**COURT OF APPEALS
DECISION
DATED AND FILED**

**September 24, 2002**

**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. 02-0750**

**Cir. Ct. No. 96-CV-156**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS
DISTRICT III**

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**MELVIN KEMPF AND IRENE KEMPF,**

**PLAINTIFFS-APPELLANTS,**

**V.**

**MICHAEL D. LILEK AND JILL M. LILEK,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from a judgment of the circuit court for Lincoln County: GLENN H. HARTLEY, Judge. *Affirmed*.

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

¶1 CANE, C.J. Melvin and Irene Kempf appeal a judgment establishing the boundary of their vacation property on Long Lake in Lincoln County. The Kempfs initiated the suit to prevent their neighbors, Michael and Jill Lilek, from further encroaching on what they believed was their property after the Lileks began to build a new garage. The Kempfs alleged they were the title

owners of the disputed land and, in the alternative, that they had acquired ownership of the land by adverse possession. Both parties had surveys prepared and, after a bench trial, the court found the Lileks' survey most accurately reflected the lots as laid out on the assessor's plat. The court determined the Lileks held title to the disputed property. In addition, the court ruled the Kempfs had only adversely possessed a small portion of the disputed area where they placed an outhouse in 1966. On appeal, the Kempfs raise several points of error challenging the court's decision. In addition, the Lileks have filed a motion for costs and attorney fees alleging the Kempfs' appeal is frivolous. We determine the trial court properly resolved the boundary dispute and therefore affirm the judgment. However, we cannot say the Kempfs' appeal is frivolous and we deny the Lileks' motion.

## BACKGROUND

¶2 In 1960, the Kempfs bought a parcel of land on Long Lake in Lincoln County. The plot was recorded on the assessor's plat as lot eight of O.R. Smith's subdivision. In 1966, they built a cottage on the lot. They also built an outhouse entirely within the disputed parcel, although at the time the Kempfs believed they were building on their lot. In addition, the Kempfs cleared a path to the lake, also believing it to be on their lot, but it was partly located on the disputed property.

¶3 After 1966, the Kempfs visited their cottage with varying frequency. From 1980 until 1993, Melvin worked as a ginseng farmer and the Kempfs did not use their cottage as much as they had previously. After Melvin sold his farming operation, he had the path to the lake bulldozed and installed old railroad ties as

steps. The parties dispute the extent of the path's maintenance between its construction and the bulldozing in 1993.

¶4 The Lileks purchased lot six of the subdivision in 1987 and lot seven in 1995. In 1996, they began to construct a garage, part of which was located on the disputed property. Believing the Lileks' garage to be encroaching on their property, the Kempfs filed suit. The Kempfs alleged they were the title owners of the property or, in the alternative, that they had acquired title by adverse possession. In September 1996, the court granted a temporary injunction against the Lileks. The parties eventually tried the case to the court on three days throughout 1999 and 2000.

¶5 Prior to construction, the Lileks hired Devon Vanden Heuvel to survey their lots. At trial, he testified he and his crew inspected the property and located a number of iron pipes throughout the subdivision. Vanden Heuvel said despite the number of pipes, very few matched those marked on the assessor's plat. He and his crew located what they believed were two pipes used as monuments in the assessor's plat survey. Vanden Heuvel testified he used these two pipes as the starting point for his survey, which he completed by following the metes and bounds descriptions for each lot. Vanden Heuvel's survey of the subdivision turned out very similar to the assessor's plat, although the shorelines in each survey were quite different. According to Vanden Heuvel's survey, the disputed area was located in lot seven and belonged to the Lileks.

¶6 The Kempfs hired David Osterbrink to prepare a survey. At trial, he said he agreed with Vanden Heuvel that not all of the iron pipes in the subdivision matched those marked on the assessor's plat. As a starting point for his survey, Osterbrink asked the Kempfs to point out the pipes they believed marked their

property boundaries. Melvin testified these pipes were ones that a neighbor had pointed out as the property boundaries when the Kempfs purchased the lot. One of these pipes was now lying horizontally under the water and was narrower than the other pipes marked on the assessor's plat and Vanden Heuvel's survey. Melvin explained he had been unable to locate this pipe for about ten years, and said it was in the water because the shoreline had "washed out." Based on these pipes, Osterbrink's survey determined the Kempfs' property line slanted about thirty degrees more to the northeast than on the assessor's plat and placed the disputed property on lot eight.

