

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 24, 2005

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. 2004AP3133-FT

Cir. Ct. No. 2003CV382

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

MARVIN A. NESS AND HARRIET B. NESS,

PLAINTIFFS-RESPONDENTS,

V.

WILLIAM CAROTHERS AND DEBORAH CAROTHERS,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Barron County:
JAMES C. BABLER, Judge. *Reversed.*

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

¶1 PER CURIAM.¹ William and Deborah Carothers are adjacent landowners to Marvin and Harriet Ness.² Ness contends he acquired title to

¹ This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

certain land along the boundary of the properties by adversely possessing it for a twenty-year period. The circuit court agreed and granted summary judgment to Ness. Carothers appeals that judgment, arguing the circuit court erred by failing to consider whether he reacquired the land by adverse possession for a seven-year period under claim of title by a written instrument and payment of taxes, pursuant to WIS. STAT. § 893.27.³ We conclude that the circuit court should have considered Carothers's claim under § 893.27 and that there are genuine issues of material fact regarding Carothers's claim. We therefore reverse the judgment.

BACKGROUND

¶2 In 1993, Carothers purchased property adjacent to property owned by Ness in the Township of Lakeland in Barron County. Ness maintained a fence between the properties, which was purportedly a boundary fence but was actually located north of the true boundary.⁴ Both parties claim title to the land that lies between the Ness fence and the true boundary. Carothers holds record title to the

² For simplicity, we will refer to William and Deborah Carothers collectively as Carothers and to Marvin and Harriet Ness collectively as Ness.

³ Carothers raises two additional issues on appeal. He contends Ness did not establish that he was an owner in possession of the property. However, we would first have to develop this argument in order to address it, and “[w]e cannot serve as both advocate and judge.” *State v. Pettit*, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992). Therefore, we decline to address this undeveloped issue. *See id.* (will not address issues on appeal that are inadequately briefed). Carothers also contends Ness's claim is barred by WIS. STAT. § 706.09 because Carothers purchased the land without notice of Ness's adverse claim. However, Carothers has not demonstrated that this issue was raised in the circuit court. *See* WIS. STAT. RULE 809.19(1)(b). We generally do not address issues raised for the first time on appeal and decline to do so here. *Wirth v. Ehly*, 93 Wis. 2d 433, 443-444, 287 N.W.2d 140 (1980).

⁴ The parties agree that the fence was maintained by Ness; however, the state of repair of the fence is disputed. William's affidavit claims the fence was always in poor repair from the time of his purchase, “broken and down in more places than not.” However, Marvin's affidavit claims the fence contained pastured cattle until 1995.

land. Ness commenced this action on November 7, 2003, contending that he had acquired title to the land by adverse possession for a twenty-year period, pursuant to WIS. STAT. § 893.25.

¶3 On June 17, 2004, Ness moved for summary judgment. He submitted affidavits stating that: (1) he purchased the land in 1960; (2) he pastured cattle up to the fence from 1960 through 1995; and (3) Marvin's father also pastured cattle there from 1934, when he purchased the land, until 1960, when he sold the land to Ness. Carothers opposed the motion, contending that whether Ness's use of the property constituted adverse possession was a factual issue making summary judgment inappropriate. He also argued that even if Ness had adversely possessed the land for a twenty-year period, Carothers had reacquired the property under the seven-year adverse possession statute, WIS. STAT. § 893.27. The circuit court concluded that Ness's un rebutted affidavits established the pasturing of cattle in the disputed land for at least a thirty-five-year period and thus Ness was entitled to summary judgment. The court also concluded that because Ness was making a claim under WIS. STAT. § 893.25, the statute relied on by Carothers, § 893.27, was inapplicable.

DISCUSSION

¶4 We review a summary judgment independently, using the same methodology as the circuit court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). We view the facts in the light most favorable to the nonmoving party. *State Bank of La Crosse v. Elsen*, 128 Wis. 2d 508, 511-12, 383 N.W.2d 916 (Ct. App. 1986). Summary judgment is appropriate when no material facts are in dispute and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08.

¶5 On appeal, Carothers does not challenge that Ness has made a prima facie case for summary judgment based on the affidavits showing Ness pastured cattle on the land for more than the requisite twenty-year period under WIS. STAT. § 893.25.⁵ Instead, he argues that the circuit court erred by failing to consider whether he had reacquired the property by adversely possessing it for a seven-year period in accordance with WIS. STAT. § 893.27. We agree.

