COURT OF APPEALS
DECISION
DATED AND RELEASED

NOVEMBER 5, 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. 96-0034

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

ROBERT P. STUPAR and
TERRY L. STUPAR,

Plaintiff-Appellant,

v.

TOWNSHIP OF PRESQUE
ISLE, WISCONSIN,
JAMES TAIT d/b/a
CENTURY 21 JIM TAIT
REAL ESTATE, ERNIE ROSSOW,
ROSE ZERWICK, JOHN S. WIMM,
NANCY R. WIMM,
DUANE A. KITTLESON,
LINDA M. KITTLESON,
LEROY S. FASSBENDER,
BARBARA K. FASSBENDER,
DALE I. KING, DORIS J. KING,
ROBERT W. DILLON, III,
PATRICIA L. DILLON,
ROBERT K. ADDICKS JOHNSON,
LOIS ADDICKS JOHNSON,
ROBERT M. VON ZIRNGIBL and
SALLY E. VON ZIRNGIBL,

Defendants,

PATRICK CHEREK and CHERYL L. CHEREK,

Defendant-Third Party Plaintiff-Respondent,

v.

JOSEPH KOLAR, SCHMIDT-HAUS REALTY, INC., JUDITH SCHMIDT-ARNOLD, SANDRA RILEY,

Third Party Defendants,

MULLEADY, INC. REALTORS, and MARIE PETRIE,

Defendants-Third Party Plaintiffs-Respondents,

NORMA JEAN COLE, ROSEMARY PATTERSON and JOHN W. HIESTAND,

Third Party Defendants.

APPEAL from a judgment of the circuit court for Vilas County: JAMES B. MOHR, Judge. *Affirmed*.

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Robert and Terry Stupar appeal a judgment denying their adverse possession claim against Patrick and Cheryl Cherek. The trial court ruled that they presented insufficient evidence of continuous and uninterrupted use of the Chereks' property and the alleged improvements did not significantly alter the character of the wild lands to provide adequate notice of adverse possession. Because the trial court used the correct standard of proof and the evidence supports its findings, we affirm the judgment.

The trial court stated that the Stupars failed to provide "clear and positive evidence" of several of the required elements of adverse possession. The Stupars contend that the trial court erroneously applied the middle burden of proof. The record does not support that contention. The trial court correctly noted that an adverse possessor must present clear and positive evidence of the adverse possession. *See* ***Zeisler Corp. v. Page***, 24 Wis.2d 190, 198, 128 N.W.2d 414, 418 (1964). Nothing in the record suggests that the trial court confused the overall burden of proof with the quality of the evidence it was to consider. *See* ***Kruse v. Horlamus Indus., Inc.***, 130 Wis.2d 357, 361-62, 387 N.W.2d 64, 66 (1986).

Adverse possession requires physical possession that is hostile, open and notorious, exclusive and continuous for twenty years. ***Leciejewski v. Sedlak***, 116 Wis.2d 629, 636, 342 N.W.2d 734, 737 (1984). The Stupars contend that the required elements were met by their predecessor in title, Horace Heistand, from 1951 to 1971. Heistand died in 1968 and the testimony of his children provided the only evidence of his use of the disputed property.

Most of the alleged improvements, a flower bed, two steps and some paths, did not significantly alter the character of the wild land such that a reasonable owner would have known that someone was making claim to the disputed property. *See* ***Pierz v. Gorski***, 88 Wis.2d 131, 137, 276 N.W.2d 352, 355 (Ct. App. 1979). Heistand's children periodically observed that grass had been mowed or "whipped" in the disputed area and one witness saw him mowing this portion of the grass. The children visited only six or seven weeks out of the seventeen years Heistand lived on the property. Evidence regarding the condition of the lawn, the paths and the flower beds in the 1990s does not provide evidence of their condition from 1951 to 1971. As the trier of fact, the inferences to be drawn from the evidence are matters for the trial court to decide. *See* ***Cogswell v. Robertshaw Controls Co.***, 87 Wis.2d 243, 250, 274 N.W.2d 647, 650 (1979).

The only improvement capable of planting the "flag of hostility," *see* ***Burkhardt v. Smith***, 17 Wis.2d 132, 137, 115 N.W.2d 540, 543 (1962), was a privy constructed on the disputed property. Regular use of the privy stopped before the twenty-year period expired. The trial court's finding that this

sporadic use of the privy does not establish continuous occupation is not clearly erroneous. *See* § 805.17(2), STATS. Merely keeping a privy on the Chereks' property without routinely using it did not give sufficient notice of the adverse possessors' claim to the land. Other privies were constructed by loggers on the Chereks' property, presumptively with permission. The true owner's discovery of an additional privy on his property would not inform him of any nonpermissive use.

By the Court.—Judgment affirmed.

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