary judgment on both of the claims alleged in their complaint. We therefore reverse the court's grant of summary judgment in favor of the DeSombres and remand for further proceedings on their claims.[8]

By the Court.—Judgment reversed and cause remanded for further proceedings.

[1] *See* *Oneida Cty. v. Converse,* 180 Wis. 2d 120, 122 n.3, 508 N.W.2d 416 (1993).

[2] Given our determination that the circuit court erred by granting the DeSombres summary judgment, we reject the DeSombres' assertion that the Boldebucks' appeal is frivolous. We therefore deny the DeSombres' motion for an

award of attorney fees and costs under WIS. STAT. RULE 809.25(3) (2017-18). All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

[3] The inclusion of this language in Brentlinger's deed is perplexing, as Blair no longer owned Lot 30—the adjoining property to the east of Lot 29—when she conveyed Lot 29 to Brentlinger. Rather, as noted above, she had conveyed Lot 30 to the Connerys just over two weeks earlier.

[4] The DeSombres do not develop any argument explaining why they should be deemed to own any portions of the pier and wet boathouse that are located within the Boldebucks' riparian zone. Moreover, they do not explain why the presence of the pier and wet boathouse within the Boldebucks' riparian zone would not interfere with the Boldebucks' riparian rights as a matter of law, given that the Boldebucks have the exclusive rights to place and use piers and other structures in aid of navigation in their own riparian zone. *See* *ABKA Ltd. P'ship v. DNR*, 2002 WI 106, ¶57, 255 Wis. 2d 486, 648 N.W.2d 854; *Anchor Point Condo. Owner's Ass'n v. Fish Tale Props., LLC*, 2008 WI App 133, ¶¶13-14, 313 Wis. 2d 592, 758 N.W.2d 144. This opinion should not be read, however, to foreclose the DeSombres from raising arguments regarding these legal issues on remand.

[5] The situation would be different if the DeSombres' complaint had contained an allegation regarding the validity of the Eagle Landmark survey and if the Boldebucks had admitted that allegation in their answer. However, that is not the case here, as the Boldebucks' answer expressly denied the only allegation in the DeSombres' complaint that pertained to the Eagle Landmark survey.

In addition, as the circuit court acknowledged in its summary judgment decision, even the Eagle Landmark survey shows a significant portion of the pier extending over the purported boundary between the parties' riparian zones onto the lakebed on the Boldebucks' side of the line. However, it is unclear from the Eagle Landmark survey whether that portion of the pier is past the line of navigation and therefore outside the Boldebucks' riparian zone.

[6] The Maines survey actually depicts two sets of boundary lines between the parties' riparian zones. One set assumes that the boundary between the parties' lots is that established by the legal descriptions in their deeds, which were based on a 2003 survey. Another set of boundary lines assumes that the boundary between the parties' lots is in a different location that was established by the 1910 subdivision plat.

Maines averred that the 2003 survey was inconsistent with the 1910 subdivision plat and was therefore "incorrect." According to Maines, if the measurements from the 1910 subdivision plat were used to determine the boundary line between the parties' lots, the pier and boathouse would extend into Otter Lake from the Boldebucks' property, rather than from the DeSombres' property.

The Boldebucks contend that Maines' affidavit creates a genuine issue of material fact because if the boundary line between the parties' lots is actually located at the site established by the 1910 subdivision plat, the pier and wet boathouse are attached to the Boldebucks' property and are located entirely within the Boldebucks' riparian zone. We do not find this argument persuasive. Regardless of where the boundary line may have been located in 1910, Blair—the common grantor to both the DeSombres' and the Boldebucks' predecessors in title—was free to subdivide her property in a manner that was inconsistent with the 1910 plat. Accordingly, the legal descriptions in the DeSombres' and the Boldebucks' deeds—which are consistent with the 2003 survey—control the location of the common boundary between their lots. Any discrepancy between the 1910 plat and the 2003 survey is therefore immaterial for purposes of this appeal.

[7] As noted above, Hug averred that in the vicinity of the boundary between the parties' properties, Otter Lake reaches a depth of three feet "at 30 feet from the ordinary high water mark."

[8] The Boldebucks raise several additional arguments in their appellate briefs. Given our conclusion that the circuit court erred by granting the DeSombres summary judgment for the reasons explained above, we need not address these additional issues. *See* *Patrick Fur Farm, Inc. v. United Vaccines, Inc.*, 2005 WI App 190, ¶8 n.1, 286 Wis. 2d 774, 703 N.W.2d 707 (court of appeals decides cases on the narrowest possible grounds).

DAVID L. FABRY, Plaintiff-Respondent,
v.
KEVIN JAGIELLO, CHERYL JAGIELLO, DAVID JAGIELLO AND KAREN JAGIELLO, Defendants-Appellants,
THE PESHTIGO NATIONAL BANK, Defendant.

Appeal No. 2018AP891.

Court of Appeals of Wisconsin, District III.

March 19, 2019.

Terry J. Gerbers, Aaron M. Ninnemann, Scott M. Engstrom, for David L. Fabry, Plaintiff-Respondent.

William Patrick McKinley, Crystal N. Abbey, for Kevin Jagiello, Cheryl Jagiello, David Jagiello and Karen Jagiello, Defendants-Appellants.

APPEAL from a judgment of the circuit court for Oconto County, Cir. Ct. No. 2017CV167, JAY N. CONLEY, Judge. *Affirmed.*

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

Not recommended for publication in the official reports.

STARK, P.J.

¶1 Kevin, Cheryl, David and Karen Jagiello ("the Jagiellos") appeal a judgment, entered following a bench trial, determining that David Fabry acquired legal title to a parcel of land by adverse possession. The Jagiellos argue the evidence at trial was insufficient to establish adverse possession because: (1) the circuit court improperly relied on the existence of a fence erected by the common grantor from whom both the Jagiellos and Fabry acquired their property; and (2) absent the fence, the other evidence regarding Fabry's use of the disputed parcel was insufficient to prove adverse possession.

¶2 We conclude the circuit court properly relied on the existence of the fence erected by the parties' common grantor. We further conclude that the evidence at trial, viewed in its totality, was sufficient to establish that Fabry adversely possessed the disputed parcel. We therefore affirm.

BACKGROUND

¶3 Fabry and the Jagiellos own adjacent parcels of property in Oconto County. It is undisputed that, prior to 1991, both parcels were owned by Earl Guseck. Fabry acquired the eastern portion of Guseck's property in October 1991. Guseck retained the western portion

of the property until his death. The Jagiellos purchased that property from Guseck's estate in June 2017.

¶4 After their purchase, the Jagiellos contested the location of the boundary line between the parties' properties. Fabry believed the property line was demarcated by a fence that Guseck had constructed before Fabry purchased his parcel. However, the Jagiellos hired a surveyor who determined that, although the fence line commenced on the actual boundary line at the southern end of the parties' properties, as the fence proceeded north, it meandered west onto the Jagiellos' property. In other words, for all but the very southern end of the parties' properties, the true boundary line lay to the east of the fence line. We shall refer to the approximately two acres of property between the actual boundary line and the fence line as the "disputed parcel." The northern portion of the disputed parcel is wooded, and the southern portion is farmland.

¶5 In August 2017, Fabry filed the instant lawsuit, seeking to quiet title to the disputed parcel. Fabry alleged he had "maintained uninterrupted possession of the [disputed parcel] for more than 20 years" and had therefore obtained title to it through adverse possession, pursuant to WIS. STAT. § 893.25 (2017-18).[1] A bench trial on Fabry's adverse possession claim took place over two days in January and February 2018.

¶6 At trial, Fabry testified that when he purchased his property in 1991, he and Guseck "walked" the property's western boundary line together, and Fabry understood that the boundary ran along the fence line. Fabry stated the fence was "still there" in 1991, and although "there were pieces of it that were broken and it was starting to diminish . . . you could see there was a fence line there, and there are rocks and grass between the two areas." Fabry conceded the fence's condition had further deteriorated since he purchased the property. Nonetheless, Daniel Hendrickson, a survey field technician hired by Fabry, testified he could discern the existence of a fence line—albeit one that was "broken" in places—when he viewed the property in September 2017.

¶7 The circuit court also heard testimony from Norman Peterson, who helped Guseck farm his property from 2008 until 2015 or 2016. When asked about his understanding of the boundary line between Fabry's property and what was then Guseck's property, Peterson testified, "There were trees. There was an old fence line, rocks. We'd pick rocks and put them on the fence line." He further testified that "there was a hill mound between the two properties and some trees and there was some fence posts and rocks." Peterson stated there was a clear distinction between the fields on either side of the fence line, and both parties farmed "right up to that fence line and field stone line." He testified Guseck respected the fence line "as being the boundary between the properties." Peterson conceded the fence was not "perfect," but he testified it was sufficient for him to discern "where [he was not] supposed to be."

¶8 Witnesses at trial also testified regarding Fabry's use of the disputed parcel. Fabry testified he had leased the southern portion of his property to his cousin, Lloyd Fabry, who farmed that land from 1992 until 2015. Fabry testified Lloyd planted crops on the property up to the fence line during each of those years. Lloyd confirmed that he had farmed Fabry's property from 1992 until 2015. He testified he was able to differentiate Fabry's property from Guseck's property based on "the dilapidated fence" and the fact that "one side was a little

higher than the other in places." He further testified that Guseck respected the fence line as the boundary between the two properties and that the fields on both sides were farmed "right up to that fence line."