¶7 In addition to testifying to their own surveys, Osterbrink and Vanden Heuvel both discredited the other's work. Osterbrink took issue with Vanden Heuvel's reliance on the assessor's plat, saying that it did not match with the property and noting Vanden Heuvel admitted he did not believe the plat correctly represented the "actual field location of these lots." He also said Vanden Heuvel's determination to follow the assessor's plat ignored most of the iron stakes throughout the subdivision, which Osterbrink believed represented how the residents actually occupied the property.

¶8 Vanden Heuvel criticized Osterbrink's survey for failing to follow the assessor's survey. Most notably, he said Osterbrink mismatched pipes on the property with those in the survey. Specifically, Vanden Heuvel said Osterbrink matched pipes even though the ones on the ground were much smaller than those called for in the survey. He said the pipes Osterbrink relied on appeared to have been placed by someone other than a surveyor.

¶9 In its decision, the trial court accepted Vanden Heuvel's survey, saying it most accurately reflected the boundary lines as laid out in the assessor's

plat. The court was skeptical of the pipes Osterbrink used to conduct his survey and concluded the results, if accepted, would rewrite the assessor's plat. After determining the disputed property belonged to the Lileks, the court ruled the Kempfs had only adversely possessed that part of the disputed parcel containing their outhouse. It found the trail to the lake did not meet the requirements of adverse possession because the Kempfs had not continually used and kept the path clear for the required twenty years. The Kempfs filed a motion for reconsideration, which the court denied. They now appeal.

## DISCUSSION

¶10 The Kempfs raise several issues. They argue the trial court erred when it (1) accepted the assessor's plat when both surveyors testified it was in error; (2) determined the Kempfs had not adversely possessed the path to the lake; (3) ignored evidence showing the parties had taken title to their lots by a common grantor who had established the boundary; (4) assumed the iron pipes had been moved; and (5) did not apportion the Kempfs' loss of lake frontage among the whole subdivision. In addition, the Lileks have filed a motion for costs and attorney fees under WIS. STAT. RULE 809.25(3), arguing the Kempfs' appeal is frivolous.

### *A. Acceptance of the assessor's plat*

¶11 The Kempfs first argue the trial court erroneously accepted the assessor's plat as reconstructed by Vanden Heuvel as proof of the boundary under WIS. STAT. § 70.27(3)(a)[1] when both surveyors testified the plat was grossly

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

erroneous. The resolution of a boundary dispute is a question of fact for the trial court and will not be upset on appeal unless the court's finding is clearly erroneous. *See* ***Beasley v. Konczal***, 87 Wis. 2d 233, 239-40, 275 N.W.2d 634 (1979).[2] 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. ***Id.*** at 240.

¶12 The trial court accepted Vanden Heuvel's survey as establishing the boundary between lots seven and eight. This line is nearly identical to the one marked on the assessor's plat. The court considered the Vanden Heuvel survey to best represent the plat and accepted it according to WIS. STAT. § 70.27(3)(a).[3] The Kempfs argue this constitutes error because both surveyors said the assessor's plat

[2] In ***Beasley v. Konczal***, 87 Wis. 2d 233, 239-40, 275 N.W.2d 634 (1979), the supreme court reviewed the trial court's findings under the "great weight and clear preponderance of the evidence" standard. This test is essentially the same as "clearly erroneous" standard. ***Noll v. Dimiceli's Inc.***, 115 Wis. 2d 641, 643, 340 N.W.2d 575 (Ct. App. 1983).

[3] WISCONSIN STAT. § 70.27(3)(a) reads:

> **Assessor's plat.** …
>
> **(3)** ASSESSMENT, TAXATION, CONVEYANCING. (a) Reference to any land, as it appears on a recorded assessor's plat is deemed sufficient for purposes of assessment and taxation. Conveyance may be made by reference to such plat and shall be as effective to pass title to the land so described as it would be if the same premises had been described by metes and bounds. Such plat or record thereof shall be received in evidence in all courts and places as correctly describing the several parcels of land therein designated. After an assessor's plat has been made and recorded with the register of deeds as provided by this section, all conveyances of lands included in such assessor's plat shall be by reference to such plat. Any instrument dated and acknowledged after September 1, 1955, purporting to convey or mortgage any such lands except by reference to such assessor's plat shall not be recorded by the register of deeds.

was wrong and, therefore, the only inference the trial court could draw was that the plat was in error. However, we determine there is credible evidence supporting the trial court's decision.

