COURT OF APPEALS
DECISION
DATED AND FILED

April 25, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 01-2402 **Cir. Ct. No. 00-CV-282**

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

RANDY O'NEILL AND RITA O'NEILL,

PLAINTIFFS-APPELLANTS,

V.

JAMES REEMER AND WEYERHAEUSER COMPANY D/B/A NORTHWEST HARDWOODS,

DEFENDANTS-RESPONDENTS.

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

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

¶1 VERGERONT, P.J. Randy and Rita O'Neill appeal the summary judgment dismissing their trespass complaint against James Reemer, owner of

adjoining real estate, and Weyerhaeuser Company, which Reemer engaged to perform logging services.[1] The trial court concluded that WIS. STAT. § 893.33(2) precluded the O'Neills from establishing title by adverse possession to the property that was logged because they did not file an action claiming title to the property within thirty years of obtaining title by adverse possession. The O'Neills contend the trial court erred in relying on ***Shelton v. Dolan***, 224 Wis. 2d 334, 591 N.W.2d 894 (Ct. App. 1998). We agree with the trial court that ***Shelton*** is controlling. We therefore affirm.

BACKGROUND

¶2 Reemer and the O'Neills own adjoining real property in the Township of Little Falls. Reemer has record title to the property the O'Neills claim by adverse possession. The O'Neills filed this action after Weyerhaeuser Company, hired by Reemer to perform logging on his property, logged the property the O'Neills claim by adverse possession. Reemer purchased his property in 1999 from Mary Waughtal, who had owned it since 1973. The O'Neills acquired title to their property in 1999 from Randy's father, who had purchased it in 1958 with Randy's grandfather from William Zillmer.

¶3 In support of their motion for partial summary judgment on their claimed title by adverse possession, the O'Neills submitted affidavits averring that they and their predecessors in title considered a barbed-wire fence erected by

[1] The complaint also asserted a claim under WIS. STAT. §§ 26.05 (Timber Theft) and 26.09 (Civil Liability for Unauthorized Cutting, Removal or Transportation of Raw Forest Products) (1999-2000).

All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

Zillmer in 1944 to mark the boundary between their property and that of the adjoining owner, and the disputed property lies on their side of this boundary. The O'Neills' submissions aver that they and their predecessors in title have used the disputed property for pasturing and hunting, and that they have done so openly, notoriously, and adversely for the past forty-five years. In support of his cross-motion for summary judgment, Reemer submitted affidavits averring that the disputed property is a "wild" natural area, that the fence the O'Neills refer to consists of a few strands of barbed wire that Reemer and Waughtal were not aware of until the lawsuit, and neither observed the O'Neills or their predecessors in title using the disputed property.

¶4 The trial court reasoned that the twenty years necessary to establish adverse possession under WIS. STAT. § 893.25(1)[2] would have begun to run when the fence was erected in 1944, and, assuming the requirements of that statute were met, adverse possession would have been established in 1964. Then, applying WIS. STAT. § 893.33(2) as we construed it in ***Shelton***, the court concluded that since the O'Neills' predecessors in title had not recorded an instrument or notice of their claim of adverse possession by 1994—within thirty years of 1964—the O'Neills were barred from now claiming title by adverse possession. Since that

[2] WISCONSIN STAT. § 893.25(1) reads as follows:

> **(1)** An action for the recovery or the possession of real estate and a defense or counterclaim based on title to real estate are barred by uninterrupted adverse possession of 20 years, except as provided by s. 893.14 and 893.29. A person who, in connection with his or her predecessors in interest, is in uninterrupted adverse possession of real estate for 20 years, except as provided by s. 893.29, may commence an action to establish title under ch. 841.

title was essential to their claims against Reemer and Weyerhaeuser Company, the court dismissed the complaint.[3]

DISCUSSION

¶5 The O'Neills contend that our decision in ***Shelton*** is not consistent with prior supreme court precedent and is contrary to the principles underlying adverse possession. Alternatively, they argue that, even if we follow ***Shelton***, they are not barred from asserting their claim of adverse possession.

¶6 We review a trial court's grant or denial of summary judgment, de novo, applying the same methodology as the trial court. ***Torgerson v. Journal/Sentinel, Inc.***, 210 Wis. 2d 524, 536, 563 N.W.2d 472 (1997). A party is entitled to summary judgment if there are no genuine issues of material fact and the party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). Since there are no factual disputes relevant to the issues the O'Neills raise on appeal, the only question is whether the trial court correctly applied the law in ruling that ***Shelton*** precluded the O'Neills' claim for adverse possession.

¶7 In ***Shelton***, the facts we assumed for purposes of our decision were that Shelton or his predecessors in title had obtained title to an access road by adverse possession, with the requisite twenty years of adverse use ending sometime in the 1950's. ***Shelton***, 224 Wis. 2d at 337. In deciding that WIS. STAT.