¶9 Fabry also testified that he had hunted on the northern, wooded portion of his property—including the disputed parcel—every spring and fall since he purchased it. In addition, Fabry testified he had erected a permanent tree stand in the disputed parcel in November 1992, which he later replaced in 2003, and had also placed temporary tree stands in the disputed parcel. Fabry further testified that he had planted trees in the disputed parcel on multiple occasions beginning in 1992 and had cut and stacked wood from downed trees and branches in that area.

¶10 Finally, Fabry and Peterson both testified that Fabry had posted "No Trespassing" signs in the disputed parcel. Peterson further testified that he and Guseck respected those signs, and Guseck "actually showed [Peterson] where they were." Hendrickson confirmed that he observed "No Trespassing" signs in the disputed parcel when completing his survey work in September 2017.

¶11 After trial, the circuit court issued a memorandum decision concluding Fabry had proven, by clear and convincing evidence, that he adversely possessed the disputed parcel for the twenty-year period from 1991 to 2011. The court found there was "overwhelming evidence" that the southern, non-wooded portion of the disputed parcel was protected by a substantial enclosure—i.e., the fence line—for more than twenty years. The court further found that Fabry had "cultivated the southern part of the property; the farm field."

¶12 As for the northern, wooded portion of the disputed parcel, the circuit court found that area "was protected by a substantial enclosure . . . but the fence did deteriorate." Nonetheless, the court found that Fabry had usually cultivated or improved the northern portion of the disputed parcel by hunting on it, erecting permanent deer stands, planting trees, cutting wood, and posting "No Trespassing" signs. In assessing the evidence, the court specifically found that Fabry, Peterson, Hendrickson, and Lloyd Fabry were credible witnesses. The court subsequently entered a judgment granting Fabry legal title to the disputed parcel, and the Jagiellos now appeal.

DISCUSSION

¶13 Our review of an adverse possession claim presents a mixed question of fact and law. *Wilcox v. Estate of Hines,* 2014 WI 60, ¶15, 355 Wis. 2d 1, 849 N.W.2d 280. We will accept the circuit court's findings of fact unless they are clearly erroneous. *Id.* However, whether the facts are sufficient to establish adverse possession is a question of law that we review independently. *Id.*

¶14 The requirements for an adverse possession claim that is not founded on a written instrument are set forth in WIS. STAT. § 893.25, which "codifies the common law elements of adverse possession." *Wilcox,* 355 Wis. 2d 1, ¶20. The statute permits a party to acquire title to real property by showing that the party and/or its predecessors in interest adversely possessed the property for an uninterrupted period of twenty years. Sec. 893.25(1). To establish adverse possession under § 893.25, a party must show: (1) "actual continued

occupation under claim of title, exclusive of any other right"; and (2) that the property was either "[p]rotected by a substantial enclosure" or "[u]sually cultivated or improved." Sec. 893.25(2). In other words, a party claiming adverse possession under § 893.25 must show that he or she used the disputed property for the requisite period of time in an "open, notorious, visible, exclusive, hostile and continuous" manner that would have apprised a reasonably diligent landowner and the public that the party claimed the land as his or her own.[2] *Pierz v. Gorski,* 88 Wis. 2d 131, 137, 276 N.W.2d 352 (Ct. App. 1979).

¶15 A party seeking to claim title through adverse possession bears the burden of proving the above elements by clear and positive evidence. *Peter H. & Barbara J. Steuck Living Tr. v. Easley,* 2010 WI App 74, ¶15, 325 Wis. 2d 455, 785 N.W.2d 631. Moreover, the evidence is strictly construed against the claimant, and all reasonable presumptions are made in favor of the true owner. *Id.*

¶16 In this case, the Jagiellos argue the evidence at trial was insufficient to establish adverse possession under WIS. STAT. § 893.25 because: (1) the circuit court improperly relied on the existence of the fence that Guseck erected before either Fabry or the Jagiellos purchased their parcels; and (2) absent the fence, the other evidence regarding Fabry's use of the disputed parcel did not clearly and positively show that property was usually cultivated or improved. For the reasons explained below, we conclude the circuit court properly relied on the fence when determining whether the disputed parcel was protected by a substantial enclosure. We further conclude that, when considered in its totality, the evidence at trial was sufficient to establish adverse possession under WIS. STAT. § 893.25(2)(b)1. and 2.

I. Existence of the fence line

¶17 The circuit court concluded the disputed parcel "was protected by a substantial enclosure, the fence line, for more than twenty years."[3] "The purpose of the substantial enclosure requirement is to alert a reasonable person to the possibility of a border dispute." *Steuck Living Tr.,* 325 Wis. 2d 455, ¶26. The enclosure "must be of a substantial character in the sense of being appropriate and effective to reasonably fit the premises for some use to which they are adapted." *Id.* (quoting *Illinois Steel Co. v. Bilot,* 109 Wis. 418, 446, 85 N.W. 402 (1901)). However, the enclosure "need not actually prevent others from entering" the disputed property. *Id.*

¶18 The Jagiellos argue the fence at issue in this case cannot satisfy the substantial enclosure requirement because it was erected by Guseck at a time when he owned both the Fabry and Jagiello parcels. They contend that, because Guseck built the fence, "its remaining presence on *his parcel* (the Jagiello Parcel) after Guseck sold the other Parcel to [Fabry] cannot be said to have put Guseck on notice of a border dispute, let alone constitute `visible' evidence that Fabry intended to exclude Guseck from his own property." The Jagiellos ask us to hold, as a matter of law, "that a claim of adverse possession cannot be premised on the existence of an enclosure or structure erected by the party against whom the claim for adverse possession is asserted."

¶19 We decline the Jagiellos' invitation to establish the rule of law they propose. Although Guseck erected the fence at a time when he owned both of the parcels at issue in this case,

Fabry testified at trial that, when he purchased his parcel, Guseck identified the fence line as the boundary between the two properties. Fabry's testimony was corroborated by Peterson and Lloyd Fabry, both of whom testified that Guseck respected the fence line as the property line.[4] The circuit court expressly found Fabry, Lloyd Fabry, and Peterson to be credible witnesses. Their testimony shows that—contrary to the Jagiellos' assertion—the fence did provide visible evidence that Fabry intended to exclude Guseck from the disputed parcel. Both men clearly understood that Fabry was claiming ownership of the property east of the fence line. The fact that Guseck erected the fence at a time when he owned both parcels does not affect our analysis. What matters is that, after selling one of the parcels to Fabry, Guseck recognized and respected the fence line as the western border of Fabry's property.

¶20 In their reply brief, the Jagiellos correctly observe that a claimant's use of property pursuant to permission from the legal titleholder cannot give rise to adverse possession. *See* *Northwoods Dev. Corp. v. Klement,* 24 Wis. 2d 387, 392, 129 N.W.2d 121 (1964) (stating possession pursuant to the true owner's permission does not demonstrate the "hostile intent necessary to constitute adverse possession"). The Jagiellos argue the evidence in this case shows that Guseck, the true owner of the disputed parcel, permitted Fabry to occupy that property, thus defeating Fabry's adverse possession claim.

¶21 However, as this court has previously recognized, "[t]he law draws a distinction between acquiescence and permissive use." *Schultz v. Frisch,* No. 2010AP904, unpublished slip op. ¶19 (WI App Feb. 23, 2012). While permissive use defeats an adverse possession claim, acquiescence "is simply another form of adverse possession." *Id.* Adverse possession by acquiescence occurs when neighboring property owners treat a common marker as their joint property line for the statutory twenty-year period. *Id.,* ¶20; *see also* *Steuck Living Tr.,* 325 Wis. 2d 455, ¶35. That is precisely what occurred in this case. From 1991 until at least 2011, Guseck and Fabry treated the fence line as the boundary between their properties. Guseck did not grant Fabry permission to use property to which Guseck believed he held title. Rather, he believed Fabry owned the land to the east of the fence line, and, as a result, he acquiesced in Fabry's use of that property. Under these circumstances, the circuit court properly considered the existence of the fence line in its adverse possession analysis.

II. Evidence of adverse possession

¶22 The Jagiellos next argue that, absent the evidence regarding the fence line, the remaining evidence at trial was insufficient to establish that Fabry adversely possessed the disputed parcel. We have already concluded, however, that the circuit court properly relied on the existence of the fence line in its adverse possession analysis. We further conclude that, when considered in its totality, the evidence at trial was sufficient to establish adverse possession under WIS. STAT. § 893.25(2)(b)1. and 2.