¶13 Specifically, the Kempfs point to Vanden Heuvel's testimony and his survey notes as evidence he believed the plat was erroneous. They argue Vanden Heuvel testified there were "several problems with the Assessor's Plat." First, we note the quoted language is not found at the record citation the Kempfs gave. Further, the statement mischaracterizes Vanden Heuvel's testimony. Instead of mentioning problems with the plat itself, Vanden Heuvel's testimony discusses the numerous pipes located on the property and the problems he and his crew had applying the plat to these monuments. Vanden Heuvel later testified he did not believe most of these pipes were part of the assessor's plat survey. His problem was not with the plat itself, but applying it to the property as it existed. Vanden Heuvel, however, testified he was eventually able to survey the property based on the plat, and the court could properly conclude this survey reflected the true boundary.

¶14 The Kempfs also point to Vanden Heuvel's survey notes that point to the discrepancies between the plat and the property as it existed at the time of his survey. Particularly, he noted the numerous pipes as well as the apparent change in the shoreline. Again, this involves Vanden Heuvel's problems in applying the plat to the property, problems he overcame. We cannot say this requires us to determine the trial court's decision had no evidentiary basis, and we determine the court properly accepted the survey as a representation of the descriptions in the assessor's plat.

*B. Adverse possession*

¶15 Next, the Kempfs contend the trial court erred by determining they had not adversely possessed the disputed property because their path to the lake did not provide a basis for a claim. Adverse possession issues are usually mixed questions of law and fact. ***Perpignani v. Vonasek***, 129 Wis. 2d 478, 490, 386 N.W.2d 59 (Ct. App. 1986), *rev'd in part on other grounds*, 139 Wis. 2d 695, 408 N.W.2d 1 (1987). Here, the parties agree if the Kempfs did adversely possess the path, it would not be founded on a written instrument, and WIS. STAT. § 893.25 controls. That statute requires a person adversely possess the property for twenty years, and that the possession be an actual, continuous possession under claim of title. WIS. STAT. § 893.25. In addition, the property can only be adversely possessed to the extent it is actually occupied and either enclosed or usually cultivated or improved. ***Id.*** The question whether these conditions are met is one of fact. ***Harwick v. Black***, 217 Wis. 2d 691, 703, 580 N.W.2d 354 (Ct. App. 1998). The trial court's findings of fact will be upheld unless they are clearly erroneous. ***Beasley***, 87 Wis. 2d at 239-40.

¶16 The court determined the Kempfs did not adversely possess any part of the disputed property except for the land under and around the outhouse, which encroached only a few feet onto the Lileks' lot. The court noted the only basis the Kempfs had to claim the remainder of the disputed area was the path to the lake. The court then determined the Kempfs did not establish adverse possession because they did not continuously maintain the path for a twenty-year period between 1966 and 1996. The only evidence of improvement, the court noted, was the initial clearing in 1966 and the reclearing in 1993. According to the court, the Kempfs' failure to maintain the path between these two clearings eliminated any possible adverse possession claim. We agree.

¶17 First, we note the parties do not contest the court's determination the Kempfs did adversely possess the part of lot seven containing their outhouse. In addition, we determine there was more than sufficient evidence presented to show the Kempfs did not meet the requirements of WIS. STAT. § 893.25 for the rest of the disputed property. The court relied on extensive photographic evidence showing a tree line and dense underbrush running from the outhouse to the path, belying any adverse possession claim for that part of the property. Although the court said it was possible the Kempfs could have established an adverse possession claim for the remainder of the disputed property based on the path alone, they did not because the path had not been continuously maintained for twenty years. In support of this determination, the court pointed to the testimony of Terry Prusser, the excavator who cleared the path in 1993. Prusser testified he had to remove stumps and trees from the path. The court inferred this meant trees had grown on the path since the first clearing, suggesting the Kempfs did not maintain the path. In addition, the court found support for the lack of maintenance in the fact the Kempfs spent little time at the cottage when Melvin was a ginseng farmer. This is sufficient evidence to support the court's findings.

