COURT OF APPEALS
DECISION
DATED AND FILED

April 15, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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No. 98-1218

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

GARY RICHARD DAY AND WILLIAM CHARLES DAY,

PLAINTIFFS-RESPONDENTS,

V.

ERNEST O. HANSON,

DEFENDANT-APPELLANT,

MARILYN E. FRANTZEN, MARGARET A. CADE, CARLA M. HUNTER, PAULA A. WEGNER, AND PATRICIA S. LARSON,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Vernon County: MICHAEL J. ROSBOROUGH, Judge. *Affirmed*.

Before Dykman, P.J., Vergeront and Deininger, JJ.

DEININGER, J. Ernest Hanson appeals a judgment which denied his claim of adverse possession and confirmed Gary and William Day to be the owners of a 6.44-acre parcel situated along the boundary between the parties' farms. Hanson claims the trial court applied the wrong burden of proof in evaluating his adverse possession claim, wrongly disregarded the testimony of certain witnesses, and incorrectly concluded that he had failed to produce sufficient evidence to establish his claim to the disputed parcel. We reject Hanson's arguments and affirm the judgment.

BACKGROUND

The parcel in question is a "bulge" created by a fence line which meanders away from and then returns to the quarter-section line which separates a forty-acre tract on Hanson's farm from the neighboring Day property. The Days hold record title to the disputed 6.44 acres, and they commenced this action to confirm their ownership of the land up to the quarter-section line. Hanson filed a counter-claim seeking to establish his title, by adverse possession or acquiescence, to the land between the quarter-section line and the fence.[1]

The disputed 6.44 acres is situated in a remote corner of both farms. It is uncultivated, lies along a steep grade, and contains woods and other natural vegetation. The fence line that creates the bulge into the Days' forty acres runs along an "old road" or trail that leads, in a long arc, to a spring in the far northwest corner of Hanson's forty acres. The trial court viewed the area for purposes of the trial, and described it, and the road or trail, as follows in its oral decision:

[1] Although Hanson's pleading contains a claim based on acquiescence, he did not argue in the trial court, nor does he on appeal, that the evidence at trial shows that the Days or their predecessors acquiesced in the fence as a boundary.

> It's a narrow valley, very scenic area …. There is a trail that by modern standards I would describe as being, I don't think I'd want to go two ways on it for cross-country skiing; at least a one way cross country trail, what many people currently refer to it as a four wheel trail, that leads up to this spring area…. [T]his trail has probably been there ever since the land's been occupied by white men …. It's the type of path or trail that if it went unused could rather quickly become overgrown.

The court gave additional description when it discussed the fence itself:

> It's a very wild, natural area…. It's a remote area …. This is the type of area where the old fence is reasonably visual now in the winter with the snow on the ground. But for the 1985 fence, if you went out there on the Fourth of July I would suggest to you through comments, common sense and common experience, you would have a hard time seeing it and the undisputed evidence is when Mr. Hanson inherited the farm from his father, I believe it was around 1976, that the fence was in disrepair and I believe it was his testimony it was not suitable for containing cattle ….

Hanson testified at trial regarding his father, Alfred's use of the disputed parcel. Alfred acquired the "north forty" of the Hanson farm in 1946. The spring is located on this forty acres, and the 6.44-acre parcel protrudes out from this forty into the Day forty. Alfred resided on the 120-acre farm until 1966, and he engaged in fairly limited agricultural enterprises—raising some tobacco, and maintaining vegetable gardens. He kept one cow, and occasionally a calf. After Alfred moved to town, Hanson grew some tobacco for a few years on the farm himself. The major portion of the farm was rented out as pasture for a number of years, both while Alfred resided there and after he left. No cattle were pastured on the farm after 1976, however.

In 1985, when contacted by a different neighbor about repairing fences, Hanson retained an individual to construct the present fence which forms the line to which Hanson makes his adverse possession claim. The fence installer testified that in constructing the present fence, he followed an older fence line, or

its remnants, but that the older fence "was so far gone" that it was "just as well" to put up a new one. He also testified that the old fence "wouldn't hold cattle back in '85."