[3] In the alternative, the court concluded that if WIS. STAT. § 893.33(2) were not a bar to the O'Neills' claim of title by adverse possession, there were disputed issues of fact whether the fence erected in 1944 was a substantial enclosure, which would preclude summary judgment for either party. The court also concluded that if § 893.33(2) were not a bar and if the O'Neills succeeded in establishing ownership by adverse possession, they would be entitled to damages for any loss under WIS. STAT. §§ 26.05 and 26.09. We need not address these alternative rulings on this appeal.

§ 893.33(2)[4] barred his action for a declaration of his interest in the access road, we analyzed two prior supreme court decisions construing the statute—***Herzog v. Bujniewicz***, 32 Wis. 2d 26, 145 N.W.2d 124 (1966), and ***Leimert v. McCann***, 79 Wis. 2d 289, 255 N.W.2d 526 (1977). We acknowledged in ***Shelton*** that "***Herzog*** is not an easy case to apply." ***Shelton***, 224 Wis. 2d at 341. One reading of ***Herzog*** is that the owner-in-possession exception in § 893.33(5)[5] permits proof of

[4] WISCONSIN STAT. § 893.33(2) provides:

> **(2)** Except as provided in subs. (5) to (9), no action affecting the possession or title of any real estate may be commenced, and no defense or counterclaim may be asserted, by any person, the state or a political subdivision or municipal corporation of the state after January 1, 1943, which is founded upon any unrecorded instrument executed more than 30 years prior to the date of commencement of the action, or upon any instrument recorded more than 30 years prior to the date of commencement of the action, or upon any transaction or event occurring more than 30 years prior to the date of commencement of the action, unless within 30 years after the execution of the unrecorded instrument or within 30 years after the date of recording of the recorded instrument, or within 30 years after the date of the transaction or event there is recorded in the office of the register of deeds of the county in which the real estate is located, some instrument expressly referring to the existence of the claim or defense, or a notice setting forth the name of the claimant, a description of the real estate affected and of the instrument or transaction or event on which the claim or defense is founded, with its date and the volume and page of its recording, if it is recorded, and a statement of the claims made. This notice may be discharged the same as a notice of pendency of action. Such notice or instrument recorded after the expiration of 30 years shall be likewise effective, except as to the rights of a purchaser of the real estate or any interest in the real estate which may have arisen after the expiration of the 30 years and prior to the recording.

[5] WISCONSIN STAT. § 893.33(5) provides:

(continued)

a claim of adverse possession, and, if the claimant succeeds in establishing title by adverse possession, then the requirement for a recording within thirty years in § 893.33(2) does not apply. ***Shelton***, 224 Wis. 2d at 341-42. However, we decided that the later supreme court case of ***Leimert*** "leaves little room for doubt that it considers ***Herzog*** to require application of the thirty-year rule." ***Shelton***, 224 Wis. 2d at 342. ***Leimert*** addressed a claim of prescriptive easement, but, we stated, did not distinguish such a claim from a claim of adverse possession. ***Shelton***, 224 Wis. 2d at 343-44. Rather, the court in ***Leimert***, "[a]pplying the ***Herzog*** holding to the case at bar," concluded that the thirty-year limitation attached at the end of the twenty years necessary for a prescriptive easement and

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> **(5)** This section bars all claims to an interest in real property, whether rights based on marriage, remainders, reversions and reverter clauses in covenants restricting the use of real estate, mortgage liens, old tax deeds, death and income or franchise tax liens, rights as heirs or under will, or any claim of any nature, however denominated, and whether such claims are asserted by a person sui juris or under disability, whether such person is within or without the state, and whether such person is natural or corporate, or private or governmental, unless within the 30-year period provided by sub. (2) there has been recorded in the office of the register of deeds some instrument expressly referring to the existence of the claim, or a notice pursuant to this section. This section does not apply to any action commenced or any defense or counterclaim asserted, by any person who is in possession of the real estate involved as owner at the time the action is commenced. This section does not apply to any real estate or interest in real estate while the record title to the real estate or interest in real estate remains in a railroad corporation, a public service corporation as defined in s. 201.01, an electric cooperative organized and operating on a nonprofit basis under ch. 185, or any trustee or receiver of a railroad corporation, a public service corporation or an electric cooperative, or to claims or actions founded upon mortgages or trust deeds executed by that cooperative or corporation, or trustees or receivers of that cooperative or corporation. This section also does not apply to real estate or an interest in real estate while the record title to the real estate or interest in real estate remains in the state or a political subdivision or municipal corporation of this state.

would bar a claim based on a prescriptive easement after the thirty years expired. ***Leimert***, 79 Wis. 2d at 298.