¶18 The Kempfs argue the court's decision would have required them to occupy or improve all of the disputed parcel, which is not required for an adverse possession claim. *See* ***Burkhardt v. Smith***, 17 Wis. 2d 132, 137-38, 115 N.W.2d 540 (1962). We disagree with the Kempfs' reading of the decision. The court said clearing the path constituted "raising the flag of hostility" for the entire disputed area. What defeated the Kempfs' claim was their failure to maintain that hostility for twenty continuous years, not the fact they did not occupy every square inch of the property.

¶19 In addition, the Kempfs suggest the court erred by viewing their seasonal use of the property as defeating the adverse possession time period. The Kempfs argue adverse possessors may leave the property for short periods without losing their claim, if during that time the owner does not assert his or her rights. *See* ***Illinois Steel Co. v. Jeka***, 123 Wis. 419, 430-31, 101 N.W. 399 (1904). They also contend adverse possessors may establish their claim by seasonal use of the property, if that is the natural use of the property. *See* ***Laabs v. Bolger***, 25 Wis. 2d 17, 23, 130 N.W.2d 270 (1964). While these propositions are undoubtedly true, they are not inconsistent with the trial court's decision. The basis of that decision was the Kempfs' failure to continuously maintain the path, in particular for the thirteen years Melvin worked as a farmer. Whether the Kempfs only used the property seasonally is not the relevant inquiry. Rather, the issue is whether they adversely possessed the disputed parcel based on their use of the path. There was sufficient evidence for the trial court to find the Kempfs had not done so.

¶20 The Kempfs also argue their claim for adverse possession is satisfied through an agreed upon boundary. They argue if two adjacent owners agree to establish a dividing line between their property and actually claim and occupy that land for the statutory period, the possession will be adverse. *See* ***Donahue v. Thomspon***, 60 Wis. 500, 503, 19 N.W. 520 (1884). There is, however, no evidence in the record to suggest the Kempfs ever made this sort of agreement with any of lot seven's previous owners. The only evidence the Kempfs point to is their neighbor on lot nine pointing out what he believed were the property boundaries in 1960. While perhaps the Kempfs could make a claim this establishes their boundary with lot nine, it does not establish a boundary with lot seven.

*C. Common grantor*

¶21 The Kempfs next argue the court erred as a matter of law by relying on the assessor's plat after the Kempfs presented evidence showing lots seven and eight were conveyed by a common grantor who established the boundary as the Kempfs suggest it exists. If adjoining owners purchase from a common grantor with reference to a boundary line marked on the ground and established by the grantor, that boundary line is binding upon the original grantees and all persons claiming under them, irrespective of the length of time that has elapsed thereafter. ***Arnold v. Robbins***, 209 Wis. 2d 428, 432-33, 563 N.W.2d 178 (Ct. App. 1997). This rule applies even if the conveyances describe the premises by lot numbers. ***Id.*** The Kempfs argue the uncontroverted evidence shows this is the case. We disagree.

¶22 Although we agree the record demonstrates one of the Lileks' predecessors in title and the Kempfs both took their property from the same grantor, it is not at all clear they did so with reference to a marked boundary line. The only evidence presented regarding the Kempfs' knowledge of the boundary is Melvin's testimony that before they purchased their lot, the owner of lot nine showed him some pipes that Melvin assumed were the lot's boundaries. There is no evidence the Lileks' predecessor in title took their lot with reference to these pipes or that the common grantor established this boundary. Absent this evidence, we cannot say the trial court erred as a matter of law in determining the boundary.

*D. Finding pipes had been moved*

¶23 The Kempfs also argue the trial court erred by assuming the pipes had been moved as a foundation for its decision when no evidence in the record suggested this could have happened. Specifically, the court found:

> It would appear that in all cases the called for line is located to the west of the stakes in place. It should be noted, however, that this assumes that the stakes located on the lands are in fact the stakes that were set as part of the assessor's plat as opposed to having been set by some earlier survey, including perhaps the original plat and additionally ignores the possibility that the stakes may have been moved.
>
> ….
>
> All that appears to contradict the Assessor's Plat are the very movable and relocatable iron stakes.