Hanson testified that the principal use of the farm since 1985 had been recreational—that he, family members and others went to the farm, and onto the disputed parcel, for such purposes as hiking, trail riding, and cross-country skiing. Hanson's son-in-law testified that he had mowed the trail from 1987 on in order to keep it open for these uses. A long-time neighbor, a former pasture renter, and two surveyors also gave testimony regarding their knowledge of the parcel, its past uses, and the remnants of old fence lines in the vicinity of the existing fence.

The Days presented no witnesses, but several of the "Thompson daughters," who were also parties in the trial court, testified. The Thompsons were predecessors to the Days, having conveyed the Day farm in 1989. The Thompson daughters had grown up on their parents' farm in the 1950's and 60's. They testified, generally, that they had helped their father make annual repairs to a fence that ran along the quarter-section line on a steep hillside, and that they did not recall ever seeing a fence line in the vicinity of the present, 1985 fence.[2]

[2] The Days impleaded the Thompson daughters on a claim of breach of warranty of title. The appealed judgment makes the Thompson daughters jointly and severally liable to the Days' attorneys for all attorneys fees, costs and disbursements incurred by the Days "relating to [Days'] enforcement of their title" to the disputed parcel. At trial, the Thompson daughters were aligned with the Days on the merits of the title dispute. For procedural reasons not relevant to this opinion, we dismissed the Thompson daughters' attempted cross or co-appeal of trial court rulings adverse to them. We did permit them the opportunity to appear as respondents on Hanson's appeal, but they filed no respondent's brief.

In addition to the findings noted above regarding the "scenic," "natural," and "wild" character of the parcel in question, the trial court found that the path along the 1985 fence was a "very logical way in the topography" to get from the Hanson farm buildings to the spring in the northwest corner of the farm. The court also made these findings:

(1) the quarter line crosses a very steep hill with a "very steep drop off" to the north near the spring;

(2) "there is evidence of an old fence that is to the east of the described [quarter-section] line by about 25 feet or so," but there was no evidence regarding "how it got there [or] how long it was there";

(3) "[t]here is greater evidence of a more recent fence" in the vicinity of the 1985 fence which forms the boundary of the disputed parcel, but "we don't know who built this [older] fence … [or] why it was built here";

(4) there was no evidence of how the Thompsons and Alfred Hanson, as neighboring landowners from 1946 through 1966, regarded the parcel in question, or of what they viewed to be the boundary between their farms in the area in question;

(5) the evidence did not establish the "meaning" of the pre-1985 fence, whether "this was or was not a permissive use";

(6) the Hanson farm was not actively farmed since "the 60's," and that the "primary use" of the disputed land since that time was for access to the spring and various recreational uses;

(7) the Days and their predecessors had paid the real estate taxes on the disputed parcel during the 50-year period in question;

(8) the old road or path is "evidence of a use but not necessarily an adverse use"; and

(9) the "quality of the enclosure" prior to the 1985 fence was "extremely poor," such that the Days' predecessors were given "little notice if any … that Mr. Hanson was claiming this as his land."

In reaching its ultimate conclusion that Hanson had failed to meet his burden of proving adverse possession for a sufficient period to claim ownership, the court indicated that it gave little weight or credibility to the testimony of witnesses on both sides of the dispute regarding events which occurred prior to about 1976, noting that "[a]s a matter of common sense, people aren't able to remember mundane events. It's human nature for people to have a self-serving memory of those events." The court denied the Days' pretrial motion in limine to exclude *all* testimony regarding events more than twenty years prior to the commencement of the action, concluding that "that was not the law." However, in its oral decision at the conclusion of the trial, the court acknowledged that it looked "primarily if not exclusively at the last 20 years" because of its credibility concerns regarding testimony on the older events. Similarly, because of those credibility concerns, the court stated that it had determined that it should "look more to the physical facts of this case."

