

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 23, 2009

David R. Schanker
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. 2008AP2536

Cir. Ct. No. 2006CV208

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

MARY L. BOYLES,

PLAINTIFF-APPELLANT,

V.

GERALD HUNTER AND DARLENE HUNTER,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Green Lake County: RICHARD O. WRIGHT, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Brown, C.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Mary Boyles appeals from a judgment declaring that disputed property is owned by her neighbors, Gerald and Darlene Hunter. We agree with the circuit court and affirm this decision. However, we reverse the

circuit court's award of costs to the Hunters and remand for further proceedings relating to costs.

¶2 Boyles sued the Hunters to determine ownership of a portion of their neighboring properties in Green Lake County. The dispute relates to property north and west of Belle Fontaine Creek. The circuit court found that since 1894, the property described in the deeds in the Hunters' chain of title was that property to the north and west of the creek. Until 1968-1970, the property of Boyles and her predecessors in title was described as the property to the south and east of the creek. The deeds in both chains of title treated the creek as the boundary between the properties.¹

¶3 During 1968-1970, Boyles' predecessor in title, Vernon Loveland, commissioned a survey. The surveyor drew new boundary lines (the Thousand survey) upon which Loveland relied to claim not only the property south and east of the creek, but also the property north and west of the creek which he quit-claimed to Boyles in 1970. The court found that there was no basis for the property lines established in the Thousand survey. The Loveland-Boyles 1970 quit claim deed arising from this survey was the first time in Boyles' chain of title that any mention was made of or claim asserted to property north and west of the creek. Although Loveland signed an affidavit claiming the property to the north and west of the creek and outlining his use of that property over years, the court found that the affidavit did not coincide with the evidence of the properties'

¹ We are not going to parse the deeds prior to 1894 because Boyles' claim to the property north and west of the creek derives from her grantee, Vernon Loveland, who did not formally assert a claim to that property until 1968-1970. Therefore, we do not address Boyles' claim that Hunter was a stranger to title due to irregularities in pre-1894 deeds in his chain of title.

boundaries and there was no evidence at the site of the activities described in Loveland's affidavit. Specifically, the court found that Loveland's claim to have erected buildings, fenced the property and cultivated the land lacked supporting evidence. The court found that the property in question was not suitable for cultivation and if Loveland had erected buildings and a fence, as he claimed, there would have been traces of such activities on the property, which there were not. The court deemed not credible Boyles' claim that she erected a fence anywhere north and west of the creek. The court found no other evidence supporting Boyles' claim to property north and west of the creek.

¶4 The circuit court also rejected Boyles' adverse possession claim to property north and west of the creek. Because there was no evidence to support the surveyor's boundaries as expressed in Boyles' deeds and the deeds in both chains of title considered the creek to be the dividing line between the properties, Loveland and Boyles were strangers to title and could not make a good faith adverse possession claim to the property north and west of the creek. The court declared that the Hunters owned all property in the NW ¼ of the SW ¼ of Section 17, laying north and west of Belle Fontaine Creek. The court also awarded costs to the Hunters. Boyles appeals.

¶5 We will uphold the circuit court's findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2) (2007-08).² In addition, the circuit court, as the factfinder, was the arbiter of the weight and credibility of the evidence,

² All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

and we must accept the inferences drawn. *Wallen v. Wallen*, 139 Wis. 2d 217, 224, 407 N.W.2d 293 (Ct. App. 1987).

¶6 On appeal, Boyles relies upon facts not found by the circuit court and upon evidence the circuit court did not deem credible. Boyles casts the Hunters as strangers to title. Rather, it was Boyles who was a stranger to title to the property north and west of the creek as a result of the history of the chains of title since 1894, the Thousand survey, and Loveland's incredible affidavit and quit claim deed.³ These findings are not clearly erroneous based on the record.

¶7 The Hunters took title to property north and west of the creek in 1956; Loveland took title to property south and east of the creek in 1946. Loveland claimed title to the north and west property in 1970. Under WIS. STAT. § 706.09(1), a conveyance is free of a prior adverse claim if there were no recorded adverse claims for more than thirty years before the Hunters took title in 1956. Sections 706.09(1)(k); § 706.09(2)(b). Therefore, the Hunters took title in 1956 free of any claim by Loveland or Loveland's successors in interest to this property.

¶8 Boyles argues that her payment of real estate taxes on the disputed property for more than seven years supported her adverse possession claim. WIS. STAT. § 893.27(1). Adverse possession under this statute is set out in WIS. STAT. § 893.26(2) to (5). Section 893.26(2) provides:

(2) Real estate is held adversely under this section or s. 893.27 only if:

(a) The person possessing the real estate or his or her predecessor in interest, originally entered into possession of

³ Surveyor Donald Lenz opined that when Thousand made the survey, he drew the property lines where he believed they should be, rather than where the deed said they were.

the real estate under a good faith claim of title, exclusive of any other right, founded upon a written instrument as a conveyance of the real estate or upon a judgment of a competent court;

(b) The written instrument or judgment under which entry was made is recorded within 30 days of entry with the register of deeds of the county where the real estate lies; and

(c) The person possessing the real estate, in connection with his or her predecessors in interest, is in actual continued occupation of all or a material portion of the real estate described in the written instrument or judgment after the original entry as provided by par. (a), under claim of title, exclusive of any other right.