¶23 The circuit court first concluded the southern portion of the disputed parcel was protected by a substantial enclosure—i.e., the fence line. *See* WIS. STAT. § 893.25(2)(b)1. We agree with that conclusion. Multiple witnesses testified at trial regarding the existence and condition of the fence line between the Fabry and Jagiello parcels. The court found those witnesses credible, and "[w]hen the circuit court acts as the finder of fact, it is the

ultimate arbiter of the credibility of the witnesses and the weight to be given to each witness's testimony." *See* *State v. Peppertree Resort Villas, Inc.*, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345. Although the Jagiellos assert—in a single-sentence argument— that the fence was "so dilapidated that it could not credibly be said to have served as an enclosure to/from the [disputed parcel]," they do not cite any evidence to support that assertion, nor do they explain why the court's credibility determinations were "inherently or patently incredible or in conflict with the uniform course of nature or with fully established or conceded facts." *See* *Global Steel Prods. Corp. v. Ecklund Carriers, Inc.*, 2002 WI App 91, ¶10, 253 Wis. 2d 588, 644 N.W.2d 269. The testimony at trial amply supports the court's conclusion that the southern portion of the disputed parcel was protected by a substantial enclosure.

¶24 In addition, the circuit court properly concluded that Fabry had "cultivated" the southern portion of the disputed parcel by farming it. *See* WIS. STAT. § 893.25(2)(b)2. Both Fabry and Lloyd Fabry testified that Lloyd farmed the southern portion of Fabry's property from 1992 until 2015 and that his farming operations extended up to the fence line. The court expressly found Fabry and Lloyd to be credible witnesses. The Jagiellos argue the Fabrys' farming activity was insufficient to give rise to adverse possession because they "simply continued to farm the area that had been previously farmed by Earl Guseck when Earl Guseck owned both Parcels," which was insufficient to "put Guseck on notice that Fabry was intending to take title to a piece of Guseck's land." We disagree. By permitting Lloyd to farm up to the fence line every year from 1992 until 2015, Fabry clearly put Guseck on notice that he was claiming ownership of the property east of the fence line.

¶25 As for the northern, wooded portion of the disputed parcel, it is unclear whether the circuit court concluded that area was protected by a substantial enclosure. *See* WIS. STAT. § 893.25(2)(b)1. In its memorandum decision, the court initially stated the disputed parcel "was protected by a substantial enclosure, the fence line, for more than twenty years." The court then specifically addressed the southern portion of the disputed parcel, stating, "The southern farmed area was still protected by a substantial enclosure after the fence deteriorated. . . . There is overwhelming evidence to that effect." However, the court continued, "The hunted/wooded area to the north is a different situation. It was protected by a substantial enclosure as I have found, but the fence did deteriorate." Nevertheless, the court then concluded Fabry had usually cultivated or improved the northern portion of the disputed parcel. *See* § 893.25(2)(b)2.

¶26 Regardless of whether the northern portion of the disputed parcel was protected by a substantial enclosure, the circuit court properly concluded Fabry had usually cultivated or improved that area. Evidence was introduced at trial that, after purchasing his property in 1991, Fabry hunted on the northern portion of the disputed parcel every fall and spring. Fabry also testified he had erected both permanent and temporary deer stands in the disputed parcel. He further testified that he had planted trees in the disputed parcel on multiple occasions beginning in 1992 and had cut and stacked wood from downed trees and branches in that area. The evidence also showed that Fabry had repeatedly posted "No Trespassing" signs in the northern portion of the disputed parcel. We agree with the circuit court that, taken together, all of these factors establish that Fabry usually cultivated or improved that property.

¶27 In arguing to the contrary, the Jagiellos separately analyze each of Fabry's activities in the northern portion of the disputed parcel and argue each activity is insufficient to show usual cultivation or improvement under WIS. STAT. § 893.25(2)(b)2. However, when analyzing whether the evidence is sufficient to establish the elements of adverse possession, we must consider the totality of the evidence regarding Fabry's use of the disputed parcel. *See, e.g.,* *Kruckenberg v. Krukar*, 2017 WI App 70, ¶13, 378 Wis. 2d 314, 903 N.W.2d 164. Here, while each individual use of the disputed parcel might have been insufficient to give rise to adverse possession when considered in isolation, taken together, Fabry's acts of hunting, placing permanent and temporary deer stands, planting and cutting trees, and posting "No Trespassing" signs were sufficient to show that he usually cultivated or improved the northern portion of the disputed parcel.

¶28 The Jagiellos also rely heavily on *Steuck Living Trust* to support their claim that the evidence was insufficient to establish usual cultivation or improvement. However, *Steuck Living Trust* is distinguishable on its facts. In that case, the plaintiffs alleged they had obtained title to a seventeen-acre parcel by adverse possession, based on the conduct of their predecessors in title. *Steuck Living Tr.*, 325 Wis. 2d 455, ¶¶2-4. The plaintiffs' immediate predecessor in title testified at trial that he had bow hunted in the disputed area once; he went four-wheeling there five or six times; he took friends to walk there; and he cleared brush from a trail. *Id.,* ¶5. Another prior owner testified that he had hunted in the disputed area "steadily" from 1974 to 2003; he had erected portable tree stands there; and he had constructed a road and walking trail. *Id.,* ¶¶6, 20. However, the true owner—Easley—testified that he was not aware of any hunting activity in the disputed area and that, although he had seen two tree stands there, they were "very old" and he believed they predated his purchase of the property. *Id.,* ¶7.

¶29 On appeal, we concluded the "regular use of the disputed area for hunting, the deer stands, and the dirt road and trail do not constitute open, notorious, visible, exclusive and hostile use." *Id.,* ¶19. We explained there was no evidence that Easley had ever encountered the plaintiffs' predecessors in title hunting in the disputed area. *Id.,* ¶20. We rejected the circuit court's finding that the sound of gunshots should have put Easley on notice of an adverse claim, noting Easley could not have been sure that the shots came from the disputed area and, in any event, the shots "would have been consistent with trespassers." *Id.* We similarly concluded the presence of portable tree stands in the disputed area was "consistent with trespassers." *Id.* We also reasoned that the dirt road and trail were "consistent with an easement to [a nearby] lake rather than adverse possession of the seventeen acres." *Id.* Given the nature and size of the property, we concluded the cutting of a single tree by one of the plaintiffs' predecessors in title was "not reasonable notice of an exclusive claim" to the disputed area. *Id.,*

¶21. Finally, we noted that neither of the plaintiffs' predecessors in title had "posted the disputed area, which *would* have been notice to Easley that someone else claimed it." *Id.*

¶30 *Steuck Living Trust* differs from this case in several important respects. First, it appears the hunting activity in this case occurred with greater regularity than that in *Steuck Living Trust.* Second, Easley was apparently unaware of the hunting activity in the disputed area in *Steuck Living Trust,* and we concluded there was no reason he should have been aware of that activity. Conversely, in this case, Peterson expressly testified that he had observed

Fabry and his wife hunting in the disputed parcel from Guseck's property, which gives rise to a reasonable inference that Guseck was also aware—or should have been aware—of their hunting activity.

¶31 Third, while *Steuck Living Trust* involved only "portable" deer stands, Fabry installed both temporary and permanent deer stands in the disputed parcel. Fourth, although *Steuck Living Trust* involved a single instance of cutting down a tree in the disputed area, Fabry testified he repeatedly planted trees in the disputed parcel beginning in 1992 and also cut and stacked wood from downed trees and branches in that area. Fifth, we emphasized in *Steuck Living Trust* that the plaintiffs' predecessors in title had not posted the disputed area, which would have given Easley notice of their claim. Here, in contrast, there was ample evidence that Fabry posted "No Trespassing" signs in the disputed parcel. Furthermore, there was evidence that Guseck was aware of—and respected—those signs. Sixth, in *Steuck Living Trust,* we expressly concluded that the disputed area was not protected by a substantial enclosure. *Id.,* ¶33. In this case, although the circuit court found that the fence between the parties' properties had deteriorated over the years, there was nevertheless *some* undisputed evidence that a fence had previously existed in the wooded area and that Guseck respected that fence as being the western boundary of Fabry's property.

¶32 Taken together, the evidence in this case demonstrates that, for at least twenty years, the southern portion of the disputed parcel was protected by a substantial enclosure, and Fabry usually cultivated or improved the entirety of the disputed parcel. Fabry's use of the disputed parcel was "open, notorious, visible, exclusive, hostile and continuous" and would have apprised a reasonably diligent landowner and the public that Fabry claimed the disputed parcel as his own. *See* *Pierz*, 88 Wis. 2d at 137. As such, the circuit court properly concluded that Fabry had acquired legal title to the disputed parcel by adverse possession.

By the Court.—Judgment affirmed.

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

[2] Our supreme court has clarified that the "hostility" requirement under the common law is equivalent to the "claim of title" requirement in WIS. STAT. § 893.25(2)(a). *See* *Wilcox v. Estate of Hines*, 2014 WI 60, ¶22 & n.13, 355 Wis. 2d 1, 849 N.W.2d 280. No "deliberate, willful, unfriendly animus" is required. *Id.,* ¶22.

[3] As discussed in greater detail below, it is unclear whether the circuit court concluded the entire disputed parcel was protected by a substantial enclosure, or only the southern, non-wooded portion of the disputed parcel. Regardless, the court concluded the entire disputed parcel was usually cultivated or improved, pursuant to WIS. STAT. § 893.25(2)(b)2.

[4] Lloyd Fabry testified he farmed Fabry's property from 1992 until 2015, which encompassed nearly the entire twenty-year period from 1991 until 2011 during which the circuit court found that Fabry adversely possessed the disputed parcel. Although Peterson testified he helped Guseck farm his property from only 2008 until 2015 or 2016, the court could reasonably infer that if Guseck considered the fence line to be the property line during that time period, the same was true between 1991 and 2008.