The court also noted in its bench decision that "we all agree [the burden of proof] is by a preponderance of the evidence on the claimant [Hanson]." However, because of "a presumption against adverse possession" noted in the applicable case law, the court observed that the claimant's burden is often

described "in terms that's a little bit stronger than the typical by a preponderance of the evidence." The court also described the adverse possession cases as creating a burden on the claimant of "preponderance of the evidence plus." Acknowledging that it was a "close case," and that the court had changed its view of the proper outcome over the course of the trial, the court gave the following rationale for concluding that Hanson had failed to establish his adverse possession claim to the 6.44-acre parcel:

> [I]n adverse possession cases, the Court strictly construes the evidence against the claimant and in favor of the person who owns the land by survey, and I posed this question to myself this morning as I was listening to some of the testimony, is the claimant [Hanson's] evidence sufficient to [pre]clude the Court from drawing an inference from all the evidence that Alfred Hanson's use of the disputed area was permissive? I can't say that it does in this case ….

The court entered judgment accordingly, confirming that the Days "are the owners in fee simple" of the disputed 6.44 acres and ordering Hanson to remove the 1985 fence. Hanson appeals the judgment.

ANALYSIS

A trial court's factual findings will not be disturbed on appeal unless they are "clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." *See* § 805.17(2), STATS. When a trial court sits as trier of fact, it determines issues of credibility. *See* ***Fidelity & Deposit Co. v. First Nat'l Bank***, 98 Wis.2d 474, 485, 297 N.W.2d 46, 51 (Ct. App. 1980). The application of statutory and case law to a given set of facts, however, is a question of law, which we review de novo. *See* ***Bahr v. State Inv. Bd.***, 186 Wis.2d 379, 386, 521 N.W.2d 152, 153 (Ct. App. 1994). In the context of an adverse possession claim, "the trial court's determinations as to what the parties did, and how the land appeared, are facts," but whether, under the facts

as found, Hanson adversely possessed the disputed parcel is a question of law. *See* ***Klinefelter v. Dutch***, 161 Wis.2d 28, 33, 467 N.W.2d 192, 194 (Ct. App. 1991).

Hanson first raises two specific claims of error regarding the trial court's reasoning in its decision to deny his adverse possession claim to the disputed parcel. The first is that the trial court applied an incorrect burden of proof in evaluating Hanson's claim. We disagree. The parties do not dispute that one who claims ownership of land by virtue of adverse possession bears the burden to establish the necessary elements "to a reasonable certainty by the greater weight of the credible evidence," that is, "the ordinary or lowest burden of proof." *See* ***Kruse v. Horlamus Indus.***, 130 Wis.2d 357, 362-67, 387 N.W.2d 64, 66-68 (1986). The trial court explicitly acknowledged and accepted the fact that "preponderance of the evidence" was the appropriate burden of proof for Hanson to bear.

Hanson points out, however, that the court later referred in its decision to a burden that is "a little bit stronger," and to "preponderance of the evidence plus." We conclude that, when read in the context of the court's entire oral decision, these references were simply the court's shorthand for the statutory presumption that one who occupies land is presumed to do so in subordination to the rights of the legal titleholder, and for the rule in adverse possession cases that "evidence of possession must be clear and positive and must be strictly construed against the claimant." *See* § 893.30, STATS.; ***Allie v. Russo***, 88 Wis.2d 334, 343, 276 N.W.2d 730, 735 (1979). Moreover, since we review de novo whether the facts as found establish Hanson's adverse possession of the parcel, any misstatement or misapplication by the trial court of the relevant burden of proof, evidentiary standards or presumptions, is of no consequence. *See* ***State v. Alles***,

106 Wis.2d 368, 391, 316 N.W.2d 378, 388 (1982) ("[I]t is immaterial what ground the trial court assigned as the reason for his ruling if it be in fact correct.")

