COURT OF APPEALS
DECISION
DATED AND RELEASED

March 21, 1996

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

NOTICE

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

No. 94-3164

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

ALYCE M. DREA,

Plaintiff-Appellant,

v.

DAVID DUREN
AND WONEWOC FARMERS MUTUAL INSURANCE CO.,

Defendants-Respondents.

APPEAL from a judgment and an order of the circuit court for Richland County: KENT C. HOUCK, Judge. *Judgment reversed; order affirmed and cause remanded.*

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

VERGERONT, J. Alyce Drea appeals from a summary judgment dismissing her complaint which alleged adverse possession of certain real estate in Richland County. The trial court denied Drea's motion for partial summary judgment and granted summary judgment in favor of David Duren, the adjoining landowner, and his insurer, Wonewoc Farmers Mutual Insurance

Company. Drea also appeals from an order denying her motion for reconsideration and relief from judgment.

On appeal, Drea claims that the trial court erred on two alternative grounds: (1) there are no issues of material fact and she, not Duren, is entitled to summary judgment; or (2) there are issues of material fact and summary judgment for either party is improper. She also claims that the trial court erroneously exercised its discretion in denying her motion for reconsideration and relief from judgment. We conclude that the trial court did not erroneously exercise its discretion in denying Drea's motion for relief from judgment. We also conclude that because there are genuine issues of material fact, neither party is entitled to summary judgment. We therefore reverse the summary judgment and affirm the order denying Drea's motion for relief from judgment.

BACKGROUND

Drea's amended complaint alleges that in 1993, Duren removed a fence (the old west fence) that separated their farms and erected a new fence that encroached on land that she and her predecessors in title had possessed and occupied since 1919, believing it to be theirs. Drea requested declaratory, monetary and injunctive relief. Duren's answer admitted that he removed portions of the old west fence, but denied that it was the legal boundary and denied that the new fence encroached on Drea's property. Duren claimed the disputed property was his in light of the legal boundary.

Drea moved for a partial summary judgment declaring that her rights and interests in the disputed property are superior to Duren's and granting her title to the property. The court concluded that the first evidence of Drea's hostile and exclusive possession of the disputed property occurred in 1975, when the old west fence was rebuilt without a gate. Since Duren removed the old west fence in the fall of 1993, Drea's period of exclusive possession was less than twenty years. The court granted summary judgment to Duren and dismissed Drea's complaint.

Drea then moved for reconsideration and relief from judgment under § 806.07, STATS., asking that the issue of adverse possession be tried by a jury. The ground for the motion was that Drea had not filed affidavits to rebut those submitted by Duren because she had not known until the hearing on her summary judgment motion that Duren was requesting summary judgment in his favor. Had she known, she would have submitted the affidavit of her brother, Joseph Schmitt. Drea attached Schmitt's affidavit to her motion.

The trial court denied Drea's motion for reconsideration and relief from judgment. The court stated that it was clear at the hearing on the motion for summary judgment that the court was going to look at the materials submitted to see whether either party was entitled to summary judgment. According to the court, both counsel indicated at that hearing that the court had all the materials necessary to decide the motion. Drea's counsel did not ask for the opportunity to submit supplemental materials.

RELIEF FROM JUDGMENT

We address first the issue whether the trial court erroneously exercised its discretion in denying Drea's motion for relief from judgment. Our resolution of this issue will determine whether we consider Schmitt's affidavit in reviewing the court's decision on summary judgment.

Although Drea did not specify the paragraph of § 806.07(1), STATS., on which she was relying, it appears from the accompanying affidavit of counsel and the argument of counsel at the hearing on the motion that the pertinent ground is para. (a), "[m]istake, inadvertence, surprise, or excusable neglect." Whether to grant relief under § 806.07 is within the trial court's discretion. ***Nelson v. Taff***, 175 Wis.2d 178, 187, 499 N.W.2d 685, 689 (Ct. App. 1993). We do not reverse the denial of such a motion if the record shows that the trial court, in fact, exercised discretion and there is a reasonable basis for the court's determination. ***Id.***

We conclude the trial court did exercise its discretion in denying the motion and that there is a reasonable basis for its decision. Drea's argument was that she was surprised by Duren's request for summary judgment in his

favor at the August 29, 1994 hearing on her summary judgment motion and that explained why she had not submitted Schmitt's affidavit earlier. At the August 29 hearing, the court had before it affidavits submitted by both parties in support of, and in opposition to, Drea's motion. Duren's counsel argued against summary judgment in Drea's favor and also asked the court to consider granting summary judgment in Duren's favor under § 802.08(6), STATS. He stated that, based on the affidavits presented, Drea was not going to be able to get to the jury. After hearing argument from both counsel, the court asked whether Drea's counsel agreed that "the facts that are in the affidavits are the facts that we're going to have at trial." Drea's counsel answered: "[e]ssentially so." The court took the matter under advisement to "see if I can grant summary judgment one way or the other because to take this matter to trial is going to cost these people a lot of money and may, may not be necessary."