2020 WI App 55

ROBERT D. COREY, SR. AND CHERYL C. COREY, Plaintiffs-Respondents, ROBERT D. COREY, JR., KEITH A. COREY, DAN M. COREY, CRAIG J. KODE AND THERESA A. KODE, Plaintiffs, v. NORBERT T. ROFFERS AND CAROL A. ROFFERS, Defendants-Appellants.

Appeal No. 2019AP1239.

Court of Appeals of Wisconsin, District II.

July 29, 2020.

APPEAL from an order of the circuit court for Racine County: EUGENE A. GASIORKIEWICZ, Judge. *Modified and, as modified, affirmed.* Cir. Ct. No. 2017CV1354.

Before Reilly, P.J., Gundrum and Davis, 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).

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2017-18).

PER CURIAM.

¶1. Norbert T. and Carol A. Roffers (the Rofferses) appeal from an order of the circuit court granting the Coreys[1] declaratory judgment. The Rofferses claim a forty-foot wide ingress/egress easement on land owned by the Coreys. The circuit court, pursuant to the written easement agreement documents, declared the easement to be the twelve-foot wide gravel driveway that existed at the time the Rofferses purchased their property and also declared a dispute resolution procedure for future disagreements between the parties. We affirm the court's decision, although we modify the order governing dispute resolution.

Facts

¶2 Three written documents affect the easement at issue: a Certified Survey Map 2239 (CSM 2239), which created three residentially zoned lots (attached to the end of this decision); a Driveway Maintenance Agreement; and a Driveway Easement Agreement. CSM 2239 created Lots 1, 2, and 3 and also provided access onto Highway K for all three lots as only one access point onto Highway K was permitted. The east twelve feet of the twenty-four-foot driveway access was to serve as access to Lot 1, and the west twelve feet was to be shared by Lots 2 and 3 as their access onto Highway K. Lot 2 is owned by the Coreys, and Lot 3 is owned by the Rofferses. CSM 2239 reflects a "40' WIDE

INGRESS/EGRESS EASEMENT" across the northern boundary of Lot 2, as Lot 3 would be landlocked without an easement granting access across Lot 2. CSM 2239 was recorded on May 1, 2000.

¶3 The Driveway Maintenance Agreement, recorded on May 9, 2000, describes the cost-sharing for the twenty-four-foot driveway access for all three lots onto Highway K as well as the cost-sharing for Lots 2 and 3 for the driveway that serves those lots. Lots 2 and 3 "shall share in the cost of improving, maintaining, snow removal, etc. of that part of the driveway fronting on said Lot 2, necessary to afford access for the owner of said Lot 2" and Lot 3 is obligated to "bear the cost of improving, maintaining, snow removal, etc. of that remaining part fronting on Lot 2 and on Lot 3, to afford access to his premises."

¶4 The Driveway Easement Agreement was recorded on April 16, 2003, shortly before the Rofferses purchased Lot 3. The Coreys, as owners of Lot 2, expressly granted a "driveway easement" to Lot 3. The easement agreement explained that "the parties desire to confirm the grant of easement for *driveway purposes* by execution of this Agreement." (Emphasis added.) The Driveway Easement Agreement acknowledged the existence of the forty-foot wide ingress/egress easement reflected in CSM 2239, but it restricted the easement to "*existing driveways for driveway purposes* situated thereon." (Emphasis added.) The easement agreement defines "[d]riveway purposes" as "residential driveway for ingress and egress and includes use by the owners of Lots 2 and 3 and the occupants of any residence situated on the lots and their respective invitees and agents."

¶5 The Coreys commenced this declaratory judgment action[2] and the Rofferses counterclaimed, both asking the circuit court to declare each party's rights under the easement. The Rofferses and Coreys have failed as neighbors,[3] and while their interactions were testified to, we need not address them as we interpret the easement agreements and not their behaviors. The Rofferses assert the right to use/maintain the entire forty-foot wide ingress/egress area referenced in CSM 2239, whereas the Coreys claim the easement is the twelve-foot wide gravel driveway that existed when the easement was granted via the Driveway Easement Agreement.

¶6 Following a one-day trial, the circuit court held that the easement granted the Rofferses the right to use "the existing 12-foot wide gravel driveway for vehicular ingress and egress purposes and they cannot drive over any other part of the 40-foot wide ingress/egress easement." The court expressly held that the Rofferses do not have the right to use or perform maintenance anywhere on the Coreys' property outside of the twelve-foot wide driveway easement. The court also declared that "[a]ny vegetation vertically overhanging the 12-foot wide gravel driveway up to a height equivalent to the height of a semi-truck may impede vehicular traffic and must be removed." The court further modified the Driveway Maintenance Agreement to include a dispute resolution procedure to be utilized going forward.[4]

¶7 The Rofferses claim the court erred in finding their easement to be the twelve-foot wide gravel driveway rather than the forty-foot wide ingress/egress area and in preventing them from maintaining the "area immediately adjacent to the easement." We affirm the circuit court's declaration that the easement is the existing twelve-foot wide gravel driveway that

existed at the time the Rofferses purchased Lot 3 and that an easement owner does not have the right to maintain land outside of the easement granted.

Standard of Review

¶8 The construction of an easement is a question of law that we review de novo while benefitting from the analysis of the circuit court. *Garza v. American Transmission Co. LLC,* 2017 WI 35, ¶19, 374 Wis. 2d 555, 893 N.W.2d 1; *Grygiel v. Monches Fish & Game Club, Inc.,* 2010 WI 93, ¶12, 328 Wis. 2d 436, 787 N.W.2d 6. "[W]e look to the deed of easement ... to determine what right to use the dominant estate holder has." *Garza,* 374 Wis. 2d 555, ¶24. The circuit court's findings of fact will not be set aside unless clearly erroneous, and all inferences will be drawn in favor of the circuit court's ruling. *Mentzel v. City of Oshkosh,* 146 Wis. 2d 804, 808, 432 N.W.2d 609 (Ct. App. 1988). If the language of the deed of easement is unambiguous, we look no further than the deed of easement itself. *Garza,* 374 Wis. 2d 555, ¶25.

Law of Easements

¶9 "An easement grants a right to use another's land." *Id.,* ¶23. An easement creates two estates: "the dominant estate enjoys the ability to use the land in the way described in the easement, while the servient estate permits that use." *Id.* The Rofferses hold the dominant estate, while the Coreys are obligated to permit the Rofferses to use their property "in the way described in the easement." *Id.* "The dominant estate holder's `use of the easement must be in accordance with and confined to the terms and purposes of the grant.'" *Id.* (citation omitted). "Any use not in accordance with the specific right to use granted in the easement is outside the easement's scope and thus prohibited." *Id.*

¶10 We find no ambiguity in the easement documents. CSM 2239 did not expressly grant a forty-footwide easement to Lot 3; CSM 2239 reserved a forty-foot corridor along the north lot line of Lot 2 for "ingress/egress" to Lot 3. The Driveway Maintenance Agreement expressly referred to the twenty-four-foot wide driveway coming off of Highway K, and CSM 2239 makes clear that twelve feet of the twenty-four-foot wide driveway would serve Lot 1 on the east and twelve feet of the driveway would serve as the access to Lot 2 and Lot 3 on the west. The Driveway Maintenance Agreement referenced the cost sharing of the "driveway fronting on said Lot 2, necessary to afford access for the owner of said Lot 2" and "that remaining part fronting on Lot 2 and on Lot 3, to afford access to his premises for the owner of said Lot 3," giving credence to the fact that the existing driveway continued on as a twelve-foot driveway across Lot 2.

¶11 The Driveway Easement Agreement expressly acknowledged the reservation of the forty-foot wide ingress/egress easement reflected in CSM 2239 but explained that "the parties desire to confirm the grant of easement for driveway purposes by execution of this Agreement" and restricted the easement to "*existing driveways for driveway purposes.*" (Emphasis added.) At the time the Rofferses purchased Lot 3, the easement was for the "existing" driveway, which as the court found was twelve-feet in width and corresponds to the twelve-foot wide driveway access from Highway K to be shared by Lots 2 and 3. The Rofferses have not contested the court's factual finding that the existing gravel driveway is

twelve-feet wide. The Rofferses have the right to the full use of the twelve-foot driveway for driveway purposes, which is expressly defined in the Driveway Easement Agreement as a "residential driveway for ingress and egress and includes use by the owners of Lots 2 and 3 and the occupants of any residence situated on the lots and their respective invitees and agents." The court did not err in declaring that the Rofferses' attempt to use or maintain the driveway easement outside of the twelve-foot width of the existing driveway was prohibited as any use outside of a granted easement is prohibited. *See* *Garza*, 374 Wis. 2d 555, ¶23.

