

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 30, 2015

Diane M. Fremgen
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. 2014AP2129

Cir. Ct. No. 2012CV313

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

EDWARD KRUEGER AND CAROL KRUEGER,

PLAINTIFFS-RESPONDENTS,

v.

ROBERT NIEDZWIECKI AND RHONDA NIEDZWIECKI,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Door County:
D. TODD EHLERS, Judge. *Reversed.*

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 PER CURIAM. Robert and Rhonda Niedzwiecki appeal a judgment awarding Edward and Carol Krueger a small strip of land by adverse possession. The Niedzwieckis argue the trial court erroneously determined WIS.

STAT. § 706.09,¹ relating to innocent purchasers, did not foreclose the Kruegers' adverse possession claim.² We agree with the Niedzwieckis that § 706.09 barred the adverse possession claim because the Kruegers ceased all use or occupancy of the disputed land long before the Niedzwieckis made their land purchase. Accordingly, we reverse.

BACKGROUND

¶2 The Kruegers purchased a rural parcel in 1968. That same year, the Niedzwieckis' predecessors in title purchased an abutting parcel. At that time, there was an existing fence near the property line separating the parcels. The fence was located in approximately the correct location at one end, but angled gently across the true property line into what is now the Niedzwieckis' parcel, creating the small triangle of land now in dispute.³ The disputed area consists of swamp, woods, brush, high grass and marsh.

¶3 After a bench trial, the court entered the following written findings of fact. The wire fence on wooden posts was in place by the late 1940s and substantial portions of it were still in place in 1968. The Kruegers improved the fence in 1972 in order to pasture cattle, which they did in 1972 and 1973. The

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

² The Niedzwieckis alternatively argue that the trial court erroneously denied their motion for summary judgment and that the Kruegers failed at trial to prove adverse possession at any time preceding the Niedzwieckis' land purchase. Because we reverse on other grounds, we need not reach these alternative arguments. See *State v. Castillo*, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (appellate courts not required to address every issue raised when one issue is dispositive).

³ Edward Krueger estimated the disputed land constituted .11 acres and was 24 feet deep at the widest point. A survey shows the true boundary line is 397.78 feet long.

fence was not further maintained after 1974. As the fence deteriorated, the Kruegers marked the fence posts with paint or placed ribbons every few years. This line marking commenced around 1985 and continued until 2002.

¶4 Shortly after acquiring their parcel, the Kruegers placed several “No Trespassing” signs near, but not on, the fence. The signs are long gone, but a few of the backing boards are still present. The Kruegers also cut timber on their parcel soon after acquisition, which included cutting three of four birch trees from the disputed area; some of the stumps are still evident. The Kruegers constructed a hunting stand in the disputed area in the 1970s, and built a more substantial stand in the mid-1980s. The Kruegers, and then their children and grandchildren, periodically hunted in the disputed area and used the hunting stands.

¶5 The court did not enter a written finding regarding when the Kruegers and their family ceased hunting within the disputed area. However, the Kruegers’ grandson testified he last hunted on the disputed land in 2002 or 2003.⁴ He continued hunting nearby, but because there were hunters on the abutting parcel, he “sat 40 yards off the property line then.” The Niedzwieckis testified they commenced hunting on their subsequently acquired parcel in 2002, with permission of their predecessors. Further, they testified that, from that time until they purchased the land, the hunting stand in the disputed area was in such disrepair that nobody could have possibly used it.

⁴ The Niedzwieckis assert the Kruegers and their guests hunted in the disputed area until 2002. The Kruegers do not dispute that assertion in their response brief or cite any evidence of their subsequent hunting in the disputed area.

¶6 The Niedzwieckis purchased their parcel in 2010. Prior to closing, they had the land surveyed by a registered land surveyor. The surveyor's notes indicate, "REMNANTS OF A FENCE ATTACHED TO ANCIENT WOOD FENCE POSTS. FENCE NOT MAINTAINED." Additionally, the survey drawing depicts four posts within the parcel, as well as one at each end beyond the sides of the parcel.

¶7 After purchasing their parcel, the Niedzwieckis repaired the tree stand in the disputed area. The Kruegers then strung a new wire fence along the ancient fence line. The Niedzwieckis objected, and then removed the new fence themselves after the Kruegers refused to do so. The court found the Niedzwieckis "were aware of the existence of the remnants of the wire fence prior to their purchase of the ... Parcel in 2010 as a result of the ... survey."