¶9 Boyles cannot meet the good faith requirements of WIS. STAT. § 893.26(2)(a). Boyles cites Loveland’s affidavit as proof that Loveland had a good faith claim to title. However, the circuit court deemed the Loveland affidavit a sham. Loveland had no good faith basis for claiming more property than that described in his 1946 deed to property south and east of the creek.

¶10 The circuit court’s findings of fact regarding the use of the property north and west of the creek preclude any conclusion that Boyles adversely possessed that property.⁴ A party claiming adverse possession must show that the disputed property was used for the requisite period of time in an “open, notorious, visible, exclusive, hostile and continuous” manner that would apprise a reasonably diligent landowner and the public that the possessor claimed the land as his or her own. *Pierz v. Gorski*, 88 Wis. 2d 131, 137, 276 N.W.2d 352 (Ct. App. 1979); WIS. STAT. § 893.26(4) (facts constituting possession and occupation of real estate for purposes

⁴ For this reason, we need not address whether the circuit court erred when it applied a good faith standard to Boyles’ adverse possession claim.

of adverse possession include, *inter alia*, usual cultivation or improvement, protected by a substantial enclosure, used for ordinary use of the occupant).

¶11 The circuit court found that there was no evidence of the use Boyles claims to have made of the property since the 1970 Loveland-Boyles conveyance. While witnesses for Boyles testified that they built a fence, bridges over the creek and hunted the property, the Hunters' witnesses testified that they did not see hunters north and west of the creek and no fence was installed on the property since the Hunters purchased it in 1956. Gerald Hunter testified that there was a fence on the property at the time of his 1956 purchase, which pre-dated Boyles' purchase of property along the creek. Hunter testified that he used the property for farming and pasturing animals, and Boyles did not use the property for that purpose. Hunter disputed Loveland's affidavit averments that his activities north and west of the creek included: cultivation, maintaining buildings, enclosing the area with a wire woven fence, and pasturing animals.

¶12 The weight and credibility of this evidence regarding use of the property north and west of the creek was for the circuit court, and the circuit court did not find Boyles' evidence credible. Therefore, the requirements for adverse possession were not satisfied.

¶13 Boyles also relies upon WIS. STAT. § 893.25. That statute permits a person to acquire title to real property by adverse possession for an uninterrupted period of twenty years. The statute requires the land to be actually occupied and either protected by a substantial enclosure or usually cultivated and improved. Section 893.25(2). The circuit court found that there was no actual occupation, substantial enclosure or improvement by Loveland or Boyles.

¶14 We turn to Boyles' challenge to the taxation of costs. The Hunters' counsel drafted proposed Findings of Fact, Conclusions of Law and Judgment. In that document, the Hunters included \$ 954.38 in costs under WIS. STAT. § 814.04. In an August 27, 2008 letter to the court and the parties, Boyles objected to the costs on the following grounds: costs were not allowed under WIS. STAT. § 841.06, the circuit court never ordered costs, the WIS. STAT. § 814.10(1) procedure for seeking costs was not followed, and the Hunters did not submit any proof of their costs. The court signed and entered the judgment submitted by the Hunters and awarded the costs they included in that document.

¶15 The Hunters argue that Boyles should have filed a motion challenging costs under WIS. STAT. § 814.10(4) and because she did not, she waived her objection to costs. We do not agree that Boyles waived her objection. We first note that the Hunters did not satisfy the provisions of § 814.10(1) and § 814.11: no affidavit or bill of costs was filed; the costs were merely inserted into the proposed judgment. The circuit court signed the proposed findings, conclusions and judgment on September 3, 2008, several days after Boyles' August 27 letter objected to the inclusion of costs in the judgment. Because costs had not been taxed at the time Boyles objected, a motion challenging the taxation of costs need not have been filed. Section 814.10(4). Boyles' August 27 letter was sufficient to interpose an objection to the proposed costs. The circuit court should have addressed Boyles' objection to costs.⁵

⁵ We express no opinion on the merits of Boyles' objection to costs. All we hold is that the circuit court should have addressed the objection. The court shall do so on remand.

¶16 We agree with the circuit court that the property north and west of Belle Fontaine Creek belongs to the Hunters and reformation of the deed was appropriate. However, we reverse the circuit court's award of costs to the Hunters and remand for further proceedings relating to costs.

No costs to either party on appeal.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

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