¶12 Given the Rofferses' and the Coreys' ongoing disputes with one another, the circuit court also declared a dispute resolution process going forward. We do not see the dispute resolution process as necessary given the established law of easements. The Rofferses have the absolute right to trim/remove vegetation that encroaches within their twelve-foot wide driveway easement and do not need approval from the Coreys to do so as long as they stay within the aforementioned twelve-foot space. Implied in every easement is "the right of the dominant estate to do what is reasonably necessary to enjoy the easement" so long as the dominant estate does not "cause unreasonable damage to the servient estate or interfere unreasonably with its enjoyment." *Id.,* ¶¶29, 31 (citation omitted). We modify the court's dispute resolution procedure to make clear that the owners of Lot 3 (the Rofferses) are not obligated to seek permission from the owners of Lot 2 (the Coreys) to remove impediments within the twelve-foot easement area pursuant to the Driveway Maintenance Agreement or make reasonable use of the twelve-foot driveway easement unless the owners of Lot 3 seek contribution from the owners of Lot 2 for the cost of maintaining the easement area. In that instance, the circuit court's order relating to dispute resolution shall be adhered to.

Conclusion

¶13 The Driveway Easement Agreement expressly grants the owners of Lot 3 an easement to use the existing gravel driveway on Lot 2, which the court found to be twelve-feet wide. The Rofferses have the right to trim and remove vegetation that invades the twelve-foot area of the easement, including the vertical space, but the Rofferses may not exceed that twelve-foot area. The circuit court's dispute resolution procedure is modified as discussed above.

By the Court.—Order modified and, as modified, affirmed.

[1] The plaintiffs, Robert D. Corey, Sr. and Cheryl C. Corey, are husband and wife and have a joint life tenancy in the real estate. Robert D. Corey, Jr., Keith A. Corey, Dan M. Corey, Craig J. Kode, and Theresa A. Kode have a joint remainder interest in the real estate. We will refer to all the plaintiffs in this case as "the Coreys."

[2] The Coreys also filed claims for trespass and nuisance. The circuit court dismissed those causes of action, and that order of dismissal is not raised on appeal.

[3] The Rofferses and the Coreys do not like each other. The circuit court described them as "unneighborly": "[B]oth parties have acted with incredible immaturity and without basic human consideration for their neighbors" and "[i]t is my sincere desire that the two parties actually communicate with one another regarding future events in this matter."

[4] The circuit court's Findings of Fact and Conclusions of Law indicated that it was modifying the Driveway Maintenance Agreement to include the following paragraph:

When repairs are necessary or, one party believes repairs are necessary, and he cannot get the agreement of the other party, 2 versus 3 or 3 versus 2, then the parties shall submit proposals, either a proposal to modify or a proposal not to modify, for binding arbitration by an arbitrator and that they will equally share the cost of the arbitrator, and the arbitrator's decision will be binding on the parties relative to what maintenance ought or not to be done, and the cost and cost sharing of that maintenance. If the parties cannot agree on an arbitrator, one party may submit to the Court the request for the appointment of an arbitrator, the Court will appoint the arbitrator to decide the issue.

03 N.W.2d 164 (2017)
378 Wis.2d 314
2017 WI App 70

Lawrence KRUCKENBERG, Plaintiff-Respondent,
v.
Robert KRUKAR, Jr. and Lucia Krukar, Defendants-Appellants,
Gerald R. Chappa, Defendant.

Appeal No. 2017AP124-FT.

Court of Appeals of Wisconsin.

Submitted on Briefs June 15, 2017.
Opinion Filed September 27, 2017.

APPEAL from a judgment of the circuit court for Green Lake County, Cir. Ct. No. 2013CV135, MARK T. SLATE, Judge. *Affirmed.*

On behalf of the defendants-appellants, the cause was submitted on the briefs of Nicholas C. Zales of Zales Law Office, Milwaukee.

On behalf of the plaintiff-respondent, the cause was submitted on the brief of William H. Gergen of Gergen, Gergen & Pretto, S.C., Beaver Dam.

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

165*165 REILLY, P.J.

¶ 1 Lawrence Kruckenberg brought a claim for adverse possession and damages against his neighbors, Robert and Lucia Krukar.[1] The circuit court denied Krukar's motion for summary judgment on the ground that material issues of fact existed as to whether Kruckenberg could prove "exclusivity." The jury found adverse possession and awarded damages to Kruckenberg. Krukar's post-verdict motion challenging 166*166 the sufficiency of the evidence was denied. We affirm in all respects.

Background

¶ 2 Krukar and Kruckenberg are adjoining landowners. Kruckenberg purchased his forty-acre parcel in 1983, and Krukar purchased their 11.5-acre parcel in 2001. Kruckenberg's parcel is located to the west of Krukar's with the exception of a deeded "one-rod"[2] strip of

land that runs approximately 1361 feet along the south boundary of Krukar's parcel. The original 1882 deed from Kruckenberg's predecessor described the one-rod strip of land as "designed as a roadway" and further required the grantee "to construct and keep in repair when necessary, the fence on the North margin of said grant." Evidence reflected that the northern fence was never located entirely within the "one (1) rod in width" legal description and encroached ten to twelve feet onto Krukar's parcel for approximately 1164 feet of the length of the driveway.

Adverse Possession

¶ 3 "Adverse possession is a legal action that enables a party to obtain valid title of another's property by operation of law." *Wilcox v. Estate of Hines*, 2014 WI 60, ¶ 19, 355 Wis.2d 1, 849 N.W.2d 280; *see also* WIS. STAT. § 893.25(1) (2015-16).[3] Property is adversely possessed only if the possessor, for a period of twenty years, "is in actual continued occupation under claim of title, exclusive of any other right," and the property is "[p]rotected by a substantial enclosure" or "[u]sually cultivated and improved." Sec. 893.25(2)(a), (b); *Wilcox,* 355 Wis.2d 1, ¶¶ 19-20, 849 N.W.2d 280. Physical possession must be "hostile, open and notorious, exclusive and continuous." *Wilcox,* 355 Wis.2d 1, ¶ 20, 849 N.W.2d 280.

¶ 4 "Hostile intent," does not require "a deliberate, willful, unfriendly animus" as the law presumes the element of hostile intent "[i]f the elements of open, notorious, continuous and exclusive possession are satisfied." *Id.,* ¶ 22, 849 N.W.2d 280 (citation omitted). Adverse possession is typically not suitable for summary judgment as one claiming adverse possession must establish the length of occupancy, the area occupied, and the nature and character of occupancy, all of which are issues of fact. *See Milwaukee Cty. v. Milwaukee Yacht Club,* 256 Wis. 475, 478, 41 N.W.2d 372 (1950); *see also Illinois Steel Co. v. Jeka,* 123 Wis. 419, 427, 101 N.W. 399 (1905).

Summary Judgment Motion

¶ 5 Kruckenberg filed suit in 2013 after Krukar removed much of the northern fence in 2012-13. Krukar moved for partial summary judgment on the ground that Kruckenberg could not prove "exclusivity" as Krukar has "on many occasions used and exercised ownership rights" over the driveway and allowed others to use the roadway. Krukar presented affidavits that a neighbor used the roadway "one or two times yearly, to drive his ATV and to walk without permission from ... Kruckenberg." Additional affidavits were offered from individuals who claimed to have used the driveway "on several occasions annually" without Kruckenberg's permission. Krukar asserted that aside from the fence, Kruckenberg "took absolutely no action to publicly assert ownership, provide notice of his claim to [Krukar] or preclude anyone from using the lane."

¶ 6 Kruckenberg responded with his own affidavit indicating that the roadway and fence have remained in the same place 167*167 from the time he bought his property until Krukar removed the fence without his permission in 2012-13. At the time Kruckenberg purchased his parcel, a locked chain attached to metal end posts existed at the entrance to the roadway, and while he removed the chain, he posted a "no trespassing" sign at the

entrance to the roadway which has remained in place for more than twenty-seven years. Kruckenberg testified that he has maintained the driveway, trimmed tree branches along it, reset fence posts, and replaced wood fence posts with steel fence posts.

¶ 7 Kruckenberg and Krukar have argued over the fence and the encroachment since 2004. Krukar's request to remove the fence in 2004 was denied by Kruckenberg: "[M]y reply was no, because the fence marks my border line, marks my line — the driveway line." Kruckenberg at the time gave Krukar permission to cut a small hole in the fence so that Krukar could get to neighboring land to cut wood. Kruckenberg offered in evidence a letter from Krukar's predecessor, in which they asked Kruckenberg for permission to use the roadway.[4] Evidence was received that in 1984 a landlocked neighbor sought and received permission from Kruckenberg to use the roadway. In 2005, Kruckenberg granted permission to the county to use the roadway as a snowmobile route.

¶ 8 Summary judgment is only appropriate when there are no material factual disputes and the moving party is entitled to judgment as a matter of law. *Green Spring Farms v. Kersten,* 136 Wis.2d 304, 315, 401 N.W.2d 816 (1987). Kruckenberg opposed the motion on the grounds that he only allowed use of the road to people to whom he granted permission. Kruckenberg argued that the "casual and sporadic entry upon the land" by Krukar and others does not upset his claim for adverse possession, rather it simply created a material issue of fact as to whether Krukar's and others use of the road was sufficient to defeat the exclusivity component. We agree; "[t]he true owner's casual reentry upon property does not defeat the continuity or exclusivity of an adverse claimant's possession. The true owner's reentry should be a substantial and material interruption and a notorious reentry for the purpose of dispossessing the adverse occupant." *Otto v. Cornell,* 119 Wis.2d 4, 7, 349 N.W.2d 703 (Ct. App. 1984) (citing *Frank C. Schilling Co. v. Detry,* 203 Wis. 109, 115, 233 N.W. 635 (1930)). Here, given the competing facts, the finding is one for the fact finder, not for a court as a matter of law. Further, "[e]xclusive possession, for purposes of adverse possession, means that the claimant must show an exclusive dominion over the land and an appropriation of it to his or her own use and benefit." 3 AM. JUR. 2D *Adverse Possession* § 61 (2011). The claimant's possession, however, need not be absolutely exclusive of all individuals, and "need only be a type of possession that would characterize an owner's use of the property." 3 AM. JUR. 2D *Adverse Possession* § 62. That standard allows an adverse possessor the freedom to allow others to occasionally use the property without abandoning his or her claim.

