COURT OF APPEALS
DECISION
DATED AND FILED

July 13, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

No. 99-1967

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

GENEVIEVE LANGRECK,

PLAINTIFF-APPELLANT,

V.

CATHY GORST,

DEFENDANT-THIRD-
PARTY PLAINTIFF-RESPONDENT,

LOIS SEXTON,

THIRD-PARTY DEFENDANT.

APPEAL from a judgment of the circuit court for Wood County: PATRICK TAGGART, Judge. *Affirmed.*

Before Eich, Vergeront and Deininger, JJ.

¶1 PER CURIAM. Genevieve Langreck appeals from a judgment dismissing her adverse possession claim against Cathy Gorst. The issues are whether the court erroneously concluded that Langreck failed to prove her claim and whether the trial court erroneously excluded certain testimony at trial. We affirm.

¶2 Langreck and Lois Sexton owned adjoining residential lots in the City of Marshfield for almost forty years. In 1993 Gorst purchased Sexton's property. In 1997 Langreck requested a city permit to build a fence between her property and Gorst. The city denied the permit, however, because the proposed fence line was ten to fifteen feet over the property line into Gorst's lot. Langreck then commenced this action for adverse possession of a twenty-four by one hundred and fifty foot strip of Gorst's property.

¶3 At trial, Langreck testified that she and her family believed they owned the disputed property, and had exclusively used and controlled it since at least 1948. The primary evidence of that use and control was a clothesline the Langrecks erected in 1939, and used ever since, and their regular mowing of the area. Sexton testified that in about 1956 she and her husband informed Langreck and her husband that they intended to put a hedgerow along the true property line, which would cut the Langrecks off from their clothesline. The Langrecks objected, and the Sextons abandoned their plan to avoid disrupting their otherwise good relations with their neighbors. Sexton also testified that they permitted the clothesline to remain in use for the same reason, although they did not expressly convey that "silent" permission to the Langrecks. She added that both families frequently mowed the disputed area, and that children of both families regularly played there. Sexton testified that she planted two trees in the zone that were

never removed. (Langreck testified that the trees were right on the border and not actually in the disputed area).

¶4 Gorst and her daughter also testified to their regular mowing and cleanup of the disputed land, although Langreck stipulated that her adverse possession claim was either proved or disproved before Gorst bought the property. It was essentially undisputed that the border of the disputed area was not marked off or otherwise distinguishable from the remainder of Gorst's lot.

¶5 The trial court excluded testimony from Langreck's son about what he recalled of the hedgerow discussion in the 1950's, that occurred when he was about ten years old. The court also found Sexton's testimony credible as to who did what with the property, and concluded that the Langreck's use of it was continuously permissive. Judgment was entered dismissing the claim and this appeal followed.

¶6 Adverse possession not founded on a written instrument is established by twenty years of actual continued occupation under claim of title. WIS. STAT. § 893.25 (1997-98).[1] The burden of proof is on the party asserting adverse possession. *See* ***Allie v. Russo***, 88 Wis. 2d 334, 343, 276 N.W.2d 730 (1979). That party must show twenty years of exclusive use in an open, notorious, visible, exclusive, hostile manner that would apprise a reasonable diligent land owner and the public that the possessor claimed the land as his or her own. *See* ***Pierz v. Gorski***, 88 Wis. 2d 131, 136, 276 N.W.2d 352 (Ct. App. 1979). Adverse possession is a mixed question of fact and law that requires findings as to what

[1] All references to the Wisconsin Statutes are to the 1997-98 version.

happened and a conclusion as the legal significance of those events. *See* ***Perpignani v. Vonasek***, 139 Wis. 2d 695, 728, 408 N.W.2d 1 (Ct. App. 1987).

¶7 The trial court properly concluded that Langreck failed to prove adverse possession. In Langreck's view, the "silent permission" that the Sextons gave for using their property was proof of acquiescence to the Langrecks' hostile use, rather than the permission necessary to show a non-hostile use. However, the trial court expressly found credible Sexton's testimony that her family affirmatively asserted their ownership of the property in 1956, and thereafter shared the use and maintenance of it with the Langrecks, in neighborly fashion, until 1993. That credibility determination is not subject to review. *See* ***State v. Toy***, 125 Wis. 2d 216, 222, 371 N.W.2d 386 (Ct. App. 1985). The facts established because of it rule out the conclusion that the Langrecks used the disputed land in either the hostile or exclusive manner necessary for adverse possession.

¶8 Langreck cannot reasonably claim prejudice from the decision to exclude part of her son's testimony. The Langrecks' offer of proof suggested that the son's testimony would have confirmed rather than refuted Sexton's recollection of the hedgerow discussion. Additionally, Langreck herself witnessed the meeting and could have testified about it, but chose not to. A claimed error does not prompt reversal unless it affects the substantial rights of a party. WIS. STAT. § 805.18(2).

By the Court.—Judgment affirmed.

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