The court issued its written decision in Duren's favor on September 16, 1994. Drea filed her motion for reconsideration and relief from judgment on October 14, 1994.

We note initially that § 802.08(6), STATS., permits the court to award summary judgment in favor of the party against whom a motion for summary judgment is brought if the court finds that party is entitled to summary judgment. The court may do this "even though the party has not moved therefor." Section 802.08(6). There was therefore no need for Duren to file a motion for summary judgment prior to the August 29, 1994 hearing. However, even if Drea's surprise at Duren's request for summary judgment were justified, she does not explain why she waited until after the court issued its decision to submit Schmitt's affidavit. The record supports the trial court's description of the August 29 hearing. Drea's counsel did not ask for the opportunity to submit a supplemental affidavit and, in fact, agreed that the court had "essentially" all the facts. It was clear from the court's comments at the close of the August 29, 1994 hearing that it was going to look at the affidavits to determine whether either party was entitled to summary judgment.

The trial court considered the facts of record, explained its reasoning, and came to a reasonable conclusion. It did not erroneously exercise its discretion in denying Drea's motion for relief from judgment. We therefore

do not consider Schmitt's affidavit in deciding whether the court properly granted summary judgment in Duren's favor.

SUMMARY JUDGMENT

We review summary judgments de novo, employing the same methodology as the trial court. ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). Summary judgment is proper when there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. Section 802.08(2) and (6), STATS.

Section 893.25, STATS., governs actions to establish title based on adverse possession. It provides in part:

> (1) ... A person who, in connection with his or her predecessors in interest, is in uninterrupted adverse possession of real estate for 20 years ... may commence an action to establish title under ch. 841.
>
> (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 it is actually occupied and:
>
> 1. Protected by a substantial enclosure; or
>
> 2. Usually cultivated or improved.

The burden of proof is on the party asserting the claim of adverse possession. ***Allie v. Russo***, 88 Wis.2d 334, 343, 276 N.W.2d 730, 735 (1979). The possession must be hostile, open and notorious, exclusive and continuous. ***Id.***

But hostility in this context does not refer to actual animus; rather, if the elements of open, notorious, continuous and exclusive possession are satisfied, the law presumes hostile intent. ***Burkhardt v. Smith***, 17 Wis.2d 132, 139, 115 N.W.2d 540, 544 (1962). The possession must be sufficiently open and obvious to apprise the true owner, in the exercise of reasonable diligence, of the fact and the intention to claim possession of the property. ***Allie***, 88 Wis.2d at 343-44, 276 N.W.2d at 735.

Where a fence is concerned, the general rule is that "[w]here 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, ... title to any land between the fence and the true line is established by adverse possession." ***Klinefelter v. Dutch***, 161 Wis.2d 28, 33, 467 N.W.2d 192, 194 (Ct. App. 1991).

Since the complaint states a claim that Drea has title by adverse possession and the answer presents material issues of fact, we examine Drea's submissions to determine whether she has made a *prima facie* case for adverse possession. *See* ***Brownelli v. McCaughtry***, 182 Wis.2d 367, 372, 514 N.W.2d 48, 49 (Ct. App. 1994).

Drea avers that she has solely owned the land described in the complaint, the family farm, since 1975 and that the farm has been in her family's uninterrupted possession since 1919. The old west fence formed the boundary line between the properties for the entire period of her family's ownership of the farm. The new fence Duren erected encroaches on her pasture, which she is now unable to use to graze her livestock and as a route of access to other property she owns. The disputed property has been possessed and occupied by her and her predecessors without interruption for more than twenty years and, in fact, for the majority of this century. It has been fenced that entire time, and the prior owners of Duren's farm have never disputed the fenced boundaries.

Drea also submitted a survey of the disputed property which shows the location of the old west fence and the new fence that was built by Duren. She also submitted the affidavit of Richard Connors and George Cunningham. Connors avers that his family owned the farm now owned by Duren until it was sold to Duren. Connors is fifty-three and grew up on the farm. He worked on the land and is familiar with the old west fence. He

constructed a portion of that fence. The location of the old west fence is correctly shown on Drea's survey and that is where it has been throughout his lifetime. In the mid-1970's, Drea's portion of that fence line was replaced with new materials by George Cunningham and Joe Drea, but the location of the fence line remained the same. In the 1980's, Connors replaced his share of the same fence line which Duren has now removed. Connors added new materials but did not move the fence.