¶ 9 We observe that the existence of the northern fence in and of itself is sufficient to create an issue of material fact as the "substantial enclosure" requirement is flexible and subject to no "precise rule in all cases" as "[s]o much depends upon the nature and situation of the property." *Illinois Steel Co. v. Bilot,* 109 Wis. 418, 444, 84 N.W. 855 (1901) (citation omitted). All that is required is some indication of the boundaries of the adverse possession to 168*168 give notice and need only be "reasonably sufficient to attract the attention of the true owner and put him on inquiry as to the nature and extent of the invasion of his rights." *Id.* at 446, 84 N.W. 855; *see also Ayers v. Reidel,* 84 Wis. 276, 285-86, 54 N.W. 588 (1893) (finding whether a fence built by claimant had become a settled boundary by acquiescence was properly submitted to the jury).

¶ 10 Kruckenberg put forth sufficient evidence to show material issues of fact concerning "exclusivity" and the circuit court properly denied the motion and put the dispute to the jury.

Sufficiency of the Evidence

¶ 11 The jury found all elements of adverse possession were proven by Kruckenberg and found that Krukar caused $500 in damages for removing the northern fence. Krukar moved to vacate the verdict, challenging the jury's finding that the fence was a "substantial enclosure" and the sufficiency of the evidence regarding Kruckenberg's "exclusive" use of the property. We review a jury's verdict very narrowly and "will sustain a jury verdict if there is any credible evidence to support it." *Morden v. Continental AG,* 2000 WI 51, ¶ 38, 235 Wis.2d 325, 611 N.W.2d 659. When reviewing a jury verdict, we consider the evidence in the light most favorable to the verdict and will affirm unless the jury, properly applying the law, could not have reasonably concluded that the adverse possessor met his or her burden of proof. *Id.,* ¶ 39.

¶ 12 Krukar argues that the northern fence was insufficient to give notice of Kruckenberg's assertion of ownership. Krukar notes that in *Steuck,* this court concluded that a swampy area and a man-made drainage ditch did not constitute a substantial enclosure. *Steuck Living Trust v. Easley,* 2010 WI App 74, ¶ 30, 325 Wis.2d 455, 785 N.W.2d 631. The reasoning of the *Steuck* court does not aid Krukar. A ditch is not customarily used to demarcate the outer limits of property, which is why the *Steuck* court required some additional evidence demonstrating knowledge of that specific purpose. A fence, in contrast, is universally recognized as a way to indicate a boundary line. All that is required to fulfil the substantial enclosure requirement is something that indicates the boundaries of the adverse claim. *See* WIS JI — CIVIL 8060 ("The requirement of `substantial enclosure' must alert a reasonable person of a dispute over the land.").

¶ 13 Krukar also contests the jury's finding that Kruckenberg demonstrated exclusive use of the driveway. According to Krukar, numerous people were using the disputed lane on a regular basis, and "[n]on-exclusive use of the [driveway] by the neighbors existed long before *either* of the parties purchased their properties." Krukar's argument goes to the weight of the evidence rather than the sufficiency of the evidence. The northern fence is a "substantial enclosure"; Kruckenberg's predecessor established exclusivity by installing a chain over the entrance to the driveway; Kruckenberg replaced the chain with a "no trespassing" sign; Kruckenberg maintained the roadway and reset and replaced wood fence posts with steel fence posts; Krukar's predecessors acknowledged Kruckenberg's ownership by asking permission to use the roadway; and Krukar's request to remove the fence in 2004 evidenced notice by Krukar that Kruckenberg was claiming the land as his own.

¶ 14 The evidence was sufficient to support a finding of exclusivity and the circuit court properly denied the motion and granted judgment on the verdict.

By the Court. — Judgment affirmed.

[1] For ease, we refer to both Robert and Lucia as "Krukar."

[2] A rod is approximately 16.5 feet in width.

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

[4] Permission which Kruckenberg gave.

Here is one for fun

2018 WI App 39

THADDEUS MARTIN LIETZ, Plaintiff-Appellant,
v.
DANIEL FROST, Defendant-Respondent.

Appeal No. 2016AP2030.

Court of Appeals of Wisconsin, District II.

May 2, 2018.

Amy Leigh Matuszak, for Daniel Frost, Defendant-Respondent.

APPEAL from an order of the circuit court for Winnebago County, Cir. Ct. No. 2016CV75, SCOTT C. WOLDT, Judge. *Affirmed in part; reversed in part and cause remanded.*

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

Not recommended for publication in the official reports.

HAGEDORN, J.

¶1 Thaddeus Lietz filed a complaint alleging that Daniel Frost—a next door neighbor of Lietz's parents—made defamatory remarks against him to his parents and within earshot of others. Among the more sensational of these statements was an accusation by Frost that Lietz had been peeking in Frost's window and masturbating. The circuit court granted summary judgment to Frost. Although we agree that the court properly dismissed three of Lietz's defamation claims, we conclude that one of Lietz's claims was actionable per se, meaning Lietz was not required to prove special damages (the failure of which served as one of the circuit court's grounds for dismissing this claim). Therefore, we reverse the circuit court's order dismissing that claim and remand for further proceedings consistent with this opinion.

BACKGROUND

¶2 Lietz, proceeding pro se, filed a complaint alleging four defamation claims against Frost. This case comes before us on cross motions for summary judgment, the question here being whether summary judgment was properly granted. We will review the relevant materials submitted.

¶3 We begin with Lietz's complaint. The first claim alleged that while Frost was walking on his lawn in the summer of 2014, he made defamatory comments "in a boisterous manner that could be heard by others," saying something to the effect of, "Yeah, the neighbor's one-arm kid was peeping in my window and masturbating. I got pictures." The second claim alleged "slander under defamation of character" based on statements allegedly made on or around June 19, 2015, at 6:30 a.m. "on the outside lawn in between" Frost's residence and Lietz's parent's residence. These statements "could be heard by others in a public/non-private setting." Though the precise content of these statements was not specified, the complaint did refer to the affidavits of Lietz's parents—Jeffery and Mary Lietz (discussed further below). Lietz's third claim was for "defamation" and alleged that "Frost told law enforcement that . . . Lietz was peeking into his window, trampling his bushes right outside his windows, and masturbating." Lietz's fourth and final claim alleged "defamation of character through slander, libel, and/or by intimidation tactics that may or may not be considered blackmailing." This claim generally referred to "statements in writing or vocally," but failed to identify the content of the statements being referenced.

¶4 During Lietz's deposition, he denied that there was any truth to the alleged statements by Frost. And he clarified that the statements were made in front of his parents and others. Lietz also generally referred to certain audio recordings allegedly made of these incidents, but failed to specifically identify those recordings.[1]

¶5 Lietz also submitted evidence from his parents in support of his motion for summary judgment. By his affidavit, Jeffery claimed that at around 6:00 a.m. on June 19, 2015, he heard Frost say, "Oh, oh, wonder if there's any kids . . . peeping in the windows here." Jeffery understood this to be a reference to his son. Jeffery averred that his wife Mary had called 911 and, while on the phone with dispatch, heard Frost say something about a "one arm kid . . . peeking in his windows and masturbating." Jeffery also alleged that he heard Frost "loudly conversing on a cell phone . . . outside" stating "that he had pictures of [Lietz] masturbating." Jeffery further claimed in his affidavit that on July 2, 2015, he "heard and recorded" Frost singing a made up song referring to a "kid . . . peeking in our bedroom." Jeffery understood this to be a reference to his son as well.

¶6 Jeffery also was deposed by his son, and testified that he heard Frost say "[s]omething to the effect the neighbor's one-armed kid was peeking in his windows," and Frost had pictures of this conduct. When asked whether he believed Frost's accusations against Lietz, Jeffery responded that he "can't say what was true or not" but noted that he did not "think it's in keeping with what we know of . . . our son." Jeffery was asked if he remembered an incident in 2014 where Frost made defamatory remarks, and he responded he did not.

¶7 In her affidavit, Mary averred that Frost said "someone's one arm kid was peeping in [his] window and masturbating." According to Mary, Frost "looked directly at me when stating this and said such in the presence of another individual . . . Bob, Surveyor for

Herbert Surveying." Frost also told Mary that "he had photos in his possession to prove that [Lietz] was seen masturbating in front of [Frost's] windows."