¶8 The court determined the Kruegers had established adverse possession of the disputed land, based on twenty years' possession from 1972 through 1992. The court further concluded WIS. STAT. § 706.09, relating to innocent purchasers, was "inapplicable to this case" because the survey gave the Niedzwieckis "notice of the [Kruegers'] potential interest or claim of interest in a portion of that parcel. Furthermore, the Court has already found that the [Kruegers'] occupancy of the Disputed Area was actual, visible, open and notorious." The Niedzwieckis appeal.

DISCUSSION

¶9 The Niedzwieckis argue the trial court erroneously applied WIS. STAT. § 706.09. Application of a statute to a set of facts presents a question of law subject to de novo review. See *Klinefelter v. Dutch*, 161 Wis. 2d 28, 33, 467 N.W.2d 192 (Ct. App. 1991). Section 706.09(1) provides: "A purchaser for a

valuable consideration, without notice as defined in sub. (2) ... shall take and hold the estate or interest purported to be conveyed to such purchaser free of any claim adverse to or inconsistent with such estate or interest”⁵ In turn, § 706.09(2) states:

A purchaser has notice of a prior outstanding claim or interest, within the meaning of this section wherever, at the time such purchaser’s interest arises in law or equity:

(a) ... Such purchaser has affirmative notice apart from the record of the existence of such prior outstanding claim, including notice, actual or constructive, arising from use or occupancy of the real estate by any person at the time such purchaser’s interest therein arises, whether or not such use or occupancy is exclusive; but no constructive notice shall be deemed to arise from use or occupancy unless due and diligent inquiry of persons using or occupying such real estate would, under the circumstances, reasonably have disclosed such prior outstanding interest; nor unless such use or occupancy is actual, visible, open and notorious[.]

¶10 The Niedzwieckis argue they could not have had notice of the Kruegers’ adverse possession under WIS. STAT. § 706.09(2)(a) because, at the time the Niedzwieckis acquired their parcel, (1) the Kruegers’ use or occupancy was not actual, visible, open and notorious; and (2) due and diligent inquiry would not have disclosed the adverse possession. The Niedzwieckis contend neither prong could be satisfied because, “By their own admission, [the Kruegers] had not hunted the [d]isputed [a]rea, or put up ribbons along the fence line for nearly a decade prior to the time [the Niedzwieckis] acquired their interest.” Thus, they assert, nothing the Kruegers were doing at the time of acquisition would give any

⁵ WISCONSIN STAT. § 706.09(1) contains further conditions. However, the parties only dispute the application of subsection (2)(a).

indication of their claim. They further argue that the ancient fence posts were insufficient to give notice of an adverse possession claim.

¶11 Apart from setting forth the *de novo* standard of review and reciting part of WIS. STAT. § 706.09(2)(a), particularly, that constructive notice exists where “use or occupancy is actual, visible, open and notorious,” the following is the Kruegers’ entire argument in response:

The Trial Court specifically found that the Defendants-Respondents had notice of the potential claim when they were given a survey ... dated April 9, 2010 prior to the closing of their purchase of the property showing a fence line. Therefore, the Trial Court correctly interpreted § 706.09, WIS. STAT. in its conclusion that the statute section is inapplicable to this case.

(Record citation omitted.)

¶12 The Kruegers’ cursory response, like the trial court’s analysis, fails to address the statutory requirement that their adverse possession had to be actively occurring at the time the Niedzwieckis purchased their abutting parcel. Both WIS. STAT. § 706.09(2) and (2)(a) clearly state that the use or occupancy giving rise to notice must exist at the time the purchaser’s interest arises. The Kruegers, however, had not used or occupied the disputed area—and had not maintained or marked the old fence posts—for many years prior to the Niedzwieckis’ purchase. Plainly, there was no actual use or occupancy at the time of purchase, much less any which was visible, open and notorious. Further, the survey and notes referencing four ancient wooden fence posts and remnants of an unmaintained fence would not have alerted the Niedzwieckis that a portion of the property was *presently* being adversely used or occupied.

¶13 Moreover, there was no evidence that diligent inquiry of the predecessor owners and occupiers of the Niedzwieckis' parcel would have disclosed the Kruegers' earlier adverse possession. A prior owner of the parcel and her daughter both testified they had never observed any fence or trespassers in the disputed area and that their husband/father had never told them of any such fence or trespass.

¶14 Even assuming, arguendo, the Kruegers adversely possessed the disputed area for a twenty-year period ending in 1992, the Kruegers were no longer using or occupying that area at the time the Niedzwieckis acquired their property interest. Accordingly, the Niedzwieckis were purchasers without notice, and the trial court erroneously determined WIS. STAT. § 706.09 did not bar the Kruegers' adverse possession claim.

By the Court.—Judgment reversed.

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