¶8 The O'Neills argue that in ***Shelton*** we erred in our reading of ***Leimert***. According to the O'Neills, because ***Leimert*** addressed a claim of prescriptive easement, not adverse possession, we should not have relied on it to understand ***Herzog***, and instead should have read ***Herzog*** to hold that the thirty-year recording requirement does not apply to a claim of adverse possession because of the owner-in-possession exception in WIS. STAT. § 893.33(5). However, we are bound by our prior decisions and may not overrule or modify them. ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). Therefore, the O'Neills' arguments that ***Shelton*** wrongly interpreted ***Leimert*** and ***Herzog*** must be addressed to the supreme court.

¶9 The same is true with respect to the O'Neills' argument that our decision in ***Harwick v. Black***, 217 Wis. 2d 691, 701, 580 N.W.2d 354 (Ct. App. 1998), supports their position. In ***Harwick***, we relied on ***Herzog*** to conclude that the requisite twenty-year period of adverse use does not need to be the twenty years immediately preceding the filing of the court action. ***Id.*** at 702. In ***Shelton***, we rejected the very argument that the O'Neills make based on ***Harwick***, pointing out that the applicability of WIS. STAT. § 893.33 was not raised or addressed in ***Harwick***, and our reliance there on ***Herzog*** was limited to its analysis of the merits of the adverse possession claim. ***Shelton***, 224 Wis. 2d at 344. We are thus bound by that analysis of ***Harwick***.

¶10 The O'Neills also argue that it is not logical that one who has adversely possessed property for over fifty years should not be able to claim title, while one who has adversely possessed property for between twenty and fifty

years should be able to do so. In addition, they point out that, generally, either the person who is adversely possessing property or the title holder is unaware of the true title holder, and therefore it is not logical to expect that the person who is adversely possessing will file a record of his or her claim before the incident prompting a lawsuit arises. We acknowledge the reasonableness of these arguments, although we observe it is also arguably reasonable to discourage claims to real estate that have existed for a lengthy period but of which there is no record. However, the bottom line is that these arguments go to the proper construction of WIS. STAT. § 893.33, and it is the supreme court, not this court, that has the authority to decide whether our construction and application of that statute in ***Shelton*** was correct.

¶11 As an alternative argument, the O'Neills advance the proposition that even if ***Shelton*** were correctly decided, their claim of adverse possession is not barred. They assert that we should interpret ***Herzog*** to mean that evidence that is older than fifty years is not admissible; therefore, since their suit was filed in 2000, they must prove adverse use for the twenty years between 1950 and 1970. This may be one way to read ***Herzog***, but we do not agree it is consistent with ***Shelton***. In ***Shelton***, we concluded that "[b]ecause Shelton did not perform the acts required by § 893.33(2), STATS., within thirty years of obtaining title by adverse possession, the trial court properly dismissed that claim." ***Shelton***, 224 Wis. 2d at 344. Since it is undisputed that the O'Neills did not perform the acts required by WIS. STAT. § 893.33(2) within thirty years of the date on which they assert they obtained title by adverse possession, the trial court correctly followed ***Shelton*** and dismissed the O'Neills' complaint.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

¶12 LUNDSTEN, J. (*concurring*). I agree with the majority that ***Shelton v. Dolan***, 224 Wis. 2d 334, 591 N.W.2d 894 (Ct. App. 1998), controls the result in this case. Moreover, the justifications for adverse possession laws are sound and need not be repeated here. I write separately to emphasize the odd result dictated by ***Shelton***'s interpretation of prior supreme court decisions.

¶13 Under ***Shelton***, if a person continuously, openly, and notoriously possesses property, sufficient to satisfy "uninterrupted adverse possession" under WIS. STAT. § 893.25(1) (1999-2000),[6] for forty-nine years prior to a legal action, the person may obtain legal title to the property. However, if the legal action arises in the fifty-first year of such possession, the person has no claim because of WIS. STAT. § 893.33(5) and its thirty-year time limitation. ***Shelton***, 224 Wis. 2d at 341-44.

¶14 The O'Neills proffer the argument that application of a thirty-year time limit on recording an instrument or notice of claim of adverse possession makes little sense because adverse possession is typically an unintentional activity. Thus, the adverse possessor in most instances will not know there is a need to assert his or her legal right after twenty years of adverse possession. The majority acknowledges the reasonableness of this argument, but suggests "it is also arguably reasonable to discourage claims to real estate that have existed for a

[6] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

lengthy period but of which there is no record." Majority at ¶10. I do not understand why there is a greater need to discourage claims after fifty years of adverse possession compared with claims prior to fifty years of adverse possession. Neither the majority nor the defendants in this case supply an answer. They did not, of course, need to do so because we are bound by ***Shelton***. Perhaps the defendants may be able to provide a compelling argument if called on to do so. However, based on what is before this court, it appears that ***Shelton*** draws a line neither required by the language of WIS. STAT. § 893.33(5) nor supported by sound policy.