¶8 At her deposition, Mary testified that Frost had said "things like someone's one-armed kid is peeping in my windows, masturbating, and that he's a pursuer of little girls," and that Lietz was "a perpetrator of child pornography." Mary confirmed that all of these statements were made "very early in the morning on June 19th" of 2015, not 2014. She further explained that she called 911 to report Frost making these statements, but Frost went into his house and did not answer when the police came. After the police left, Mary claimed that Frost "came back out and started it all over again, only worse" by "yelling, screaming, shouting and saying horrible, vulgar, crude things about [her] son." Mary reiterated that these remarks were made "in front of the surveyor."

¶9 In his summary judgment briefing, Frost argued that claims two and four in the complaint—the alleged June 2015 incident and the alleged "defamation of character through slander, libel, and/or by intimidation tactics that may or may not be considered blackmailing"—should be dismissed because the complaint failed to set forth the "particular words" complained of as required by WIS. STAT. § 802.03(6) (2015-16).[2] Frost additionally argued that any alleged statements made to law enforcement under the third claim were "privileged." Frost finally argued that claim one should be dismissed because "Lietz has failed to assert whether and how his reputation has been lowered in the community as a result of the statements allegedly made by Frost." After a hearing, the circuit court granted Frost's motion for summary judgment, denied Lietz's, and dismissed all of Lietz's claims.[3] Lietz appeals.

DISCUSSION

¶10 Lietz argues that the circuit court erred by granting Frost's motion for summary judgment and denying his.[4] We conclude that the circuit court properly dismissed claims one, three, and four. However, we agree with Lietz that claim two should not have been dismissed because Lietz was not required to prove special damages.

¶11 We review the circuit court's grant of summary judgment de novo. *Freer v. M & I Marshall & Ilsley Corp.*, 2004 WI App 201, ¶7, 276 Wis. 2d 721, 688 N.W.2d 756. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2). "In order to survive summary judgment, the party with the burden of proof on an element in the case must establish that there is at least a genuine issue of fact on that element by submitting evidentiary material `set[ting] forth specific facts' pertinent to that element." *Freer*, 276 Wis. 2d 721, ¶7 (alteration in original; citation omitted).

¶12 We first address the claims properly dismissed by the circuit court. The first claim alleges that Frost "made slanderous remarks" in "the summer of 2014." However, the evidence Lietz relies upon in his briefing—the depositions and affidavits of his parents—does not contain any reference to alleged defamatory statements occurring in 2014. This evidence only supports allegations of defamation occurring in 2015, as reflected in claim two. And when he was questioned in his deposition about this claim, Lietz admitted that he

could not remember anything about the alleged 2014 incident. Lietz may not simply rely on the allegations in his complaint to prevent summary judgment. *See* *Tews v. NHI, LLC*, 2010 WI 137, ¶82, 330 Wis. 2d 389, 793 N.W.2d 860 ("Once the moving party has made a case for summary judgment, a party opposing summary judgment may not rest on the mere allegations or denials of the pleadings."). Because Lietz fails to point to any evidence supporting his claim that defamation occurred in 2014 as well as 2015, the circuit court properly dismissed this first claim.[5]

¶13 With respect to the third claim—that Frost told police Lietz had been peeking in his window, masturbating, and trampling his bushes—Lietz does not develop a response to Frost's argument that any statements he made to law enforcement were privileged. The only response Lietz offers is a conclusory and undeveloped assertion in his brief-in-chief that all of the statements alleged in the complaint "were not privileged because Frost made the statements outside where anyone could have heard." Lietz did not mention the issue at all in his reply brief. Thus, we conclude that Lietz has conceded the point. *See* *Schlieper v. DNR*, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (unrefuted arguments may be deemed conceded).

¶14 Turning to Lietz's fourth claim—"defamation of character" through "intimidation tactics that may or may not be considered blackmailing"—we conclude this claim was improperly pled. As Frost points out, a defamation claim must set forth the particular words complained of, and Lietz's complaint fails to do this. *See* WIS. STAT. § 802.03(6). Without a specified date, it is unclear whether the alleged defamatory remarks are the same ones made in June 2015, or whether this is referring to a separate incident. In short, even construing the fourth claim liberally, *see* *Lewis v. Sullivan*, 188 Wis. 2d 157, 161, 524 N.W.2d 630 (1994) (explaining that pro se pleadings are generally construed liberally), it provides nothing to link it to any of the specific statements alleged elsewhere in the complaint or contained in the summary judgment materials. Furthermore, Lietz never responds to Frost's argument that the circuit court properly dismissed the fourth claim because it was improperly pled. *See* *Schlieper*, 188 Wis. 2d at 322 (unrefuted arguments may be deemed conceded).

¶15 We now turn to claim two—the alleged defamation occurring in June 2015. Frost argues that the circuit court got it right because Lietz cannot show that the alleged defamatory statements harmed his reputation.[6] Lietz responds that he need not show reputational harm because statements imputing certain crimes to him—like alleging that he peeked in a window and masturbated—are "actionable without proof of damage." Lietz is correct.

¶16 A defamation claim requires: (1) a false statement; (2) communicated through speech, writing, or conduct to a person other than the person defamed; and (3) "the communication is unprivileged" and is defamatory— that is, the communication "tends to harm one's reputation so as to lower him or her in the estimation of the community or to deter third persons from associating or dealing with him or her." *Torgerson v. Journal/Sentinel, Inc.*, 210 Wis. 2d 524, 534, 563 N.W.2d 472 (1997); *see also* *Ranous v. Hughs*, 30 Wis. 2d 452, 460, 141 N.W.2d 251 (1966). Defamation may be either in written form, known as libel, or oral, known as slander. *Freer*, 276 Wis. 2d 721, ¶9. Lietz's claim here is for slander. As with any tort claim, the plaintiff must generally show that he or she sustained some sort of

damages as a result of the defamatory communication; this is referred to as "special damages." *Martin v. Outboard Marine Corp.,* 15 Wis. 2d 452, 459, 113 N.W.2d 135 (1962); *see also Freer,* 276 Wis. 2d 721, ¶¶9-10.

¶17 Frost does not dispute that Lietz has produced enough evidence on the basic elements of a slander claim to survive summary judgment. Lietz claimed in his deposition testimony that Frost's accusations were false, which at the very least creates a genuine issue of fact for trial. As to whether the statement was communicated to a third party under the second element, Mary and Jeffery testified and averred that they heard the alleged statements. In addition, Mary averred that Frost made the defamatory statements to a third party named Bob, a surveyor. Thus, Mary's affidavit and her deposition testimony create a material issue of fact regarding whether the remarks were communicated to a third party.[7] Frost does not claim otherwise. Nor does Frost claim that the alleged statements in Lietz's second claim were privileged, and we see no indication that they were. Finally, we reject any notion that the alleged statements did not tend to harm Lietz's reputation so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him under the third element. Regardless of whether a person's reputation is *actually* lowered by being accused of peeking in a window and masturbating—which is a question of damages—we think it obvious that such remarks *tend* to do so and therefore are defamatory.

¶18 Frost's real argument—and the primary basis of the circuit court's ruling dismissing Lietz's defamation claim—is that Lietz has failed to produce any evidence showing actual reputational harm or special damages.[8] Relatedly, Frost argues Lietz could not prove reputation harm because he already had a bad reputation. While parties claiming slander ordinarily must prove special damages, certain types of slander are "`actionable without proof of damages' because damages are `presumed from the character of the defamatory language.'" *Freer,* 276 Wis. 2d 721, ¶11 (quoting *Martin,* 15 Wis. 2d at 459). Our courts sometimes call this slander that is actionable per se. *See Martin,* 15 Wis. 2d at 459-60.[9] Slander that is actionable per se is limited to the following four categories:

(1) "`imputation of certain crimes' to the plaintiff;"

(2) "`imputation . . . of a loathsome disease' to the plaintiff;"

(3) "`imputation . . . of unchastity to a woman' plaintiff;" or

(4) "defamation `affecting the plaintiff in his business, trade, profession, or office.'"

Freer, 276 Wis. 2d 721, ¶11 (quoting *Martin,* 15 Wis. 2d at 459).

¶19 Here we are concerned with the first category—making slanderous remarks imputing criminal conduct to another person. Over a century ago, our supreme court confirmed that statements imputing a "crime involving moral turpitude" or a crime which could subject the plaintiff "to an infamous punishment" are actionable per se. *Earley v. Winn,* 129 Wis. 291, 309, 109 N.W. 633 (1906) (citation omitted). As to what punishments are "infamous," the court clarified that a mere "fine or imprisonment in the county jail" will suffice. *Id.* at 310.

¶20 Our supreme court reaffirmed this holding in *Starobin v. Northridge Lakes Dev. Co.*, 94 Wis. 2d 1, 14-16, 287 N.W.2d 747 (1980). In *Starobin,* the court considered whether a slander claim based on statements imputing the crime of disorderly conduct to the plaintiff must, like ordinary slander claims, allege special damages. *Id.* at 11-12, 16. The court concluded it does not, explaining:

Under the *Earley* case, in Wisconsin all crimes involve moral turpitude or subject the accused to infamous punishment, because by definition a crime in this state is conduct prohibited by state law and punishable by fine or imprisonment or both.[[10]] Thus under the *Earley* decision anyone who publishes a slander which imputes any criminal offense (even one punishable by fine or imprisonment in county jail or both) is subject to liability without proof of special damages.