¶6 An owner's title, acquired by adverse possession, can be defeated by the subsequent adverse possession of another. As our supreme court explained:

The owner of land whether by deed or adverse possession has a legal title and is presumed to be in possession thereof and the occupation of such land by another person is deemed to be under and in subordination to such legal title *unless the land is possessed adversely for the necessary statutory period.*

Herzog v. Bujniewicz, 32 Wis. 2d 26, 33, 145 N.W.2d 124 (1966) (emphasis added). While Ness established legal title by adverse possession, pursuant to WIS. STAT. § 893.25, by pasturing cattle for a twenty-year period, that title is itself subject to attack by adverse possession.⁶ Here, Carothers claims title by virtue of adverse possession for a seven-year period under color of title and payment of

⁵ Pasturing of cattle in an enclosure is sufficient to establish adverse possession of the land within the enclosure. *Northwoods Dev. Corp. v. Klement*, 24 Wis. 2d 387, 393, 129 N.W.2d 121 (1964).

⁶ Our interpretation is in accord with 2 C.J.S. *Adverse Possession* § 11 (2003), which states: “Although the title to land has been acquired by adverse possession, it may, like any other title, be defeated by a subsequent adverse possession for the statutory period.”

taxes, as provided by WIS. STAT. § 893.27.⁷ Section 893.27, entitled “Adverse possession; founded on recorded title claim and payment of taxes,” provides:

(1) An action for the recovery or the possession of real estate and a defense or counterclaim based upon title to real estate are barred by uninterrupted adverse possession of 7 years, except as provided by s. 893.14 or 893.29. A person who in connection with his or her predecessors in interest is in uninterrupted adverse possession of real estate for 7 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 as provided by s. 893.26(2) to (5)⁸] and only if:

(a) Any conveyance of the interest evidenced by the written instrument or judgment under which the original entry was made is recorded with the register of deeds of the county in which the real estate lies within 30 days after execution; and

(b) The person possessing it or his or her predecessor in interest pays all real estate taxes, or other taxes levied, or payments required, in lieu of real estate taxes for the 7-year period after the original entry.

¶7 Ness concedes that Carothers entered the disputed property under a good-faith claim of title based on a written instrument and that he paid the taxes on the property since purchase in 1993. *See* WIS. STAT. §§ 893.27 and 893.26. However, Ness argues Carothers has failed to demonstrate a seven-year period of uninterrupted adverse possession. *See* WIS. STAT. § 893.27.

⁷ Indeed, Ness does not challenge the applicability of WIS. STAT. § 893.27 to this case. *See Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (arguments not refuted are deemed admitted).

⁸ WISCONSIN STAT. § 893.26(2)-(5) requires, among other things, that the person claiming adverse possession “originally entered into possession of the real estate under a good faith claim of title, exclusive of any other right, founded upon a written instrument.” WIS. STAT. § 893.26(2)(a).

¶8 To establish adverse possession, Carothers must show that he used the disputed property for a seven-year period in an open, notorious, visible, exclusive, hostile, and continuous manner that would apprise a reasonably diligent landowner and the public that he claimed the land.⁹ See *Pierz v. Gorski*, 88 Wis. 2d 131, 137, 276 N.W.2d 352 (Ct. App. 1979). Because Carothers’s property is recreational and seasonal in character, “the fact that it is not continuously occupied does not militate against such occupation being sufficient to constitute adverse possession so long as it is exclusive.” *Laabs v. Bolger*, 25 Wis. 2d 17, 23, 130 N.W.2d 270 (1964).

¶9 Ness contends that the boundary fence has existed in good repair from 1934 to the present and that he has used the land ever since the time of purchase in 1960. However, William’s affidavit asserts he never saw Ness pasture cattle on the land after 1995 or make any significant improvements to the fence since 1993. William’s affidavit further states that he rolled back portions of the fence that were in disrepair, hunted on the land each year since he purchased it in 1993, and made improvements such as building a deer stand, putting the land in a forest management program, changing the drainage and putting up no trespassing signs. Deborah claims in her affidavit that she cross-country skied and snowshoed in the disputed area each winter since 1993.

⁹ The open, notorious, visible, exclusive, hostile, and continuous standard for adverse possession is most often associated with the twenty-year adverse possession statute, WIS. STAT. § 893.25. However, “[a]n adverse claimant relying on the color of title ten year statute [WIS. STAT. § 893.26] must prove the character of the possession in the same manner as the claimant relying on the twenty year statute.” *Perpignani v. Vonasek*, 139 Wis. 2d 695, 735 n.19, 408 N.W.2d 1 (1987). Because the seven-year statute, WIS. STAT. § 893.27, adopts the ten-year statute’s requirements of adverseness, this standard also applies here.

¶10 Based on the parties' affidavits, we conclude there are genuine issues of material fact regarding the state of repair of the fence, who has possessed the disputed land since Ness stopped pasturing cattle in 1995, and whether Carothers has adversely possessed the property from Ness for a seven-year period. Therefore, summary judgment is inappropriate.

By the Court.—Judgment reversed.

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