Cunningham avers that he is seventy-nine years old, that he has lived all of his life in the area, and that most of his life he has been familiar with the Drea and Duren farms and with the location of the old west fence line shown on Drea's survey. In the mid-1970's, with Joe Drea, he rebuilt the Dreas' portion of that fence line, using new materials in the same location as the fence line that was there. The portion he rebuilt, the portion he replaced, and the Connors' portion of the same fence line are all as described on Drea's survey. This was the fence line removed by Duren.

We conclude that Drea's submissions establish a *prima facie* case that she and her predecessors in interest openly used the land up to the old west fence and that she and the owners of the adjacent land regarded that fence as the boundary line between the properties for a continuous period of at least twenty years.

We now examine the materials Duren submitted to determine if Duren is entitled to summary judgment or, alternatively, to determine if there are material facts in dispute that would entitle Duren to a trial.[1]

Duren submitted two affidavits by him, two by his father, Joseph Duren, and a survey that he commissioned. Taken together, these affidavits

[1] We do not consider the affidavit of John O'Brien which Duren submitted. O'Brien averred that he was asked to photograph and inspect the disputed property by Duren's attorney. Attached to his affidavit are copies of what he states are 1978 and 1986 ASCS aerial photographs of the property, which he comments on and compares. He also attached two non-scale drawings he made illustrating his points, and he relates statements of Duren's father, some of which relate conversations Duren's father had with Joseph Schmitt. O'Brien's statements are either inadmissible hearsay or lack proper foundation. His affidavit therefore does not meet the requirements of § 802.08(3), STATS.

aver as follows. On January 29, 1988, Duren bought certain property from the estate of John S. Connors that adjoins Drea's farm to the west. When he purchased the property, in addition to the old west fence on the west boundary of the disputed property, there were several barbed wire fences on the east side of the disputed property near what he now knows to be the true property line (old east fence). At the time he bought the farm, he thought the old east fence was very near the true property line. He grew up in the area and has been familiar with the Drea property and his property since the mid-1960's. At that time, the southern portion of the disputed property was an oat field, fenced on both the east and west sides, with a gate in the old west fence allowing access from the (then) Connors' property, a gate in the old east fence allowing access to the oat field from the Dreas' property, and a gate in the south end of the oat field fence leading to the highway. He worked in the oat field as a boy between 1963 and 1966.

Duren always believed the old east fence was located very near to the true property line. When portions of the old west fence were rebuilt, the gates were eliminated. Since the time he has owned his farm, the old west fence has been in poor condition--several of the wooden fence posts are broken off, steel posts are bent, the wire is rusted, strands are broken, and in some places there are only three or four strands. The Dreas' cattle have broken through that fence one hundred times or more since he has owned the property. He does not agree with the location of the old west fence line as depicted on Drea's survey. He has paid the real estate taxes on his entire farm, including the disputed property.

Duren knows Joe Schmitt, who is Drea's brother and used to own the Drea farm. Schmitt manages the Drea farm and acts as agent for Drea. Within a year after Duren bought his farm, Schmitt told him the old west fence was in poor condition and suggested Duren rebuild it. When Duren told him that was not the true property line, Schmitt did not dispute that or insist that Duren rebuild the old west fence.

Duren's father, Joseph, has lived in the immediate vicinity of the disputed land for his entire sixty-eight years, except for three years in the military. He rented land from the Dreas for several years in the 1970's and 1980's. He recalls seeing Joe Drea, Tom Drea, George Cunningham and Pat Connors fencing in the area now subject to dispute, but he does not know if they were removing, relocating or only repairing the fence line. In the 1930's

and 1940's, he helped with the harvest in the oat field, described in his son's affidavit, and the oats went to the Connors' farm. The oat field used to be fenced in, with gates as his son describes, and the Connors used the gates to go from their side of the oat field to the highway. After the early to mid-seventies, there was no longer an oat field there, it was pasture. He always thought the oat field was part of the Connors' farm.

Joseph Duren also knows Schmitt. Schmitt told him in the early 1990's that the true property line was marked by a certain iron pipe that is near the location of the old east fence.

We conclude that Duren's submissions create genuine issues of material fact that preclude summary judgment for Drea. Although Duren's submissions do not dispute the existence and location of the old west fence, the evidence that part of the disputed property was entirely fenced in, with a fence on the east side very near what Duren claims is the true property line, and that gates provided access to both neighboring farms, gives rise to a reasonable inference that the oat field was not under the exclusive possession and control of the Drea family before the old west fence was rebuilt and the gate removed. On summary judgment, we are required to draw all reasonable inferences from the evidence in favor of the non-moving party. ***Grams v. Boss***, 97 Wis.2d 332, 339, 294 N.W.2d 473, 477 (1980). Drawing all reasonable inferences in Duren's favor, removal of the gate could have occurred after October 1973. Based on these inferences, there was not uninterrupted, exclusive possession for twenty years.[2]

The evidence of Schmitt's statement concerning the true boundary line and of his failure to disagree with Duren's statement on the true boundary line also creates a material factual dispute. Both Duren's affidavit and his father's affidavit aver that Schmitt had owned the Drea farm and is now managing it; Duren's affidavit also avers that Schmitt acts as agent for Drea. Since no affidavit controverts these averments, Duren has made a sufficient showing at this stage that both Schmitt's statement and his failure to disagree are admissible as the admission of a party opponent under § 908.01(4)(b)4,

[2] The evidence that the oats went to the Connors in the 1930's and 1940's does not create a genuine factual dispute as to the nature of the Drea family's use and possession during the twenty years previous to October 1993.