Starobin, 94 Wis. 2d at 15-16 (footnote and citations omitted). The court reasoned that "[e]ven if there might be criminal offenses imputed to persons which would not be capable of harming their reputations, we do not view disorderly conduct as such an offense, and we have no reason to depart from the *Earley* case which is a precedent of long standing." *Starobin*, 94 Wis. 2d at 16. Therefore— because disorderly conduct could be punished by a fine, imprisonment, or both— the court concluded that falsely claiming that a person committed the offense of disorderly conduct is actionable without proving special damages. *Id.*

¶21 *Starobin* is still the law. Under this rule, any statement accusing another person of criminal conduct may be actionable per se; no special damages need be alleged or proven. The basic thrust of Frost's alleged slander was that Lietz had been peeking in his windows and masturbating. Frost never disputes that the alleged remarks imputed criminal conduct to Lietz. Thus, we need not decide whether peeping in a window is punishable as disorderly conduct under WIS. STAT. § 947.01(1) (prohibiting "indecent" conduct that "tends to cause or provoke a disturbance"), lewd and lascivious behavior under WIS. STAT. § 944.20(1)(b) (prohibiting indecent exposure), or another statutory provision. The alleged defamatory remarks clearly implicate Lietz in criminal conduct and are deemed actionable per se. Therefore, we hold that Lietz's second slander claim based on the June 2015 remarks is actionable per se. He need not prove special damages, and the circuit court erred in dismissing it.

¶22 We finally decline Lietz's request that we order the circuit court to grant his motion for summary judgment. In addition to raising several affirmative defenses, Frost's answer denied all of the complaint's factual allegations "[t]o the extent responsive pleading is required." This is a denial that the allegedly slanderous statements were made and the extent of communication to others. Because material facts are disputed, Lietz is not entitled to summary judgment.

CONCLUSION

¶23 Because Lietz failed to properly support claims one, three, and four in his complaint, the circuit court properly granted Frost's motion for summary judgment on those claims. However, Lietz has provided enough on his second claim to survive summary judgment.

Therefore, we reverse the circuit court's decision to dismiss Lietz's second claim and remand for further proceedings consistent with this opinion.

By the Court.—Order affirmed in part; reversed in part and cause remanded.

[1] Lietz did not bring any of these recordings to his deposition.

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

[3] While the record does not include a transcript of the summary judgment hearing, the circuit court did enter a written order memorializing two "Findings" as grounds for its decision. First, it found that Lietz "has not pled nor brought forth the elements to support his claim," and noted in particular, "the plaintiff had to show reputational harm but he is currently sitting in jail." Second, the order stated that the circuit court "finds that the only people who would have heard the alleged statements were the plaintiff's parents and/or law enforcement."

Lietz complains about the circuit court's reasoning, including its comment that he is sitting in jail. However, since our review on summary judgment is independent of the circuit court, we need not address Lietz's characterization of the circuit court's decision.

[4] Several other claims made below will not be addressed here. Lietz unsuccessfully moved for judgment on the pleadings, but he does not pursue that argument on appeal. Frost also sought sanctions below on the grounds that Lietz's case was frivolous. The circuit court disagreed, and Frost does not appeal that determination.

Finally, Lietz moved the circuit court to initiate felony charges against Frost and order that Frost "be taken into custody at this time for booking and processing." The circuit court denied the motion because it had "no authority or jurisdiction to issue criminal charges against the defendant in the context of this civil litigation." Though Lietz claims on appeal that this decision was erroneous, he fails to develop any coherent legal argument, so we will not address it further. *See* *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals need not address undeveloped arguments).

[5] In various places in his deposition and briefing, Lietz ambiguously refers to certain audio recordings supposedly capturing some of Frost's alleged defamation, as well as a "Scandisk external hard drive" containing these recordings and other documents. However, other than these vague references, Lietz fails to specifically identify what part of the record or "external hard drive" he is referring to. In fact, Lietz's brief-in-chief does not contain a single specific record number citation. Because Lietz fails to identify what recordings he is referencing or even the part(s) of the record where these recordings may be found, we are left to guess what he is referencing. We do note that there is a USB flash drive in the record with numerous audio files and documents. However, we will not develop Lietz's argument for him by scouring this USB drive for support for Lietz's dismissed claims. Pro se or not, he must be his own advocate. *See* *Pettit*, 171 Wis. 2d at 647.

[6] Frost also suggests that the second claim should be dismissed for failure to set forth the specific defamatory words. In keeping with the established practice of liberally construing the pleadings of pro se litigants, *see* *Lewis v. Sullivan*, 188 Wis. 2d 157, 161, 524 N.W.2d 630 (1994), we disagree. Though the complaint is somewhat difficult to follow, it sets forth the words complained of in claim one and merely does not repeat them for claim two. Furthermore, the complaint references the affidavits of Jeffery and Mary Lietz, which clearly state the specific defamatory remarks made in 2015—the precise date referenced in claim two. The reasonable and fair inferences from Lietz's summary judgment briefing are that these 2015 remarks form at least part of the basis for claim two.

[7] Frost does not appear to argue that parents cannot be a third party under the second element of the claim. We read Frost's argument to be simply that Lietz's reputation was not lowered in the eyes of his parents. In any event, it is clear that admissible evidence was submitted showing that a surveyor named Bob heard the offending remarks.

[8] Frost also insists that Lietz "cannot show that any alleged statements were made with actual malice" and asks us to affirm the dismissal of all of Lietz's claims on that ground. Although malice is ordinarily implied by the fact of publication, *see* *Denny v. Mertz*, 106 Wis. 2d 636, 657-58, 318 N.W.2d 141 (1982), Frost does not meaningfully interact with the relevant case law on malice, attempt to explain why Lietz was required to show malice, or

meaningfully explain why Lietz's proffered evidence fails to show malice. We decline to address this undeveloped argument. *Pettit*, 171 Wis. 2d at 646-47.

[9] *Martin* explained:

Libel per se and slander per se have been used to mean actionable per se and sometimes confused with it. The distinction between defamation, which is actionable by itself, or per se, and that which requires proof of special damages is not the same as the distinction between language which may be defamatory on its face or may convey a defamatory meaning only by reason of extrinsic circumstances.

Martin v. Outboard Marine Corp., 15 Wis. 2d 452, 460, 113 N.W.2d 135 (1962). Thus, we avoid the somewhat confusing term "slander per se" and instead refer to slander that is "actionable per se." *But see Freer v. M & I Marshall & Ilsley Corp.*, 2004 WI App 201, ¶11, 276 Wis. 2d 721, 688 N.W.2d 756 (referring to slander that is actionable per se as "slander *per se*").

[10] The court cited to WIS. STAT. § 939.12 (1975), which defined "Crime" as "conduct which is prohibited by state law and punishable by fine or imprisonment or both." *Starobin v. Northridge Lakes Dev. Co.*, 94 Wis. 2d 1, 12 n.4, 15, 287 N.W.2d 747 (1980). The current version of the statute is identical. *See* § 939.12.

Interesting cases yet to be resolved:

1) The Floating Bog:

   The Story about Bogs

   Mud Bog with cribs were one of the most unique features of the Chippewa Flowage. These floating bogs still exist and many more be created in the future. The “Island” you see in the bay outside your cabin, may totally move to a new location the next day. Bogs can range in size from the size of a parking space to several acres. The “Forty Acre Bog” on the west side of the flowage sports mature Tamarack trees. A bog can remain in a familiar location for years, but they are also known to move significant distances when conditions are right. A huge bog was located off of Deerfoot Lodge for more than 30 years. Then high water combined with high winds moved the bog, which eventually broke up into smaller pieces that were further scattered.

   When the Chippewa Flowage was created in 1923, much of the land that was flooded was swamp. Many of these swamp areas, actually peat bogs, floated to the surface. Over time seeds scattered by the winds and birds flying overhead germinated on the bogs. Plants from grasses to trees began to grow. The bog you see today can be quite developed including mature trees. Although the Flowage was created 80 years ago, new bogs can be created anytime. A phenomenon known as Mud Bogs can appear at any time, although they show up most frequently in the fall. They will either rise to the surface temporarily or then slowly sink down to the bottom again, or they may stay permanently on the surface and eventually develop plants and trees.

2) Misplaced Driveway.

   For thirty plus years the owner of the back 40 had used the driveway that cut through his father’s yard because the easement area would make no sense and after all the easement was not well

defined. Now the new owner puts up a fence. Survey shows that the first part of drive is on land of party A but then travels on to B's land then back to A's land and finally all on B's. Back forty owner gets easement from B and blocks A's use of those portions of road on B's land because A has blocked back 40 owner.

3) Lake Michigan collapse

   Road to cottage across neighbors just collapsed into gully leaving a gap filled with water 35 feet wide. Neighbor refuses to adjust right of way easement but does offer to buy the now land locked parcel for its remnant value. Suing for easement by necessity. Should the survey have anticipated the possibility?

4) Quarter Corner Across the River

   The original field notes clearly show that the original survey was created using the quarter corner across the river. If one waits until the river freezes one can be a lot more accurate or should one just tie it in to another survey father west even though this property was originally surveyed from the monument across the river to the east?