

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 18, 2001

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.

No. 01-0202-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

HOWARD EYTCHESON,

PLAINTIFF-RESPONDENT,

V.

RANDY L. EYTCHESON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sawyer County:
THOMAS J. GALLAGHER, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Randy Eytcheson appeals a judgment declaring Howard Eytcheson's rights in a boundary dispute and dismissing Randy's claim for adverse possession.¹ Randy argues that (1) the evidence sufficiently

¹ This is an expedited appeal under WIS. STAT. RULE 809.17. All statutory references are to the 1999-2000 version unless otherwise noted.

establishes his claim of adverse possession; (2) a fence line establishes his claim; and (3) four surveys establish his ownership. Because the record supports the trial court's determination, we affirm the judgment.

Background

¶2 Howard and Randy are cousins who own adjoining property in Sawyer County. A dispute arose concerning the location of the boundary between their properties. At trial, John Rawlings testified that he has been a real estate title examiner for twenty years. Based upon his training, experience, and the research he performed at the Sawyer County Courthouse, he believed Howard owned the property in question.

¶3 Howard testified that he was seventy years old. He spent the first twenty years of his life on the property in question and, in the 1990s, he inherited it from his mother. He stated that there was no fence marking the southern border of his property, but that the family had a "hog fence that was north of the [southern] border." He acknowledged that Randy claimed ownership up to the fence line. Nonetheless, he maintained that the fence was designed to keep cattle and hogs in, but not mark the border. The fence was twenty-five to thirty feet north of the southern border as shown by the most recent survey.

¶4 Randy testified that he purchased his property in two parcels, one in 1993 and the other in 1996. He claims that he relied on early surveys that showed that the fence line was his northern property line. Randy, who is now thirty-five years old, testified that he was raised in the area and could remember the fence being there since he was three years old. He did not, however, know the reason that the fence was constructed.

¶5 Randy also testified that after he purchased the property, he cleared up to the fence line and planted trees in the disputed area. He testified that he did not know what previous owners did in that area. Part of the area was woods, and part was field. As far as he knew, the previous owners did nothing in that area.

¶6 Randy explained that in the part that was field, farming activity had ceased and white pine trees had started growing that reached anywhere from below knee level to fifteen feet high. The forested area consisted of poplar, maple and oak trees. Howard testified that trees grew up in the disputed area from the 1940s. He claimed that as a youngster he helped maintain the fence and picked up firewood on the south side of the fence.

¶7 The trial court determined that the latest survey established the true boundary line south of the fence. It further determined that there was no evidence of any agreement that the fence line established the boundary. The court found that the size of the trees in the disputed area were forty to fifty feet high, indicating that the area had not been farmed since the late sixties or early seventies. The court also determined that the evidence of farming in the disputed area was insufficient to find twenty years of continuous, exclusive, hostile and notorious possession. As a result, the court entered judgment declaring that Howard owned the disputed area and dismissed Randy's adverse possession claim.

Legal Standards

¶8 Adverse possession issues are usually mixed questions of law and fact. See *Perpignani v. Vonasek*, 139 Wis. 2d 695, 728, 408 N.W.2d 1 (1987). We review questions of law independently and apply a "clearly erroneous" standard to questions of fact. See *DOR v. Exxon Corp.*, 90 Wis. 2d 700, 713, 281 N.W.2d 94 (1979); see also WIS. STAT. § 805.17(2). The trial court, not the

appellate court, judges the credibility of witnesses and the weight of their testimony. *State v. Wyss*, 124 Wis. 2d 681, 694, 370 N.W.2d 745 (1985). Appellate courts search the record for evidence to support findings reached by the trial court, not for evidence to support findings the trial court did not but could have reached. *Estate of Dejmal*, 95 Wis. 2d 141, 154, 289 N.W.2d 813 (1980). Appellate court deference considers that the trial court has the opportunity to observe the demeanor of witnesses and gauge the persuasiveness of their testimony. *Id.* at 151-52. “When more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact.” *Noll v. Dimiceli's, Inc.*, 115 Wis. 2d 641, 644, 340 N.W.2d 575 (Ct. App. 1983) (citation omitted).

¶9 Adverse possession is proven by showing that the claimants and their predecessors-in-title have used the disputed property in a “hostile, open and notorious, exclusive and continuous manner” for at least twenty years. *See Keller v. Morfeld*, 222 Wis. 2d 413, 416-17, 588 N.W.2d 79 (Ct. App. 1998) (citing *Leciejewski v. Sedlak*, 110 Wis. 2d 337, 343, 329 N.W.2d 233 (Ct. App. 1982) (footnote omitted); *see also* WIS. STAT. § 893.25.² Accordingly, an essential

² WISCONSIN STAT. § 893.25 “Adverse possession, not founded on written instrument” provides:

- (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.
- (2) Real estate is possessed adversely under this section:

(continued)

element of adverse possession is the exclusivity of the occupation or possession. WIS. STAT. § 893.25(2)(a).

Discussion

¶10 Randy argues that the evidence he presented at trial proved adverse possession. Randy's argument neglects our standards of review. Howard testified that his family erected the fence not to mark borders but to contain livestock. He further testified that he maintained the fence line and collected firewood from the south of it. Even if there was some testimony to the effect that the disputed area was rented and farmed, the court was not required to believe that the rental agreement included the disputed strip. Moreover, it could have rejected any inference that the farming was done without permission of Howard's family. The trial court was entitled to accept Howard's testimony to the effect that he and his predecessors-in-title exercised dominion over the disputed parcel.

¶11 Randy further argues that the old fence line established the boundary. His citation to testimony only refers to those portions that support his claim. Randy omits those portions of testimony that show that the fence was not installed to mark a boundary between the parcels. Also, Randy argues: "The testimony of Howard Eytcheson ... is incredible." It is for the trial court, not this

(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.

court, to weigh the testimony and resolve conflicts. WIS. STAT. § 805.15(2). Here, it is evident that the trial court believed that the latest survey was most accurate and that the fence line was not an agreed boundary. As a result, Randy's argument fails.

¶12 Randy further argues that the 1925, 1960, 1962 and 1969 surveys have greater weight and more credibility than the 1998 survey. This argument suffers from the same flaw as the previous arguments. Here, the trial court determined that the latest survey was accomplished with more up-to-date technology and, therefore, should be accorded greater weight. The trial court is the arbiter of the credibility of the witnesses and its findings will not be overturned on appeal unless they are inherently or patently incredible or in conflict with the uniform course of nature or with fully established or conceded facts. *Chapman v. State*, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975). Randy's argument must be rejected.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE § 809.32(1)(b)5.