STATS.[3] *See* ***Dean Medical Ctr. v. Frye***, 149 Wis.2d 727, 734-35, 439 N.W.2d 633, 636 (Ct. App. 1989) (on summary judgment, party relying on evidence need not conclusively demonstrate admissibility but need only make *prima facie* showing of admissibility; burden then shifts to opposing party to show that evidence is inadmissible or show facts which put evidence at issue).

Drea contends that the general rule concerning fence lines is dispositive here and entitles her to summary judgment. However, the existence of a fence for a period of twenty years, in itself, does not automatically result in a successful claim for adverse possession of the property up to the fence line. Rather, the person claiming adverse possession up to a fence line must show that he or she has openly used the land up to the fence line and that it has been regarded by the adjacent landowners as the true property line for at least twenty years. ***Klinefelter***, 161 Wis.2d at 33, 467 N.W.2d at 194.

In ***Klinefelter***, the trial court made findings, which we found were supported by the record, that that had occurred. ***Id.*** at 34, 467 N.W.2d at 194. In ***Lindl v. Ozanne***, 85 Wis.2d 424, 270 N.W.2d 249 (Ct. App. 1978), there was no testimony offered by the record titleholders of the disputed property to controvert the claimants' testimony of their exclusive use of the disputed property up to the fence line. Here there is conflicting evidence, including reasonable inferences from the evidence, as to the use of the property up to the old west fence and the understanding of the adjacent landowners as to the true property line during the pertinent twenty-year period.

Because of the issues of fact, Duren is not entitled to summary judgment. The trial court incorrectly concluded that the first evidence of the

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[3] Section 908.01(4)(b)4, STATS., provides that a statement is not hearsay if it is offered against a party and is:

> A statement by the party's agent or servant concerning a matter within the scope of the agent's or servant's agency or employment, made during the existence of the relationship ....

Silence in response to a statement may constitute an admission of assent if it is more reasonably probable than not that one would dissent if the statement were incorrect. ***Pawlowski v. Eskofski***, 209 Wis. 189, 197, 244 N.W. 611, 614 (1932).

Drea family's hostile and exclusive possession was the rebuilding of the old west fence in 1975 without a gate. That conclusion overlooks the evidence presented by Drea. In deciding whether summary judgment should be granted in Duren's favor, the reasonable inferences from the evidence must be drawn in Drea's favor. *See* ***Grams***, 97 Wis.2d at 339, 294 N.W.2d at 477. A reasonable inference from Connors' affidavit is that he built and repaired a portion of the old west fence because he considered that fence line to be the true boundary line between his property and the Drea farm. A reasonable inference from Drea's affidavit is that her family used the disputed property as pasture and the adjacent property owner did not ever use the disputed property.

Duren relies on ***Allie v. Russo***, 88 Wis.2d 334, 276 N.W.2d 730 (1979), in arguing that he is entitled to summary judgment. In ***Allie***, the court determined that certain of the trial court's factual findings were unsupported by the record and therefore concluded that adverse possession had not been established. ***Id.*** at 347-49, 276 N.W.2d at 737-38. However, in ***Allie*** there was no evidence that the titleholder considered the fence line to be the true boundary line. The great weight and clear preponderance of the evidence, the ***Allie*** court concluded, was that the titleholder had always considered the fence to be on her property and had weeded and shoveled in the disputed area. ***Id.*** at 348, 276 N.W.2d at 737. ***Allie*** does not support ignoring the evidence in Drea's favor at the summary judgment stage.[4]

By the Court.—Judgment reversed; order affirmed and cause remanded.

Not recommended for publication in the official reports.

[4] Although Duren's submissions describe the old west fence as being in poor condition, Duren does not appear to argue that he is entitled to summary judgment on the ground that it was not a substantial enclosure under § 893.25(2)(b)1, STATS. Duren is not entitled to summary judgment on this issue. *See* ***Klinefelter v. Dutch***, 161 Wis.2d 28, 35-36, 467 N.W.2d 192, 195 (Ct. App. 1991) (land is "substantially enclosed" even though in some areas the wire is down, trees have grown up, and cattle can get through).