Hanson's second claim is that the trial court erroneously "excluded as unreliable" the testimony of witnesses for both sides regarding events more than twenty years prior to the commencement of the action. We conclude, however, that the court did not do this. The trial court expressly denied the Days' motion to preclude the introduction of evidence of events relating to the disputed land occurring prior to 1976. All witnesses called by either side were permitted to testify, and no testimony was excluded on the basis of the dates of events testified to. The trial court allowed testimony regarding events dating back to 1946, and it then weighed and considered that evidence. After receiving all of the evidence at trial, it concluded that the credibility of the testimony regarding events in the 1960's and earlier was suspect, and that "this case" was thus best resolved on the "physical facts," and on the more credible evidence as to what had transpired on the disputed parcel over the past twenty years. This sifting and winnowing of the evidence presented at trial is precisely what trial courts, when sitting without a jury, are expected to do. The weight and credibility to be accorded the testimony of witnesses at trial is a matter within the province of the trial court. *See* ***Mullen v. Braatz***, 179 Wis.2d 749, 756, 508 N.W.2d 446, 449 (Ct. App. 1993).

Hanson posits that the trial court's view of the evidence, however, was tantamount to requiring him, erroneously, to establish his adverse possession claim solely based on the immediately preceding twenty years, instead of over "any" twenty year period. *See* ***Herzog v. Bujniewicz***, 32 Wis.2d 26, 33-34, 145 N.W.2d 124, 128 (1966); ***Harwick v. Black***, 217 Wis.2d 691, 701-02, 580 N.W.2d 354, 358-59 (Ct. App. 1998) (concluding that under ***Herzog***, "any twenty-year time period is sufficient," which "does not need to be the twenty years

immediately preceding the filing of a court action."). Again, we do not conclude that the trial court erred.

The trial court concluded that insufficient evidence had been introduced to establish that the requisite open, hostile and notorious possession by Hanson or his father had occurred at any time prior to 1985, when the new fence was erected. The court did not limit its consideration strictly to events occurring after 1976, nor did it say that events prior to that year were irrelevant to Hanson's claim. The court's determination that Hanson had presented insufficient evidence to overcome the presumption that his father's use of the path and the disputed parcel from 1946 to 1966 was permissive, shows that the court gave consideration to the entire time period within which Hanson claimed to have established his adverse possession. Hanson lost at trial not because the court did not consider his evidence, but because, in the trial court's view, the evidence Hanson produced was insufficient to overcome the presumption in favor of the Days' title.

Hanson's final complaint is not with the trial court's reasoning in reaching its decision, but with the decision itself. He claims the court erred in its legal conclusion that he had not met his burden in establishing adverse possession of the disputed parcel for the requisite period.[3] As we have noted, this is a question of law we decide de novo. Nonetheless, we benefit from the trial court's

[3] Hanson does not challenge any of the trial court's factual findings as being clearly erroneous in his brief in chief. In his reply brief, in a section devoted primarily to correcting the Days' summary of the facts, Hanson suggests that the trial court's fact finding was inaccurate in certain details. Hanson does not, however, explain how these details affected the court's decision. Moreover, we will not, as a general rule, consider issues raised for the first time in a reply brief. *See* ***In re Estate of Bilsie***, 100 Wis.2d 342, 346 n.2, 302 N.W.2d 508, 512 (1981). We thus address only the question of whether the court drew an incorrect legal conclusion from the facts it had found.

analysis and the reasoning in its oral decision. *See* ***State v. Isaac J.R.***, 220 Wis.2d 251, 255, 582 N.W.2d 476, 478 (Ct. App. 1998).

Section 893.25(1), STATS., provides that "uninterrupted adverse possession of 20 years" bars an action for the recovery or the possession of real estate "based on title." Subsection 2 of the statute provides:

> (2) Real estate is possessed adversely under this section:
>
> (a) Only if the person possessing it, in connection with his or her predecessors in interest, is in actual continued occupation under claim of title, exclusive of any other right; and
>
> (b) Only to the extent that it is actually occupied and:
>
> 1. Protected by a substantial enclosure; or
>
> 2. Usually cultivated or improved.