¶24 We disagree with the Kempfs' characterization of the court's decision. The court does not say the pipes had definitely been moved. Rather, the court suggests it was a possibility. Regardless of this distinction, the trial court's conclusion that the pipes may have been moved does not seem as important to its decision as the fact the pipes the Kempfs rely on in their survey did not appear to be part of the assessor's plat. Nonetheless, our review of the record suggests there is sufficient evidence for the trial court to make this finding. Regarding the stake found underwater, Melvin said it was possible someone had pulled it out of the ground, and that it had been missing for ten years. He also said there had been rumors in the early 1990s that some residents were moving stakes. In addition, Vanden Heuvel said one of the pipes appeared to have been driven by "someone other than a surveyor." This provides an adequate basis for the court to determine the pipes could have been moved.

*E. Frontage apportionment*

¶25 Finally, the Kempfs contend the trial court erred by granting the Lileks the lake frontage when it should have been apportioned among all of the lots in the subdivision. In support, the Kempfs rely on ***Van Deven v. Harvey***, 9 Wis. 2d 124, 100 N.W.2d 587 (1960), in which a survey of a subdivision as a

whole revealed a small excess of land. ***Id.*** at 127. The supreme court said the extra land must be apportioned among all of the lots. ***Id.*** at 132-33. Similarly, if there were a shortage of overall land, the court held that must be apportioned in the same way. ***Id.***

¶26 The Kempfs claim to have lost approximately twenty-five feet of lake frontage as a result of the trial court's decision. They argue ***Van Deven*** requires this land be spread among all of the subdivision lots and the court erred by granting it entirely to the Lileks. We do not read ***Van Deven*** this way. In ***Van Deven***, a survey of the whole subdivision revealed extra land. ***Id.*** at 127. Here, the survey did not find any overall extra land. Instead, it determined the proper way to apportion the land was within the subdivision's overall boundaries. There is no excess land, and ***Van Deven*** is not applicable.

*F. The Lileks' frivolous appeal motion*

¶27 The Lileks have filed a motion for attorney fees and costs pursuant to WIS. STAT. RULE 809.25(3), arguing the Kempfs' appeal is frivolous. Specifically, the Lileks contend the Kempfs' appeal is "without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law" under RULE 809.25(3)(c)1. In support, the Lileks point to erroneous record citations and misstatements of the evidence in the Kempfs' brief. The Lileks also contend the Kempfs' appeal improperly attempts to retry factual issues resolved by the trial court.

¶28 Whether an appeal is frivolous is a question of law. ***NBZ, Inc. v. Pilarski,*** 185 Wis. 2d 827, 841, 520 N.W.2d 93 (Ct. App. 1994). Further, we cannot award fees under WIS. STAT. RULE 809.25(3) unless "the entire appeal is

frivolous." *See* ***Manor Enters., Inc. v. Vivid, Inc.***, 228 Wis. 2d 382, 403, 596 N.W.2d 828 (Ct. App. 1999).

¶29 We cannot say the Kempfs' appeal, viewed as a whole, is frivolous. While we agree the Kempfs' brief does contain a mistaken record citation, we do not believe this requires us to determine the appeal was frivolous. As for the alleged misstatements of the evidence, we note an appellant is allowed to fit the facts of a case into a well-established legal framework, and the mere fact they are unsuccessful in doing so does not render their arguments frivolous. ***Tomah-Mauston Broadcasting Co., Inc. v. Eklund***, 143 Wis. 2d 648, 659, 422 N.W.2d 169 (Ct. App. 1988). In this case, most of the Kempfs' challenges were to the sufficiency of the evidence supporting the trial court's decisions. This is a legitimate basis for an appeal, and we cannot say the Kempfs were merely attempting to retry factual issues. Even if we were to determine the Kempfs' challenges to the sufficiency of the evidence were without a reasonable basis, we conclude their common grantor argument was a legitimate attempt to fit the facts in an established legal framework. Because we must conclude the entire appeal is frivolous, this alone would defeat any such claim. *See* ***Manor Enters., Inc.***, 228 Wis. 2d at 403.

*By the Court.*—Judgment affirmed.

Not recommended for publication in the official reports.