Hanson argues that the evidence he produced at trial establishes that he and his father "were in open, notorious, continuous and exclusive possession of the disputed area which was protected by a substantial enclosure for a period of 50 years, from 1946 to 1996." In support, he relies primarily on ***Klinefelter v. Dutch***, 161 Wis.2d 28, 467 N.W.2d 192 (Ct. App. 1991), and cases cited in that opinion, for the following proposition, which Hanson asserts should control the outcome here:

> Where adjacent landowners have openly used land up to a fence which has been regarded as the true line between their properties for at least twenty years, the general rule is that title to any land between the fence and the true line is established by adverse possession.

Id. at 33, 467 N.W.2d at 194 (citation omitted).

The chief difficulty with Hanson's fence-based argument is that, unlike the claimant in ***Klinefelter***, he did not establish that the "adjacent

landowners," the Thompsons/Days and Hanson and his father, ever regarded the pre-1985 fence "as the true line between their properties." We agree with Hanson, however, that the factual circumstances we reviewed in ***Klinefelter*** bear some similarities to the present facts, and that if Hanson proved sufficient facts at trial to come within the ***Klinefelter*** holding, he should prevail on his adverse possession claim. Thus, we discuss our opinion in ***Klinefelter*** in some detail.

In ***Klinefelter***, as here, the dispute was over a boundary strip created when a fence was installed at a distance from a quarter-section line, instead of along the described line. Also, as here, the principal use of the disputed parcel was recreational—the claimants having testified that they used the property for hunting, hiking and berry picking. *See* ***id***. at 32, 467 N.W.2d at 193. Significantly, however, the claimants in ***Klinefelter*** had also cleared an area for a new roadway, cut wood on the disputed parcel, and planted trees on it. *See* ***id***. Also in contrast with the evidence regarding the remnants of the pre-1985 fence in the present case, the purpose and origin of the fence which defined the boundary of the adversely claimed strip in ***Klinefelter*** was no mystery. It had been erected in 1934 to mark and protect a one-rod wide strip which the claimants' predecessor had sold to a neighboring farmer for use as an access lane between his adjacent parcels. (As noted, the lane was to have been along the quarter-section line, but was erroneously set off some 75 feet onto the adjoining forty acre parcel.) The ***Klinefelter*** claimants, after acquiring their land in 1967, had repaired the north half of the fence such that it would "contain cattle," and although the south half of the fence was "not nearly as substantial" at the time of trial, the testimony was that it had been sufficient to contain cattle for several years after 1967. *See* ***id.*** at 32, 35, 467 N.W.2d at 193, 195.

We concluded that on the facts before us, the requirements of "actual continued occupation" and protection "by a substantial enclosure" were met for a sufficient duration, and that the claimants had established their claim to the disputed parcel. *See* ***id***. at 34-37, 467 N.W.2d at 194-96; *see also* § 809.25(2), STATS. We noted that the "substantial enclosure" requirement had little to do with physically keeping persons or creatures in or out, and that its main purpose was in the provision of notice to the titleholder "that another may claim an interest in that land." ***Id***. at 34-35, 467 N.W.2d at 194-95. We rejected the argument that the "wild" or "natural" condition of the surrounding property fundamentally altered either the purpose or operation of the adverse possession statute. We also concluded that the facts found by the trial court, as well as the exhibits in the record, left "no doubt" that a fence had been erected along the length of the disputed parcel, and that the old cattle lane and adjacent fence had thus modified the disputed parcel from its natural state. Moreover, we noted that the titleholder acknowledged that he had seen the fence at the time he purchased his property. *See* ***id***. at 36, 467 N.W.2d at 195.

The record presently before us falls short of establishing the elements of adverse possession as exemplified in ***Klinefelter***. Like the trial court, we cannot conclude that the present record establishes a continuous twenty-year period of adverse possession at any point during the period 1946 through 1996. We could perhaps conclude that, for the eleven years immediately preceding commencement of the action, Hanson established both his actual occupation of the disputed parcel and his substantial enclosure of it with the 1985 fence. During this period, for instance, his son-in-law regularly mowed the path to the spring, and went on frequent recreational outings on the parcel in question.

Prior to 1985, however, a much different picture emerges, as the trial court rightly noted. A fence of unknown purpose and origin fell into disrepair, with no clear and credible evidence in the record as to when it had served as an identifiable, operational fence, or how long it had been in disrepair. *Cf.* ***Seybold v. Burke***, 14 Wis.2d 397, 404-06, 111 N.W.2d 143, 147-48 (1961) (concluding that a fence that had fallen into disrepair, although some posts and wire on the ground remained, did not satisfy a claimant's burden to show a substantial enclosure for twenty years). We also deem significant the trial court's findings that the disputed parcel and adjacent areas were wild and natural. Although we acknowledged in ***Klinefelter*** that § 809.25, STATS., operates alike on natural as well as cultivated lands, the nature and character of the land at issue does bear on what type of occupation and enclosure are sufficient to put a titleholder on notice of an adverse claim. Here, the trial court concluded that even the present, 1985 fence would be difficult to see during summer months, and we conclude that the fence remnants that pre-existed the 1985 fence did not serve to "wave the flag of hostility" such that the Thompsons would have had occasion to suspect an adverse claim of ownership.

By the same token, the evidence regarding use of the disputed parcel prior to 1985 could hardly be said to establish "actual continued occupation" by Hanson or his father. We agree with Hanson that residence on the premises, the erection of substantial improvements, or even cultivation is not required to establish "actual continued occupation." *See, e.g.,* ***Northwoods Dev. Corp. v. Klement***, 24 Wis.2d 387, 391-92, 129 N.W.2d 121, 123 (1964) (holding that the pasturing of cattle in an area enclosed by fencing can constitute "exclusive, open, and visible" possession). We also acknowledge that a qualifying use need only be that for which the land in question is suitable. *See* ***Pierz v. Gorski***, 88 Wis.2d 131,

137, 276 N.W.2d 352, 355 (1979). Nonetheless, the evidence found credible by the trial court shows at most that, prior to 1985, the parcel was subject to occasional recreational use and, in some years, the pasturing of cattle.[4] Unlike the showing made by the claimants in ***Klinefelter***, Hanson presented no evidence that any significant clearing, cutting, road building or planting took place on the disputed parcel prior to 1985.

Just as important, the pre-1985 uses related more to the path than to the steep, wooded hillside that comprises the bulk of the disputed parcel. That persons and cattle used the path to access the spring does not necessarily exhibit a possessory intent by the users. By the same token, it also appears that the Hansons' use of the path was not exclusive, as there was testimony that persons other than Hanson, his father and their invitees utilized the path for outdoor activities. In short, we cannot conclude on this record that the occasional uses occurring before 1985 can be deemed to establish actual continued occupation, or open, notorious and exclusive possession, for a twenty-year period. *See* ***Pierz***, 88 Wis.2d at 137, 276 N.W.2d at 355 (holding that "[a]cts which are consistent with sporadic trespass are insufficient to apprise a reasonably diligent owner of any adverse claim").

This court, like the trial court, is required to "strictly construe the evidence against the adverse possessor and apply all reasonable presumptions in favor of the true owner." ***Id***. at 136, 276 N.W.2d at 355 (citation omitted). After conducting our own review of the testimony and exhibits offered at trial under this

[4] For example, when he was asked if he had personally seen cattle "in the disputed area" while his father occupied the farm between 1946 and 1966, Hanson replied that he "seldom saw cattle there … but occasionally I've seen a cow there."

evidentiary standard, we conclude that the trial court did not err, and that Hanson has failed to establish to a reasonable certainty by the greater weight of the credible evidence that he and his predecessor adversely possessed the disputed parcel for a twenty-year period prior to the commencement of this action. Although the Days also did not establish that their predecessors had visibly occupied or enclosed the parcel, as titleholders they had no obligation to make such a showing.[5]

CONCLUSION

For the reasons discussed above, we affirm the appealed judgment.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[5] We note in closing that, on this record, Hanson might have more easily established his acquisition of an adverse, non-possessory right to use the path through the disputed parcel for access between the buildings and the spring on his farm. He advanced no claim to such an easement in the trial court or on appeal, however, and we thus have no occasion to consider the issue.